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Shop Talk: Conversations about the Constitutionality of Our Labor Law

David M. Beatty

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Abstract

In this essay Professor Beatty joins the debate as to how, if at all, the Charter of Rights and Freedoms and the process of judicial review can be integrated with our tradition of democratic rule and the sovereignty of the popular will. Rather than deal directly with the arguments of those who are critical of the entrenchment of a written bill of rights, Professor Beatty endeavors to cast the Charter and the new role of the judges in the best possible light. Analogizing the process of constitutional review to "conversations of justification" (using examples drawn from the labour law field), Professor Beatty describes how the Charter offers those who are generally financially weak, numerically small and otherwise politically disadvantaged an opportunity to participate in the formulation of social policies which profoundly affect their lives in a way majoritarian politics have never allowed.

Keywords

Canada. Canadian Charter of Rights and Freedoms; Labor laws and legislation; Canada

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SHOP TALK: CONVERSATIONS ABOUT THE CONSTITUTIONALITY OF OUR LABOUR LAW[©]

BY DAVID M. BEATTY*

In this essay Professor Beatty joins the debate as to how, if at all, the *Charter of Rights and Freedoms* and the process of judicial review can be integrated with our tradition of democratic rule and the sovereignty of the popular will. Rather than deal directly with the arguments of those who are critical of the entrenchment of a written bill of rights, Professor Beatty endeavors to cast the *Charter* and the new role of the judges in the best possible light. Analogizing the process of constitutional review to "conversations of justification" (using examples drawn from the labour law field), Professor Beatty describes how the *Charter* offers those who are generally financially weak, numerically small and otherwise politically disadvantaged an opportunity to participate in the formulation of social policies which profoundly affect their lives in a way majoritarian politics have never allowed.

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I. INTRODUCTION

Five years have now passed since the entrenchment of the *Canadian Charter of Rights and Freedoms*¹ in the Canadian Constitution. The controversy and debate which surrounded its formulation and infusion into our system of government still endures. In the media, in our legislatures, in the courts and especially in our law schools much ink has been spilled (or bites taken) and many conversations have been spent exploring the meaning of that event. Seemingly, neither the reasoning of the courts nor the arguments of the analysts have been able to deliver a decisive argument one way or the other.

Broadly speaking, there are in this, as in every debate, two points of view. There are the critics and there are the supporters of the *Charter*, and of the system of judicial review which it entails. The critics, or the sceptics as they are sometimes called, think that empowering our courts to review the decisions of our lawmakers against the rights and freedoms the *Charter* guarantees was a mistake for two reasons. First, they say such an alteration in our system of government distorts and is inconsistent with our democratic tradition of popular sovereignty. This is an argument about the legitimacy of our third branch of government exercising the authority that is implicit in a process of constitutional review. In addition, the critics say that even if legitimate, our courts are institutionally ill suited and poorly designed to perform the functions that constitutional review entails. The judicial process, it is said, works best and is structured to deal with concrete disputes between two parties and to develop a true picture of a specific event². In their view it is simply not equipped to handle the broad inquiries

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

² P. Weiler, *In The Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974) at 170.

into the integrity of major pieces of social policy that are unavoidably at the centre of constitutional review.

Each of these concerns raises valid and important issues and warrants a response from those who take a more sanguine interpretation of the entrenchment of the *Charter* and the possibilities of judicial review. In this essay I want to focus my attention on the first claim the critics of judicial review advance; on the very possibility, viz. the legitimacy, of the courts being given the power to review the constitutional validity of rules and policies our lawmakers have enacted into, or declared to be, the law. Clearly this is the more fundamental of the two lines of argument because, unlike the second, if it carries the day there is no way, short of starting all over, that the damage can be repaired.

Defenders of judicial review might respond to the legitimacy argument in a variety of ways. On the one hand, one could try to identify some flaw in the critique on its own terms. One could try to show that the understanding the critics have of judicial review is in some way incoherent or internally inconsistent and so unable to sustain the position it seeks to prove. Alternatively one might, by examining the jurisprudence, show how the practice of judicial review, as young and as spotted as it has been, tends to confirm the theoretical possibility that it can be integrated with, and further the ends of, our liberal democratic tradition of government. Still another, and perhaps the most direct, way for defenders of the *Charter* to react is to describe as clearly and forcefully as they can the basis on which and the ways in which judicial review can enhance the liberal democratic quality of our (governmental) structures of state.

In this essay, I intend to limit myself to this third approach. My objective is to make the positive case for the *Charter* and judicial review as powerfully as I can.³ In a separate essay, I have endeavoured to deal more directly with the critic's arguments which

³ I have employed the same strategy more fully in D.M. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill-Queens University Press, 1987). This essay is organized around and reproduces large segments from the book. Because my concern is to work through the implications of the interpretation of the *Charter* which I think shows it in its best light, I will not analyze various judgments that several lower courts have written on some of the issues – such as mandatory retirement or workers' compensation – that are discussed in the text, except to note them in passing.

purport to deny the theoretical legitimacy of judicial review.⁴ By examining the decisions in which the Supreme Court of Canada refused to extend constitutional protection to workers' freedom to bargain collectively, to picket and to engage in strikes, decisions which the critics believe prove their case as clearly as it can, I have tried to show the critic's position is vulnerable even on its own terms. Eventually I hope to canvass all of the major judgments of the Supreme Court of Canada dealing with the *Charter* to determine the extent to which the practice of constitutional review actually has promoted the ultimate objectives which underlie our liberal democratic system of government.

Let me begin then, to make what I think, both normatively as well as a positive description of our constitutional law, is the strongest claim that can be made in support of the *Charter* and the process of judicial review. My objective will be to establish that judicial review is not only consistent with but indeed furthers the democratic quality of our method of government. I want to show how on April 15, 1982, when the *Charter of Rights* was entrenched in our constitution, a new process of citizen participation in our system of government was made available to individuals who feel aggrieved by decisions defended in the name of popular sovereignty.

Any time a country incorporates a written bill of human rights and freedoms into its constitutional rules of government, the time-honoured prerogative of Parliament to be wrong, simply because it expresses the will of the people — or, in theory, at least a majority of them — is substantially (though not absolutely) qualified.⁵ With the entrenchment of the *Charter*, those who feel adversely affected by decisions taken in the name of majority rule are empowered to activate a debate of legitimation in which the ethical (constitutional) integrity of the majority's decision has to be explained and justified in a particular way. Rather than being rebuffed with a simple quantitative claim of numerical superiority

⁴ D. Beatty & S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in the Free and Democratic Societies" (1988) 67 Can. Bar Rev. at 573.

⁵ A point Chief Justice Dickson recognized in a lecture given to the Faculty of Law at the University of Calgary. B. Dickson, "The Democratic Character of the *Charter of Rights*" in F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada* (Canada: University of Calgary Press, 1984) 325 at 326.

from the majority who supported the policy at hand, those who feel they have been discriminated against can insist that some qualitative, ethical, justification be advanced for the decision as well.

With the entrenchment of the *Charter*, the process of validation through which any social policy must pass before it acquires the authority of law is extended in this important respect. Now, after preferences have been polled in our legislative assemblies, a kind of "conversation of justification" must occur between the winners and losers of the declared law. Far from undermining the democratic character of our system of government, constitutional review offers the potential for even more meaningful citizen participation in the formulation of the rules which most directly control how they will experience their lives. Those who feel unfairly burdened by a particular law have the right to be told how the will of the majority conforms to our constitutional values, and if it does not, to have the law altered in an appropriate way.

The court's role in these conversations is, first, to structure and organize the presentation of the debate and secondly, if no other resolution is possible, to rule on the strength of the arguments presented. In this latter role, when it issues a judgment about the constitutional validity of any particular law or social policy, its function can be likened to a social critic who evaluates the ethical integrity of some law, or custom or practice of a community⁶. After listening to the arguments, pro and con, as to whether a particular rule or law furthers or flies in the face of the values which lie at the core of the *Charter* and our (liberal democratic) theory of social organization, the third branch of government issues a judgment about the moral⁷ quality of a proposed course of action some agent or branch of government proposes to pursue.

In theory, this opportunity to participate in the processes by which social policy is translated into law should be especially attractive to those individuals who traditionally have had little

⁶ The metaphor of social critic is borrowed from M. Walzer, *Interpretation and Social Criticism* (Cambridge, Mass.: Harvard University Press, 1987).

⁷ In the final analysis, because s. 33 of the *Charter* provides a mechanism with which a legislature or its executive can override or opt out of most of the constraints the *Charter* imposes, any judgment a court issues will bind only in virtue of the moral, not the legal, force of its reasoning.

influence in the other two branches of government.⁸ Because courts are less vulnerable than the other two branches of government to the influence of wealth and other pressures that powerful lobbies can exert, in theory the courts offer those who are financially weak, numerically small, or otherwise disadvantaged politically, perhaps their most effective opportunity to participate in the law-making processes of our communities. Because, in theory, neutral principles and reason are the only criteria against which decisions should be made by the courts,⁹ those who are economically and otherwise politically disadvantaged should secure a fairer hearing here than they do in the less accessible and less visible back rooms of politics. Neutral principles and reason are more evenly distributed than are the financial and the other personal resources which are the effective currency in the processes and institutions of politics.

This depiction of the third branch of our government, as being a forum for reasoned discourse, free from the imperfections and impurities of politics is, by admission, an idealized one. As I said at the outset, my purpose here is to make the best case I can for the interpretation I favour of the *Charter* and judicial review. Having sketched, in the most general terms, the description of the *Charter* and the process of judicial review that I think is most appealing and most congenial with our political tradition of liberal democracy, I will endeavour, in the remainder of this essay to show how this vision can be put into practice. In Part II of the essay I will identify two principles of constitutional interpretation which, both as a matter of political theory and jurisprudential fact, lie at the heart of our *Charter of Rights*. My intention here is to identify those principles of judicial review which should enjoy the widest, if not universal support, of all individuals, acting rationally, so that the

⁸ This is a point P. Russell made in his essay "The Effect of the *Charter of Rights* on the Policy-Making Role of Canadian Courts" in F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada*, *supra*, note 5 at 293.

⁹ For a very useful cataloguing and review of the arguments that have been advanced in the United States on whether such neutral, objective principles exist and if they do, what their content is, see P. Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Scholarship" (1981) 90 *Yale L.J.* 1063.

credibility of the conclusions they yield will be as secure as they can possibly be.¹⁰

In Part III, I will apply these principles to three different rules in the law we use to regulate relations of people at work which have already been challenged as violating the *Charter*. In a society which has only rarely elected a political party formally allied with and committed to the interests of workers, labour laws provide an especially salient opportunity to test the hypothesis that the courts can enhance the democratic quality of our system of government in the way I have described. If workers as a group, and especially those who are least well off, can make use of the courts to encourage our legislators and their delegates to treat them with more concern and respect, that will provide powerful confirmation of the ability of the courts to enhance the democratic quality of our government. Following along conversations about the constitutionality of: (i) excluding farmworkers from our collective bargaining laws; (ii) requiring people to leave the workplace because they turn 65 years of age and (iii) denying workers, as a class, the opportunity to sue their employers in tort when the latter have done them wrong, will provide us with real-life examples to test the principles of judicial review developed in Part II and to assess the integrity of the conversational metaphor.

In the fourth section of the essay, I will outline the beginnings of a conversation about the constitutional validity of the principle of exclusive representation which is one of the cornerstones of our system of collective bargaining. Using the same principles of interpretation that we applied in the preceding cases, we will follow the challenge of unskilled and unorganized workers who can claim that there are (particularly in Western Europe) alternate principles through which the interests of workers can be represented collectively, which will better able them to participate democratically in the decision-making processes of their enterprises. Their example, perhaps more than any other, best illustrates how empowering constitutional conversations can be and ultimately how

¹⁰ T. Scanlon has formulated a similar standard of moral reasoning as requiring us "to be able to justify [our] actions to others on grounds they could not reasonably reject." See T.M. Scanlon, "Contractualism and Utilitarianism" in A. Sen & B. Williams eds, *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982) 103 at 116.

much more democratic the courts can encourage our community to be.

II. TWO PRINCIPLES OF CONSTITUTIONAL REVIEW

In this section then, I want to introduce two principles of constitutional interpretation. One relates to the ends for which any piece of social policy might be formulated and enacted into or declared to be law. The other focuses on the particular means, the details of the particular policy instrument, the lawmaker has chosen to translate his or her policy objectives into law. With respect to the former, I want to offer, as a first principle, the admittedly very general proposition that in guaranteeing all of the specific rights and freedoms enumerated in its text, the *Charter* can be understood as protecting a set of civil liberties or human rights, which are at the core of individual freedom and dignity, from being compromised by any arm or agency of government. More broadly stated, we can say that, like all of the major declarations and covenants of human rights and freedoms, our *Charter* is intended to ensure that even when – or more properly especially when – any group of persons gains control of any part of the governmental process, they must respect some (and to that extent equal) authority in every person to participate in and ultimately maintain some control over the various decision-making processes through which his or her life is ultimately governed.

Another way of expressing this basic ideal which infuses the *Charter* is to say that its entrenchment commits our law makers to recognize and respect each person in our society as a rational, sentient being with a capability for and interest in accomplishing a set of plans and purposes in his or her life which he or she has chosen for himself or herself. For example, it demands that in constructing the institutions within which (for example collective bargaining) and formulating the rules according to which (for example mandatory retirement) each person must pursue his or her own preferences with respect to said employment, society will respect this basic equality in our personhood. In the co-ordination and reconciliation of the competing ambitions of each individual in the society, the *Charter* requires our legislatures to respect some

basic equality in a person's right to self-government; to what I will call equality of personhood for short.

Now I can't imagine that the principle of equality of personhood (or equality of liberty as it might also be called), will be problematic for anyone who has joined in the debate about the integrity of constitutional review. Certainly as a matter of positive law it was recognized immediately and planted firmly in our constitutional jurisprudence. Within the *Charter's* over arching objective, the creation of a society which is both democratic and free,¹¹ the Supreme Court and various provincial Courts of Appeal have recognized that it is essential that "all persons should be treated by the law on a footing of equality, with equal concern and respect, to ensure each individual the greatest opportunity for his or her enhancement."¹² As the Supreme Court of Canada put it in one of its earliest judgments:

A free society is one which aims at equality with respect to the fundamental freedoms. Freedom must surely be founded in respect for the inherent dignity and inviolable rights of the human person.¹³

As a matter of political theory the principle is certainly consistent with — indeed it would seem to be a pre-condition of — our liberal democratic tradition of government. Even the most committed democrats would be constrained to acknowledge the validity — the neutrality — of this principle. All citizens of a community must enjoy some (and therefore equal) measure of independence, some equal opportunity and authority to make choices for themselves, if the community's claim to be democratic is not to be a complete sham. To say our institutions and processes of government are democratic presupposes a degree of freedom and autonomy on the part of all of the individuals whose lives will be substantially controlled by the coercive authority of the State.

¹¹ *Regina v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 (SCC) [hereinafter *Oakes*].

¹² *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513 at 529 (C.A.).

¹³ *Regina v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 at 359 [hereinafter *Big M Drug Mart*].

In addition, the text of the *Charter* strongly suggests that its drafters understood that the principle of equal personhood was at the core of our constitution and system of government. A close reading of its initial sections reveals that two different techniques have been employed by the drafters to realize this deep constitutional norm. First, the *Charter* guarantees a certain degree of physical and intellectual independence which is taken to be a condition precedent to an individual's being autonomous and in control of his or her own development. It marks off a space in each person's life which is free from the intrusions of others and in which the individual may determine for himself or herself the most basic aspects of his or her separate existence. Thus, in its guarantee of the integrity of our physical persons against unreasonable search and seizure (section 8), arbitrary arrest and detention (subsections 9-11), cruel and unusual treatment (section 12) and the associated legal rights to counsel (section 11), to interpreters (section 14) and against self-incrimination (section 13), we see the *Charter* protecting the conditions of human freedom which have the deepest roots in our legal system. Simultaneously, in guaranteeing (in section 2) the fundamental freedoms of conscience and religion, of thought, belief, opinion and expression, of assembly and of association, the *Charter* protects the corresponding intellectual independence which is understood as being equally essential to and a pre-condition of individual autonomy and self-control.¹⁴ These rights, to our physical and intellectual independence, along with those guaranteeing a degree of mobility and linguistic autonomy, mark off an area of personal responsibility and integrity in which each of us is entitled to be equally (but not absolutely) free from the interference of others.

The *Charter's* commitment to the ethical ideal of equality of personhood is not, however, a concept which is exclusively negative or anti-social in character. It has a positive, social dimension to it

¹⁴ For a prudential account of why conditions of freedom and material well-being are prerequisites for human agency and autonomy, see A. Gewirth, "The Basis and Content of Human Rights" in *Human Rights: Essays on Justifications and Applications* (Chicago: University of Chicago Press, 1982) 41. See also L.H. Tribe, *American Constitution Law* (Mineola: Foundation Press, 1978) at 573ff and R.M. Smith, "The Constitution and Autonomy" (1982) 60 Tex. L. Rev 175.

as well. In addition to requiring our legislators to respect a private sphere, within which all individuals may govern and choose for themselves, free from the interference of others, the *Charter* also extends its commitment to equality to the public arena as well. Thus the democratic rights which are set out in sections 3-5 and the equality rights which are provided in section 15 together guarantee that each person has a right to participate as an equal in and be treated as an equal by the legislative processes in which the community collectively settles the rules which govern its affairs. Where conditions of conflict and scarcity prevail, where our ambitions as individuals collide, and must therefore be reconciled by rules jointly and publicly determined, the *Charter's* guarantee of our democratic rights and equality rights ensures that each person can participate to some minimum (and therefore equal) degree (to vote, stand for office, etc.) in the formulation of those rules and will benefit from and be protected by their equal application. It guarantees the integrity of the democratic process itself.

To summarize then, the principle of equality of personhood that is guaranteed collectively in the rights and freedoms specified in the *Charter* might be characterized as our first principle of social justice. "Ordered liberty," as it has sometimes been described¹⁵ is, in a sense, our most basic political ideal. With respect to those conditions our society regards as essential to being able to choose a lifestyle for oneself (independence of thought and physical inviolability of the person), each individual is guaranteed equal protection against social interference.¹⁶ And, in the processes and institutions which settle the rules of social co-operation to which everyone's life plans and ambitions must conform, the principle insists on a further dimension of the equality that holds between us. Together the political, civil, legal and equality rights entrenched in our *Charter* commit our legislatures to and constrain them by what Ronald Dworkin has called a "general requirement of justice." As defined by him, such a requirement entails that,

¹⁵ The phrase has been used by the American Supreme Court on a number of occasions. See, for example, *Roe v. Wade*, 410 US 113 (1973) (Blackman J.), *Palko v. Connecticut*, 302 US 319 at 325 (1937) (Cardozo J.).

¹⁶ See A. Gewirth, *supra*, note 14.

government must treat its citizens as equals, as equally entitled to concern and respect. Of course this general requirement is very abstract ... But we can nevertheless speak of a general duty of government to treat its citizens this way, and derive from this two distinct and more concrete responsibilities. The first is the responsibility, in creating a political order, to respect whatever underlying moral and political rights citizens may have in the name of genuine equality. The second is the obligation to extend whatever political order it does create equally and consistently to everyone.¹⁷

While the characterization of our system of social relations as one based on some conception of ordered liberty may not seem to be a particularly bold or insightful observation this should not tempt one to depreciate its significance. It is important to see that, as part of a larger political theory, the principle I am calling equality of personhood can organize, what Charles Fried has described as, "an elaborate structure of arguments and considerations which descend from on high but stop some twenty feet above the ground."¹⁸ Equality of personhood can and should guide a court in its assessment of the constitutional integrity of any legislative enactment it might be asked to review. It can provide a larger focus, a richer understanding within which the *Charter* can be interpreted and applied.

Moreover, as a principle of interpretation, it clearly does identify at least one ground on which a legislature could begin to defend any challenge to its constitutional authority to "Act" under section 1 of the *Charter*. Promoting the (equal) freedom of some (and especially the least advantaged) people in the community is, if anything is, a constitutionally valid purpose on which social regulation, including labour legislation, can be defended. There has never been any doubt that considerations of justice — as opposed, say, to utility — can justify limitations on the rights and freedoms set out in the *Charter*.¹⁹ It simply could not be otherwise. Rights and freedoms collide. When my employer terminates me from my

¹⁷ R. Dworkin, "Natural Law Revisited" (1982) Univ. of Fla. L. Rev. 165 at 185.

¹⁸ C. Fried, "Artificial Reason of the Law Or: What Lawyers Know" (1981) 60 Tex. L. Rev. 35 at 57.

¹⁹ For an argument that it is *only* when Government violates this constitutional norm of moral autonomy that departures from the equality guarantees cannot be justified under s. 1, see A. Brudner, "What are Reasonable Limits to Equality Rights?" (1986) 64 Can. Bar Rev. 469.

employment because I have reached 65 years of age, its freedom (not) to associate (by contract) with whomever it chooses can be seen to conflict, unavoidably, with my right not to have decisions made about my life simply because of my age (or sex etc.) and one of our entitlements — or maybe both — will, to some extent, have to give way. Such collisions between competing rights are at the heart of the controversy over human rights legislation and union security laws. Indeed defenders of minimum wage, health and safety and employment standards legislation also commonly point to the economic liberty of those they purport to protect as legitimizing some interference with the freedom of those they inevitably constrain.²⁰

But as important as this principle is to understanding our new system of constitutional order, it is true that, by itself, it doesn't tell us enough. We need to know more than what that principle says before we can carry our analysis any further. Integrity of purpose is not sufficient by itself to justify encroachments or limitations under section 1. Even when it is pursuing objectives which are most in keeping with our new constitutional criteria, there are limits as to how far a legislature may go. Purity of purpose is not always sufficient to exculpate us from liability when, acting as individuals, we carelessly interfere with the rights and freedoms — the personal integrity and autonomy of others — and it can not be otherwise when, acting collectively, we do the same. Legislative means, as well as ends, must conform to some external, objective, standards of constitutional review. If the principle of equality of liberty will be of assistance in telling us when a legislature might initiate legislation which constrains the liberty of some members of the community, we now need something to tell us when our lawmakers must stop.

Adhering to a strategy of caution, I propose to introduce a second principle of judicial review, which is expected to be as uncontroversial as the first. This principle is one I shall call the doctrine of the reasonable alternative, although it might also be described as the maximization principle. Simply stated, it would

²⁰ Conversations about the constitutional validity of these aspects of our labour laws are set out in D.M. Beatty, *supra*, note 3.

stipulate that if there were several ways of accomplishing a valid social objective, one of which invaded our constitutional rights less than the others, that alternative would have to be chosen by the legislature to realize its purposes. The principle would require that if one method or means existed which, *all other things being equal*, could achieve a set of social objectives which were themselves constitutionally valid, by respecting and doing less violence to our rights and freedoms, that method would have to be selected. In the face of such an alternative the limitations and exceptions to our constitutional commitments that would be caused by all of the other means of social regulation could not be "demonstrably justified" in a society which considered itself both "democratic and free".

My expectation is that this second principle of judicial review will not be any more controversial or troublesome for those who must interpret the *Charter* than the first principle. Especially when we are considering legislation which seems to prejudice those who are already seriously disadvantaged, if we refused to hold our legislatures to this principle, if rights could be violated unnecessarily, the *Charter* wouldn't be worth very much. The constitutional commitment to our equal right to control our own development would be drained of all meaning if our rights and freedoms, our equality of liberty, could be sacrificed for no rational reason.

The principle is in fact simply one variation (and one of the mildest) of what has come to be called the proportionality principle. That latter principle, in its widest formulation, holds that any restriction on our constitutional entitlements must be proportionate to the public interest that is served thereby. The more serious the limitation or invasion of a right or freedom, the more compelling the justification must be. The principle of the reasonable alternative is simply a narrower (and, I trust, even less controversial) rendition which stipulates that a limitation cannot be justified under section 1 if it can be shown that less stringent measures are available to accomplish the social purpose at hand. Both are examples of the criterion of reasonableness to which governmental restrictions on rights and freedoms must now conform.

Both the narrower and wider versions of the principle have already received some recognition by our courts as well as by those in other communities which have had considerable experience in identifying when and explaining how limits on constitutional rights

and freedoms can be justified in a society which claims to be free and democratic. Both before and after the entrenchment of our *Charter of Rights*, the Supreme Court of Canada has invoked the principle to assess the constitutional validity of laws they had been asked to review.²¹ The European Commission and Court of Human Rights as well as the United States Supreme Court have also invoked what is substantially the same principle in testing the validity of departures and deviations from the rights and freedoms set out in the European Convention of Human Rights and Freedoms and the American *Bill of Rights*. In the case of the latter, it is a fixed principle of American constitutional law that "strict scrutiny" (which includes but is not exhausted by the principle of reasonable alternatives), will be given to any governmental initiative infringing on certain of the specific rights, such as freedom of speech and assembly, which are explicitly set out in the American Constitution.²² And, in a parallel fashion the European Court, interpreting language which, in this regard, substantially parallels the words we have used in section 1 (if anything, the language is even weaker than what is in our *Charter*), has consistently applied both the broader proportionality principle and its derivative of least drastic means.²³

²¹ *Oakes*, *supra*, note 11. See also *Big M Drug Mart*, *supra*, note 13. Even before the adoption of our earlier, statutory *Bill of Rights*, legal scholars and political scientists had identified what they characterized as an "interpretive avoidance" methodology by which courts chose from among a number of possible interpretations of a legislative enactment the one which most respected our traditional rights and freedoms recognized at common law. So described, as a technique of interpretation, "interpretive avoidance" is simply the principle I have called reasonable alternatives or less drastic means, by another name. See *supra*, note 5 at 262. See also *MacKay v. The Queen*, [1980] 2 S.C.R. 370 at 406-07, 114 D.L.R. (3d) 393 at (McIntyre J).

²² See F.D. Wormuth & H.G. Mirkin, "The Doctrine of the Reasonable Alternative" (1964) 9 Utah L. Rev. 254; F.M. Struve "The Less-Restrictive-Alternative Principle and Economic Due Process" (1967) 80 Harv. L. Rev. 1463. See generally L.M. Tribe, *supra*, note 14 at 722, and in particular *U.S. v. Robel*, 389 U.S. 258 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); and *Shelton v. Tucker*, 364 U.S. 479 (1960).

²³ For a general review of the jurisprudence of the European Court and Commission of Human Rights, see J. Ross, "Limitations on Human Rights in International Law: Their Relevance to the *Canadian Charter of Rights and Freedoms*" (1984) 6 Hum. Rights Q. 180 at 213-14. Of the cases cited by Ross, the most pertinent and interesting for our purposes is the British "Closed Shop case." See *Young, James and Webster v. U.K.* (1981), 2 H.R.L.J. 185.

It was to be expected that the principle of the reasonable alternative would be readily applied by our Courts and incorporated into our legal precedents because it is so fundamental to the moral ideals which, as we have just seen, underlie our system of government. Thus it is a central tenet of most, if not all, liberal theories of law that equality of personhood, which I have characterized as the first principle of social justice, should be secured, all other things being equal, at the highest degree possible. Described in this way, the principle might, as I have noted, more aptly be characterized as the maximization principle. As Gregory Vlastos, a contemporary liberal philosopher, has put it:

if a legislature had before it two bills, B(L) and B(M), such that B(L) would provide for greater personal freedom than would B(M), then, other things remaining equal, they would be voting unjustly if they voted for the second...they would be violating the human right to freedom of those affected by the legislation. A vote for B(M) would be tantamount to a vote for the needless *restriction* of freedom. And since *freedom* is a personal (or individual) right, to equalize its restriction would be to aggravate, not alleviate, its injustice.²⁴

As well, a variation on this theme is at the root of Rawls' two principles of justice²⁵ and has been routinely invoked by utilitarians, as early as Bentham, for example, in their discussions of proper principles of punishment.²⁶ In a sense we might say the principle is the natural derivative of the interpretation of the rule of law as the commitment to a paramount law of reason.²⁷

If further justification were required for integrating this principle of constitutional interpretation into the fabric of our *Charter* jurisprudence, it could be observed that it accords with what we usually think of as the institutional competence of the courts.

²⁴ See G. Vlastos, "Justice and Equality" in R.B. Brandt, ed., *Social Justice* (Englewood Cliffs: Prentice-Hall, 1962) 31 at 62.

²⁵ J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 235.

²⁶ J. Bentham, *The Principles of Morals and Legislation* (New York: Nufner Publishing Co., 1948) c. 13 and 14.

²⁷ This formulation of the rule of law was attributed to Coke by Plucknett in T.F.T. Plucknet, "Bonham's Case and Judicial Review" (1926) 40 Harv. L. Rev. 30. Also see, T.F.T. Plucknet, *A Concise History of the Common Law* (London: Butterworth & Co. Ltd, 1936) at 51.

Not only is the principle consistent with the language of the text and the ideals of justice which underlie the *Charter*, but as well the principle only asks the court to do what we think this institution does best. It avoids the difficult issue of specifying the extent to which courts should evaluate the legitimacy of legislative ends. Instead the principle focuses exclusively on the means adopted by the legislature to accomplish its purposes. Rather than declaring to the democratically elected forums of government that they are prohibited from pursuing a particular substantive result, the principle simply requires those institutions to proceed in a different, more egalitarian, more liberal way. As a principle of judicial review it interferes least in the policy-making function of government and in so doing accords with the instinct of the courts to respect the will of the representatives who have been selected by a majority of the people to resolve such matters of policy.

With the two principles we have in hand we now have a sufficiently rigorous standard of validation to test the various rules and principles which distinguish our labour code. We have two principles – one relating to ends and one to means – which together tell as a purpose for which and the extent to which a legislature can, under section 1, validly restrict the rights and freedoms the *Charter* protects. So that I will not be misunderstood I should emphasize again that the ensuing analysis is at best partial and incomplete. It is not my intention to exhaustively review the constitutional integrity of each and every detail of our labour code. Nor do I claim that the principles I have derived from the *Charter* are themselves a complete or comprehensive statement of judicial review. They are, evidently, only part of that theory. My point is they will, for the reasons I have described, be a part.²⁸

²⁸ Of course, as a matter of positive constitutional law, other principles have been identified by the Supreme Court of Canada to guide its evaluation of the constitutional integrity of the various pieces of social policy that it has been asked to review. Foremost among these is another proportionality principle, which weighs the benefits a particular law is expected to provide to the community against the infringements on the constitutional rights and freedoms of those it constrains. While clearly an established part of the Court's perception of what is entailed by the process of judicial review, I will not make use of it in the analysis that follows. To keep to my strategy of caution, I intend only to rely on principles like equal personhood and least drastic means on which everyone who is committed to our liberal democratic system of government can agree. Enjoying the universal support of all sectors of our society, these principles have a neutrality which can ensure a measure of

III. THE PRINCIPLES APPLIED

Having identified at least two principles to which a court may have reference, in evaluating whether a piece of social policy is consistent with our new constitutional guarantees, we can now turn our attention to three different laws, which are part of our existing labour code, and which are presently being reviewed by various courts and administrative agencies to see how they might be applied in practice. In this part we will explore whether our two principles of constitutional review will yield determinative results which promote or enhance the democratic, participatory quality of our processes of government in the way I described in the introductory part. In each of the examples, the analysis will remain unchanged. Each of our principles – one relating to ends and the other to means – will be invoked to determine whether these rules, some of which have been part of our labour law for a very long time, can be justified constitutionally.

A. *Agricultural Workers*

The treatment that farmworkers have received from our democratically elected legislatures provides one of the simplest examples of how empowering the *Charter* can be when it is interpreted according to the principles we have just identified. Like domestics,²⁹ agricultural workers are among the most economically exploited and politically neutralized individuals in our society. Because they are drawn heavily from a migrant and immigrant population, these workers face even more serious obstacles to effective participation in the political process than most. Typically,

objectivity in the judicial process that a principle which balances benefits and costs does not so easily attract. For many critics, balancing of the latter kind is unavoidably subjective and ultimately an unprincipled basis on which to ground decisions. See for example, T.A. Aleinkof, "Constitutional Law in the Age of Balancing" (1987) 96 Yale L.J. 943; S.R. Peck, "An Analytic Framework for the Application of the *Canadian Charter of Rights and Freedoms*" (1986) 25 Osgoode Hall L.J. 1.

²⁹ For a discussion of the parallel plight of domestic workers in our society, see D. Beatty, *supra*, note 3 at 92-93.

these workers have not been covered by many of the most important parts of our labour code, including minimum standards governing overtime rates, workers' compensation as well as our collective bargaining laws.

Denying agricultural workers the benefits and protection of these major industrial relations policies strikes most people as being flagrantly unjust. Those who are already among the least advantaged in our society are required to labour in conditions of hardship and injustice which these industrial relations policies were meant to eradicate. In the case of their exclusion from our collective bargaining laws, it means that the legal processes we have designed to enable workers to be involved in decision-making at the workplace in a realistic way are unavailable to people who work on farms. It means that a group of workers, who are already among the least powerful, are given even less opportunity than the rest of us to participate in the formulation and application of the rules which govern the conditions under which each of us must work. The blanket exclusion of farm workers from our collective bargaining laws is a deliberate decision of the legislative branch and those in the majority of our community not to show the same respect for the farm workers' freedom of association as is shown for their brothers and sisters who work in the industrial and service sectors of our economy.

It may be that the recent judgments of the Supreme Court of Canada, holding that section 2(d) of the *Charter* does not provide any protection to the right to strike and bargain collectively, may now make a free standing argument based on freedom of association difficult to sustain.³⁰ Still, the exclusion of farm workers from our collective bargaining laws seems a clear violation of their constitutional right to receive the equal benefit and protection of that body of law. The exclusion denies them the equal protection and benefit of that body of rules our community has designed to ensure that our ethical ideals of democracy and personal self-

³⁰ See *Re Alberta Public Service Employee Relations Act*, [1987] 1 S.C.R. 313; *Re Public Service Alliance of Canada et al. v. The Queen et al.*, [1987] 1 S.C.R. 424; and *Government of Saskatchewan et al. v. Retail, Wholesale & Department Store Union, Local 544 et al.*, [1987] 1 S.C.R. 460, 38 D.L.R. 4th 161, 249, 277. For a comment on these decisions see Beatty & Kennett, *supra*, note 4.

government are recognized as much in the procedures through which personal relations are reconciled in the workplace as they are in the larger institutions we use to govern our society at large. Compared to other workers with whom they are similarly situated, farm workers in most parts of Canada have been treated discriminatorily and in a way which is fundamentally inconsistent with the tenets of a society which by its constitution claims to be both democratic and free. Denying them the opportunity to engage in collective bargaining means they can not benefit from or be protected by those legal rules and processes which allow most people some opportunity to participate in the rule-making process in the workplace. This exclusion prevents them from using what many would regard as one of the most important legal instruments they have to exercise some influence in the formulation of the rules which govern their lives. Treating agricultural workers in this way discriminates against them in the very way section 15 was meant to prescribe.³¹

Historically, agricultural workers have had little success in persuading politicians to correct this injustice. In most parts of Canada they have never been able to engage legislators and their executives in a meaningful dialogue in which the latter have shown they were amenable to righting this wrong. With the grafting of a process of constitutional review onto our system of government, the inability of farm workers to participate effectively in the design of this central aspect of our industrial relations system should be brought to an end. On the interpretation of the *Charter* that I have proposed, judicial review offers farmworkers the opportunity to have a conversation with the legislators of the most meaningful kind.³²

In the past, when farm workers have complained directly to governments that they have not been given the opportunity to participate democratically in the decision-making processes of the

³¹ See, for example, *Kask v. Shimizu et al.*, [1986] 4 W.W.R. 154, 28 D.L.R. (4th) 64 (Alta Q.B); *Streng et al. v. Corporation of the Township of Winchester* (1986), 31 D.L.R. (4th) 734, 56 O.R. (2d) 649 (S.C.).

³² This opportunity has been seized by one group of workers, who have made an application to the Ontario Labour Relations Board to have the United Food and Commercial Workers International Union, Local 195 certified as their bargaining agent for purposes of negotiating a collective agreement with their employer Cuddy Chicks.

enterprises in which they work, governments have responded in two ways. First, it was said that to allow the system of decision-making which we use in our factories to be employed on our farms would cause labour costs to rise to the detriment of consumers or to the farmers (employers) themselves if the increased costs could not be passed on. The second response was more narrowly focused and contends that collective bargaining would substantially interfere with, and ultimately jeopardize, the existence of the family farm.³³

However successful the first argument has been in debates in the legislature, it is clear it would have little force in a conversation in our courts. It directly contradicts our constitutional commitment to respect a basic equality between individuals in the control they retain over their lives. If indeed collective bargaining does increase the costs of labour to the overall detriment of society, then our legislators should repeal the legislation in its entirety rather than selectively excluding those most in need of its protection. The legislature has not given credence to this argument for the rest of the workforce. Workers who are in similar circumstances are able to choose collective bargaining as the process by which they will participate in decision-making in the workplace and settle, for example, the amount of remuneration they will receive. Where it is determined financial relief is required to offset any adverse economic consequences collective bargaining may entail, direct subsidies, in the form of grants, allowances, tax credits and the like, are recognized as the most reasonable means of providing such assistance.

Our constitutional commitment to respect each person's opportunity to control his or her development and secure the equal benefit and protection of our laws requires that agricultural workers be treated the same. The argument from financial consequences, while obviously a powerful one in a legislative process, where the farm lobby has traditionally been very strong, offers no principled basis on which the differential treatment of agricultural workers can be defended constitutionally. If anything, their already inferior economic status would demand that agricultural workers receive

³³ See Labour Law Casebook Group, *Labour Law: Cases, Materials and Commentary*, 4th ed. (Kingston: Industrial Relations Centre, 1986) at 130.

more, not less, protection from the industrial relations policies we enact into law. If, by the exclusion, government intended to provide a subsidy to the farm sector and/or to the consumers of agricultural products, it would have to extend the subsidy directly and not in a way which compromised the constitutional entitlements of those who toil in the fields, in order to satisfy the two principles we have been applying.

The second response, however, is a principled argument in a way the first is not. It can be argued, I think, that the family farm implies a way of life, a form of social organization, which is distinguishable from that which prevails in our factories and office buildings. The types of personal relationships implied by each are sufficiently unique to suggest that different decision-making processes may be appropriate to regulate the distinctive relations in each of these social spheres. Thus, if it can be established that collective bargaining is actually antagonistic to the way of life that is carried on in a family environment, the equal personhood of those who desire to pursue the pastoral path may provide a principled basis on which to limit the reach of collective bargaining statutes. Here, rights collide and in such circumstances some limitation on personal freedom is inevitable. In this situation the freedom of those who choose to experience their lives in such non-commercial, self-sustaining, ways *may* justify restraining the freedom of others who would wish to associate with them in a way which would threaten or deny them the opportunity to realize their choice.

It is not necessary for us to finally determine whether excluding individuals who labour on family farms from collective bargaining legislation would ultimately be sustained. Even if it could be established that denying those who work on family farms the protection and benefit of the policies we have designed for collective decision-making in the workplace could be demonstrably justified in a society which claimed to be democratic and free, it should be clear that that would be the limit of such an exemption. The claim of preserving a unique form of social organization like the family farm, while a principled argument, could never justify denying *all* agricultural workers the opportunity to make use of and participate in democratic processes of decision-making as most of the Labour Relations Acts across Canada do. Drafting the exclusion of farmworkers, to include those who work for large corporate

agribusinesses is much wider and more inclusive than it needs to be.³⁴ If a Legislature's purpose is to preserve the family farm, a blanket exclusion of all farmworkers is a needless and therefore unreasonable denial of their equality and restriction of their freedom. For a society committed to the ideals of freedom and democracy, the only principled way to justify such a limitation on the rights and freedoms of individuals who work in agriculture is to limit it to those who actually toil on family farms.

So, in the kinds of conversations that are held in the courts, it can be seen how groups like farm workers, who have been relatively powerless in the processes of politics and have suffered the consequences of their impotence, can invoke the *Charter* and the moral authority of our third branch of government to expose injustices under which they have been forced to labour for far too long. The example of farm workers shows directly how empowering, in terms of democratic decision-making, this new process of judicial review can be. Because they can participate more equally in this new process of transforming policy into law than they generally can in the backrooms of the legislature, farmworkers can insist that they be given the equal benefit and protection of that body of law which our society has fashioned to introduce the methods of democratic decision-making into the places people work. While *realpolitik* explanations are readily at hand to show why those who are already relatively disadvantaged will often fare poorly in the legislative and executive branches of our government, there is no principled reason why these workers should not enjoy the same benefit and protection of our system of collective bargaining as everyone else. In the context of a constitutional conversation, the fact a worker toils for large commercial enterprises in a field rather than in a plant or an office, does not provide an adequate reason why he or she should be burdened more than anyone else and in all events more than need be. Such an argument is fundamentally inconsistent with our constitutional ideal of equality of liberty and personal self-government.

³⁴ See, for example, *Industrial Relations Act*, R.S.N.B. 1973, c. 1-4, s. 1(5)(a).

B. *Mandatory Retirement*

The rules which compel people to give up their jobs at age sixty-five are among the mainstays of Canadian employment law. For huge numbers of people in Canada, working life traditionally ends at age sixty-five. For the majority of Canadian workers these laws are not coercive or objectionable in any way. Early retirement, especially for those whose jobs are too small for their spirits, is much the preferred choice to working until one reaches 70 or more years of age.³⁵

For others though, especially those who occupy jobs which are intellectually, emotionally and/or financially rewarding, mandatory retirement forces them out of the workforce against their will. For these people, the venerability of these rules do not immunize them from the charge that they are inconsistent with our constitutional commitment to respect the equal autonomy of each member of our community whenever we reasonably can. Being cut off by law from paid employment when one turns sixty-five is, *prima facie*, a violation of a person's constitutional rights when it is done without their consent and without regard to their ability to continue work.³⁶ Terminating people from their employment in such a fashion seriously discriminates against them by denying their equal freedom to pursue their chosen vocations simply on account of their age. A worker aged sixty-five is no different, *qua* worker, than his or her colleague who is sixty-four. For most academics, legislators, and

³⁵ See M. Gunderson & J. Pesando, "The Case for Allowing Mandatory Retirement" (1988) 14 *Can. Pub. Pol.* 32 at 34.

³⁶ It should be acknowledged that for many, including virtually every judge who has considered the constitutionality of mandatory retirement rules, there will be a serious preliminary issue as to whether the *Charter* would have any application to most of these rules which do not seem to be the product of the legislature, but rather are the result of individual or collective agreements. See, for example, *Harrison v. U.B.C.* (1988), 49 D.L.R. (4th) 687, 21 B.C.L.R. (2d) 145 (C.A.); and *Douglas College Faculty Association v. Douglas College*, unreported judgment of the B.C.C.A. date Jan. 6, 1988. For a discussion of the reach of the *Charter* on this issue, see Beatty, *supra*, note 3 at 94-100. See also D. Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37 *U.T.L.J.* 183.

courts the discrimination seems plain.³⁷ The only serious issue is whether, in a free and democratic society such a distinction is one whose reasonableness can be "demonstrably justified."

At this stage of a conversation about the constitutional validity of our rules mandating retirement at age sixty-five, the focus should shift and, as in the case of farm-workers, the discussion would centre on the objectives this policy was meant to serve and the means it employed to secure them. Once again, a dialogue would explore whether, evaluated in terms of its means and ends, a rule which terminates people from their employment at a specified age is justified even though it denies people's constitutional entitlement to receive equal benefit and protection of the law without discrimination on account of age.

Supporters of mandatory retirement rules argue these laws are "demonstrably justified". They point to the large number of important social objectives that these rules help secure³⁸. They say, as a matter of economic well-being, society as a whole gains by rules which mandate retirement at a specified age. Rationalizing long-term, deferred-compensation packages, harmonizing standardized public and private sector pension plans, and avoiding administrative and monitoring costs of employee performance are among the more commonly cited benefits mandatory retirement schemes are said to accomplish. In addition, making more jobs and promotion opportunities available to younger workers, as well as reducing risks

³⁷ For academics, see D. Gibson, "Distinguishing the Governors from the Governed" (1983) 13 Man. L.J. 505; and K. Klare, "The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labour Law and Civil Rights Law" (1982) 61 Ore. L. Rev. 157. See also M.J. Perry, "The Principle of Equal Protection" (1981) 32 Hastings L. J. 1133. For legislators, see, for example, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Canadian Government Publishing Centre, 1985) at 21; *The Human Rights Act*, S.M. 1974, c. 65, s. 6(1). For courts, see *Re McKinney and Board of Governors of the University of Guelph et al.* (1987), 32 D.L.R. (4th) 65 (aff'd. (1987), 46 D.L.R. (4th) 193 (C.A.), leave to appeal to the Supreme Court of Canada granted 46 O.L.R. (4th) 193 [hereinafter *McKinney*]; *Harrison v. U.B.C.*, *ibid.* See also *Craton v. Winnipeg School Division No. 1* (1985), 61 NR 241, [1985] 2 S.C.R. 150 where the Supreme Court held that the mandatory retirement rule in the public schools of Manitoba was inconsistent with the human rights code. Given the common purpose and parallel language of our human rights laws and the *Charter*, it would be expected that a similar ruling will eventually prevail in our constitutional law as well.

³⁸ These are summarized in M. Gunderson & J. Pesando, *supra*, note 35 at 35.

to health and safety that may be caused by employees being unable to discharge their duties on account of their age, are invariably offered in the catalogue of objectives this long-standing rule of our labour code has been intended to promote.

On this point, it seems certain that proponents of mandatory retirement will carry the day. All of the courts who have considered this question have recognized that in theory most, if not all, of these goals are perfectly valid objectives for a community to pursue.³⁹ None conflicts with our principle of equal personhood and one of them, the objective of work sharing, is directly supportive of it. However else mandatory retirement may be justified, it seems undeniable that this law of termination promotes our commitment to respecting an equal opportunity for every individual to control their own destiny by sharing the work of a community when it is scarce. It operates as one of a number of different laws in our labour code, which limit the time people can work in a day or a week or a lifetime, in order to help ensure everyone has some minimum and in that sense equal opportunity to work. Michael Perry has put the justification in these terms:

What does the choice to retire persons by age imply? Most persons need to be engaged in "work", in the sense of productive activity that contributes, in some fashion, to the material or spiritual well-being of the community. Certainly this is a need older persons have as well as younger persons. But older persons have had their chance – their turn – to satisfy that need (which ought not to be confused with financial need, which is a distinct matter). Surely it is not unreasonable, or morally improper, to think that younger persons ought to be given their chance too.⁴⁰

As a derivation of our principle of equality of personhood, Perry's is certainly an argument which can fairly be advanced in the kind of dialogue courts entertain to assist in their evaluation of the

³⁹ It might be noted, however, that both the B.C. Court of Appeal and Mr. Justice Gray of the Ontario Supreme Court expressed the view that mandatory retirement rules could not be justified as substitutes for more demanding and costly modes of performance evaluation. Relying on a passage in the judgment of Madame Justice Wilson in *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 178 at 184ff, the argument that mandatory retirement could be justified on the basis of administrative convenience was rejected out of hand. See *Harrison v. U.B.C.*, *supra*, note 36; *Stoffman et al. v. Vancouver General Hospital et al.* (1986), 30 D.L.R. (4th) 700, 25 C.R.R. 16 (B.C.S.C.) (leave granted for appeal to the Supreme Court of Canada, 29 B.C.L.R. (2d) xxxii); and *McKinney*, *supra*, note 37.

⁴⁰ M. Perry, *supra*, note 37 at 1155.

constitutionality of the different features of our labour code. For the same reason that it would be legitimate to distinguish between workers in their termination from employment on the basis of their age when it is a bona fide occupational qualification⁴¹, so justifying mandatory retirement as part of a work-sharing policy fits squarely within our first principle of constitutional review. Whatever other objectives it may or may not serve, mandatory retirement clearly enhances equality of personhood in our community by protecting an equal opportunity to work for every member of our society.

Some might be inclined to resist even this conclusion on the ground that it rests on a common and fatal mistake. Coined by economists as "the lump of labour fallacy," the argument is that it is both logically and empirically incorrect to assume that forcing older workers to retire will increase the number of jobs and promotional opportunities for younger members of the workforce. The thesis is one which seems to have the general endorsement of the economics community at large, although in any given case its application is still a matter of some debate and dispute.⁴²

For our purposes it is not necessary to explore the validity of the charge. On the principles and strategy of judicial review to which we are committed, it is not for the court to judge the wisdom or effectiveness of a rule or policy which a legislature has chosen to pursue. Such an argument might be pertinent under a quite separate proportionality principle, in which the benefits of a social policy are weighed against the cost to our constitutional order.⁴³ It should not, however, be invoked when the only question before the court is whether a particular rule enhances our constitutional commitment to equality of liberty in the most reasonable way that

⁴¹ See D. Beatty, *supra*, note 3 at 101-02.

⁴² The issue is raised in M. Gunderson & J. Pesando, *supra*, note 35 at 35-36.

⁴³ *Supra*, note 27. In *Harrison v. U.B.C.*, *supra*, note 36, the British Columbia Court of Appeal made reference to the lump of labour theory in rejecting the University's argument that mandatory retirement was a legitimate way of opening up job opportunities to younger members of the workforce. Although I have tried to avoid commenting on the merits of judgments offered in individual cases, it might be observed that the courts' conclusion on this issue seemed to be predicated on the evidence (or lack of evidence) that had been put before it and the judgment seems to contemplate that in the appropriate circumstances, such as those which faced the Ontario Court of Appeal in *McKinney*, its conclusion could easily be otherwise.

it can. Here the only issue before the Court is the integrity, not the practicality, of the purposes lawmakers pursue.

So on this point of the debate there seems no doubt as to which side is right. It is abundantly clear that the objectives which mandatory retirement seeks to accomplish are entirely consistent with our two principles of constitutional interpretation. However, when it comes to evaluating the means mandatory retirement rules use to further these objectives, supporters of mandatory retirement don't fare nearly so well. Indeed it seems to me that the inadequacy and defect in the method of our existing mandatory retirement rules is as certain and demonstrable as the validity of the ends they are intended to promote. Quite simply, all of the objectives of compulsory retirement that we have just identified could be pursued just as effectively through alternate rules which compromise our constitutional guarantee to equal benefit and protection of the law without discrimination based on age much less.

In the end, there is no adequate response that can be mounted to counter the challenge that mandatory retirement rules, based on a person's age, are badly overdrawn given the objectives they are meant to accomplish. If, for example, the rationale for selecting age sixty-five as the criterion on which termination from employment would be effected is that it protects the settled expectations of contributors to pensions, then there are more reasonable ways of accomplishing that objective. "Grandfathering" those cases where settled expectations would be upset if the normal retirement age were changed is the most obvious alternative which would compromise our constitutional commitment to equality and liberty much less than imposing a mandatory age of retirement in perpetuity. As an actuarial matter, there appears to be no reason why the pension schemes of the vast majority of working people could not be adjusted to allow them to retire whenever they chose with appropriate alterations being made to the size of their pensions. As a practical matter, pension plans can easily be designed to dovetail with retirements at virtually any age at which an employee chooses to leave work or with retirements which are activated by factors like years of employment which are wholly unconnected with a person's age. If, for some reason, redesigning pension plans to conform more closely to our constitutional ideals threatens the settled expectations of some workers and/or their employers then a

grandfathering law, sanctioning retirement at age sixty-five just for them, would be demonstrably more justifiable because it would impair the right to equality of treatment much less than a mandatory rule of termination for everyone when they turn sixty-five.

Equally if, as many believe, youth employment is an important objective that mandatory retirement is thought to serve, again alternate means or criteria exist by which these purposes can be achieved in a way which compromises our constitutional commitment to equal liberty substantially less. Alternate legal rules are available which can be drawn much more closely to achieve the purposes of sharing work between the older and younger members of the community. Retirement on the basis of years of employment, rather than years of age, is the most obvious alternate that springs to mind.⁴⁴ Using a criterion of years of work, rather than years of age, serves the policy objective of sharing work in a way that is more sensitive to our constitutional values because it does not stereotype all older workers as having enjoyed long careers, and because of that it would impair much less the equality rights section 15 is designed to protect. Limiting the number of years a person can occupy a (scarce) opportunity to work does less violence to our constitutional commitments than the rule we now use.

For large numbers of workers — especially females who for family and related reasons often choose to enter the workforce and pursue their occupational ambitions at a later phase of their lives — the conventional rule of retirement at age 65 does not guarantee the same degree of equality of opportunity and freedom of association as one which is predicated on years of service. Because people begin to work at different stages in their lives, basing termination on years of service rather than years of living, makes the opportunity to work, which is so integral to our dignity and self respect,⁴⁵ available on a more equal basis.

If mandatory retirement rules were redesigned in this way they would fit comfortably within a constitutional system of industrial relations. In circumstances where there is a shortage of workers —

⁴⁴ For an example of where a legislature has used both, see the *Constabulary (Pensions) Act*, R.S.N. 1970, c. 59, s. 2(1)(n)(iii).

⁴⁵ D. Beatty, *supra*, note 3 at 15-20.

as may well happen after the baby boomers move through their careers, or where work is not so attractive as to incline people to hang on as long as they can — one would not expect the parties to include such a rule of termination in their legal regime. Conversely where such distributive rules were desirable, each work community could, consistent with our constitutional commitment to pluralism and free choice, decide for itself the occasions on which and the circumstances in which any person could be said to have had his or her fair share of relevant work experience. Individualized decisions related to the work experience of each employee would replace the arbitrary stereotyping that infects our current legal regime.

If a constitutional conversation about the integrity of our rules of mandatory retirement took this path it could, I think, be offered as a second example of the hypothesis I proposed that reasoned discourse can enhance the participatory, democratic character of our system of government and the laws it produces. Although none of the lower courts which have passed judgment on this rule of compulsory termination have responded to this dialogue so far,⁴⁶ the conversation we have just constructed does show that, if one adheres to the two principles we have identified, the symbiosis between courts and legislatures can be an entirely sympathetic and cooperative one. The relationship between the courts and the other two branches of government need not be so hostile and antagonistic as the critics commonly suppose. In this example what the members of the third branch of the government would be telling legislatures and their executives is that if they decide that it is necessary or desirable to adopt a rule or policy to distribute valuable, life-giving resources, like jobs, among its members, it should formulate it in a way which does not impact adversely or discriminate unfairly against particular persons. They would have fulfilled the role of an active social critic or a wakened conscience by identifying alternate policies which can realize the objective of sharing valuable work opportunities in a way which showed more respect for our constitutional guarantees. It would be

⁴⁶ See, for example, *McKinney*, *supra*, note 37; *Connell and Harrison v. U.B.C.*, *supra*, note 36.

advising (but not compelling)⁴⁷ legislators how a rule of compulsory retirement would have to be formulated if it is to be constitutionally pure.

Still some critics might remain unpersuaded. I can imagine someone saying that even if, on the principles we are employing, there were determinative "right answers" to the question of the constitutional validity of our existing mandatory retirement rules, this example hardly supports my characterization of the judicial branch of our government as being especially hospitable to those people who traditionally have not enjoyed much influence in and access to the processes of politics. If the personal characteristics of the people who have launched the current challenges to our mandatory retirement laws are representative, then this example of constitutional litigation seems to benefit older, white, middle class males — individuals who already enjoy numerous advantages and benefits which are not available to many others.⁴⁸ How, it might be asked, would the judicial negation of this expression of the popular will promote the democratic quality of our system of government or the well-being of those who are relatively less well off?

The suspicion that even if the process of judicial review was coherent, or possible in some logical or theoretical sense, it may just as well enure to the benefit of those already better off, is not entirely unfounded. Certainly in the cases of mandatory retirement that have come before the courts so far, individuals who are already quite privileged in our society have been using the *Charter* to secure additional advantages they could not persuade other law makers to enact. However, at least in the instant case, this perception of the critic does not seem to be warranted. It is in fact predicated on an adversarial and confrontational structure of government that I alluded to above. White, affluent males will be able to effectively frustrate the will of the people to share its valuable public resources only if our lawmakers refused to acknowledge the integrity of constitutional opinion they receive. If, by contrast, as in the more cooperative model I have envisioned, legislators reacted positively to the alternatives that have been suggested to them, then this

⁴⁷ *Supra*, note 7.

⁴⁸ See M. Gunderson & J. Pesando, *supra*, note 35.

dialogue, like the one initiated by the farmworkers, would support the thesis I postulated in the introduction of this essay.

First, as we have seen, if mandatory retirement rules were based on the number of years a person occupied a valuable resource, rather than on the number of years she has lived, large numbers of female workers would benefit substantially. Redesigning compulsory retirement rules in this way would give this group of persons, who traditionally have been badly under-represented in the processes of politics, a much more equal opportunity to make use of resources (jobs) which offer enormous opportunities for a person to live their lives with dignity and self respect. And, female workers would not be the only individuals who would likely benefit if law makers tried to live up to the moral advice that was offered by the courts. Younger workers, who also have traditionally had little or no representation in the process of politics, would likely gain as well. In addition to abandoning the criterion of years of age, it would seem that another quite radical change in the current formulation of mandatory retirement schemes would be required for these rules to meet our two principles of review. Thus, if the state, (or those to whom it has delegated its authority) in justifying the rules of involuntary retirement, claims to be creating a legal environment in which each person has an equal opportunity to engage his or her talents productively, then it would also be bound to demonstrate that it had taken whatever complementary initiatives were necessary to ensure that the employment opportunities created by the retirements did not disappear.⁴⁹ As part of a job-sharing policy, a rule of mandatory retirement can not be effective by itself. In order to establish its bona fides, it would be incumbent on the legal authority imposing the rule to implement whatever complementary policies were necessary to ensure some sharing of jobs was actually achieved. Without a commitment of that kind it simply cannot be

⁴⁹ The Constitutional Court in Spain basically came to the same conclusion when it considered a mandatory retirement rule in the *Spanish Workers' Code*. The decision is reported in Boletín Oficial del Estado Gaceta De Madrid, 20 July 1981, supplemental Num 172, 16,237. For a summary of this decision, see "Judicial Decisions in the Field of Labour Law" (1984) 123 Int. Lab. Rev. 183 at 193-94.

assumed that rules of mandatory retirement will function as the job-sharing instruments that they profess to be.⁵⁰

If such a condition were attached to rules of mandatory retirement, they would qualify immediately for inclusion in a constitutional labour code. A programme coordinating the retirement of people after a maximum number of years of service with the entry of new workers to the positions just vacated would be consistent with the principles of interpretation with which we have been working. As amended, compulsory retirement rules would complement other work sharing policies such as laws which regulate the amount of overtime that can be worked or which integrate unemployment insurance benefits with shorter work weeks. It would further the constitutional objective of equalizing access to work opportunities by imposing a ceiling on the quantity of work a person could reasonably expect to claim over the course of his or her life just as these other parallel standards regulate the amount of employment a person can claim in a day and week.⁵¹ So designed, even the economists' concerns that mandatory retirement rules do not achieve their objective of sharing work would be met.

On this scenario, a conversation about the constitutional validity of compulsory retirement rules provides a second example of how groups who traditionally have not been well represented in our political institutions can make use of the process of judicial review to claim a greater measure of concern and respect. A constitutional regime of compulsory retirement would be beneficial both to the younger members of the workforce and to female workers. Retirement by years of service would relieve the hardship and injustice suffered by those (predominantly female) workers who have had relatively short careers and who will have few pension credits on which they can live after they turn sixty-five. Conditioning enforced retirements on a commitment not to reduce the employment opportunities which are created by such a rule would also promote a more equal opportunity for the youth in our workforce to embark on careers that parallel those who have come before them.

⁵⁰ M. Gunderson & J. Pesando, *supra*, note 35.

⁵¹ See, for example, *Employment Standards Act*, R.S.O. 1980, c. 137, ss 17-21.

C. *The Right of a Worker to Sue His or Her Employer for Wrongful Death or Injury in Tort*

The concern that we have just considered, that judicial review may be of more assistance to those who are already influential in and/or well treated by the processes of politics, and may not be particularly sensitive to the interests of those who are relatively less well off, is especially acute for some people when they contemplate a third constitutional challenge that has been aimed at our labour laws. This attack involves a claim that the standard immunity from civil liability rules, which deny workers the opportunity to sue their employers when they negligently harm them at work, and which have been a part of every *Workers' Compensation Act* in Canada since their inception, violate workers' entitlement to the equal benefit and protection of tort law.⁵² Here, a part of a social policy, which is held out as a model by the rest of the world⁵³ and which has been of unquestioned benefit to thousands of Canadian workers for almost three quarters of a century, seems in danger of being struck down. If the courts rule that the impugned sections violate the rights of persons who are injured at and in the course of their employment to the equal benefit and protection of our law of tort, some predict that both the democratic quality of our system of government and the well-being of those who have suffered crippling misfortune will be seriously compromised.⁵⁴ In this case, the critics might be expected to say, the true character of judicial review is revealed in that an unelected, elite group of judges is able to undermine one of the most

⁵² See, for example, *Workers' Compensation Act*, S.N. 1983, c. 48, ss 32, 34; *Workers' Compensation Act*, R.S.O. 1980, c. 539, ss 8(9),(11); *Workers' Compensation Act*, R.S.A. 1981, c. W-16, s. 18(1).

⁵³ See G.W.R. Palmer, "Abolishing the Personal Injury Tort System: The New Zealand Experience" (1971) 9 *Alta. L. Rev.* 169 at 189.

⁵⁴ In the constitutional reference that was formulated following the decision of the Newfoundland Supreme Court in *Piercey v. General Bakeries Ltd* (1987), 31 D.L.R. (4th) 373, 61 Nfld. & P.E.I.R. 147, intervenors from across the country submitted affidavits from a number of scholars and administrators that such a negative effect was inevitable. In resisting these predictions, I should acknowledge that I acted as co-counsel for Mrs. Piercey in the reference.

progressive and universally supported pieces of social legislation that has been developed by our legislatures and their executives.

If one applies the framework of analysis we have been following so far, it would seem that there is a very legitimate basis for such a fear. Certainly on the principles of constitutional interpretation that we have been using, these sections of our Workers' Compensation Acts seem to directly contradict section 15 of the *Charter*. It is not, I think, difficult to establish that a prohibition against workers suing their employers for wrongful injury violates their constitutional rights to the equal benefit and protection of our law of torts. First, it seems beyond dispute that workers as individuals and as a class have been denied the equal benefit and protection of those principles of tort law which are available to everyone else in the community who are victims of irresponsible and/or wrongful behaviour. What this rule states is that if two individuals are injured in an automobile accident caused by the wrongdoing of a third, one of whom is on her way to and in the course of her work and the other is on her way to and in the course of shopping, only the latter will be able to claim the benefit and protection of our principles of tort law. Compared to other victims of accidents and misfortune with whom they are "similarly situated", injured workers are denied the opportunity to obtain corrective justice from those who have harmed them wrongfully.⁵⁵

Although one might initially be tempted to say that workers are not discriminated against because all — or mostly all⁵⁶ — workers

⁵⁵ Courts generally have accepted the idea that the "analytical point of departure in any s. 15 complaint" is to determine whether the challenger has been treated differently — viz. unequally — compared with others who are situated in similar circumstances: see *R. v. Century 21 Ramos Realty Inc.* (1987), 37 D.L.R. (4th) 649, 58 O.R. (2d) 737 (C.A.); *Smith Kline & French Laboratories Ltd et al. v. Attorney General of Canada* (1986), 34 D.L.R. (4th) 584, 12 C.P.R. (3d) 385 (F.C.A.); *Re Andrews and Law Society of British Columbia et al.* (1986), 27 D.L.R. (4th) 660 (B.C.C.A.), 2 B.C.L.R. (2d) 305, (S.C.C. judgment released); *Re Blainey and Ontario Hockey Association et al.*, *supra*, note 12; *Re McDonald and The Queen* (1985), 21 D.L.R. (4th) 397, 51 O.R. (2d) 745 (C.A.); P. Westen, "The Empty Idea of Equality" 95 *Harv. L. Rev.* 537 at 542-43. But see the judgment of Morgan J.A. in *Re Validity of Sections 32 & 34 of the Workers' Compensation Act 1983* (1987), 44 D.L.R. (4th) 501, 67 Nfld. & P.E.I.R. 16 (Nfld. C.A.).

⁵⁶ As we noted in our discussion of the rules which deny agricultural workers the benefit and protection of our collective bargaining laws, workers who are amongst the least advantaged in our community are frequently excluded from our Workers Compensation Laws

are treated alike, on reflection the flaw in that reasoning becomes apparent to most. To adopt that strategy would lead to results in which laws which sanctioned the discriminatory treatment of women or native people would be upheld as well so long as all – or mostly all – individuals in those groups were burdened in the same way. To determine whether someone has been treated equally or differently than another one must look to the purpose of the law rather than the classification or characterizing trait that it uses.⁵⁷ As our standard treatises on the principles of tort law make abundantly clear, doing corrective justice between persons who act irresponsibly and those they injure is one of the core purposes this body of law is expected to achieve.⁵⁸ Given that objective, it is other victims of torts, and not other workers, who are the relevant group of comparison in determining whether those injured in the course of their employment have been denied the equal benefit and protection of the law. Comparing victims of accidents in the workplace to those whose misfortune occurs in some other location, the impugned rules treat the former unequally, by denying them opportunities and entitlements (our rules of tort) that are enjoyed by everyone else.

Moreover, rules of this kind are blatantly discriminatory, at least in the sense that the *Charter* understands that word. The inequality imposes a burden which directly threatens individual autonomy and the possibility of self rule. These sections of our Workers' Compensation Acts deny individual workers the protection and benefit of that body of rules which our society has devised to

as well. Agricultural workers, entertainers, and domestics are among those most commonly denied the benefit of these schemes of no-fault, work related, accident compensation schemes. See, for example, *Workers' Compensation Act*, R.S.O. 1980, c. 539, s. 131; *Workers' Compensation Regulations* (Newfoundland) 1984, 330/83, s. 6.

⁵⁷ J. Tussman & J. TenBroek "The Equal Protection of the Laws" (1949) 37 Calif. L. Rev. 341 at 344. This seminal work has repeatedly been cited by Canadian Courts in their interpretation of s. 15 as the analytical point of departure in determining whether a law which treats people differently is a violation of their constitutional rights. See, for example, *R. v. Century 21 Ramos Realty Inc.*, *supra*, note 55; *R. v. R.L.* (1986), 14 O.A.C. 318, 27 C.R.R. 30 (C.A.); *Re Andrews and Law Society of British Columbia et al.*, *supra*, note 54.

⁵⁸ For a description of the fundamental character of tort law, as a means by which corrective justice can be done in the community, see A.M. Linden, *Canadian Tort Law*, 3d ed. (Toronto: Butterworths, 1982) at 13-14; E. Weinrib, "Toward a Moral Theory of Negligence Law" in Bayles & Chapman eds, *Justice, Rights and Tort Law* (Boston: Reidel Co., 1983).

secure the physical integrity and personal dignity of people against the irresponsible and wrongful behaviour of others. These rules fly in the face of our constitutional commitment to the principle of equal personhood. They deny the basic commitment of free and democratic societies to show an equal respect for the inherent dignity and inviolable rights of each person; in this case the long standing civil or legal right to insist that corrective justice be done between victim and wrongdoer.

Now as with each of the other two conversations that we followed, at this stage of the discourse, the focus would shift to the question of whether, even if the immunity sections violated the constitutional rights of workers in this minimal, *prima facie*, way, such rules are demonstrably justified in a society which is committed to be both democratic and free.⁵⁹ On the principles we are using the issue would be whether these rules were necessary or the least drastic means available to the legislature to accomplish the compensatory, rehabilitative and preventative objectives that Workers' Compensation Acts are expected to promote.

For our purposes, of testing the hypothesis that judicial review can enhance the democratic character of our system of government by providing an opportunity of participation to those

⁵⁹ The cases, on who bears the onus to produce such evidence, proving on a balance of probabilities that these sections of the Act are justified or not, are divided. Some have adopted the view that the complainant bears the onus of proving these rules are not justifiable (in order to establish a violation of s. 15) while others have held it falls to their supporters to establish (under s. 1) that there are important considerations which justify the compromise of the constitutional order that such laws entail. Compare *Andrews v. Law Society of British Columbia et al.*, *supra*, note 55 and *R. v. Century 21 Ramos Realty Ltd.*, *supra*, note 55 with *McKinney*, *supra*, note 37; *Re Rebic and Collver et al.* (1986), 22 C.R.R. 66 at 78 (B.C.C.A.), and *Smith, Kline and French Laboratories Ltd v. Attorney General of Canada*, *supra*, note 55.

It should be noted that both the Newfoundland Court of Appeal and the Ontario Divisional Court have followed the first line of cases in dismissing the challenges to the immunity sections of their *Workers' Compensation Act* on the ground that, considered as a whole, this legislative regime is neither unfair nor unreasonable because it provides generous benefits to workers in many circumstances where there would be no relief available at common law. See *Re Workers' Compensation Act*, *supra*, note 55.

My own view is that the better position is that the question of whether a law which discriminates adversely against individuals is unreasonable or unfair is best considered as a matter of justification under s. 1. This interpretation is more consistent with the other sections of the *Charter* (including s. 33) and it gives the *Charter* the large and liberal interpretation our Supreme Court has recognized a constitution must be given if it is to realize its ultimate objective of making Canadian society as democratic and free as it can be. *Oakes*, *supra*, note 11.

who are not especially effective in the processes of politics, we can safely assume that these rules can not meet our second test of constitutional review. There is much historical and empirical evidence and analytical literature to support this position⁶⁰ and it is this position which I believe shows judicial review in its best light. In fact even the critics focus on this outcome in support of their counterposition that judicial review can easily frustrate the will of our popularly elected legislatures to the disadvantage of those who are already relatively less well off. Making this assumption, that these sections can not be justified, at least in the form they are presently drafted, should be congenial to both supporters and critics of judicial review because each of them thinks that it provides evidence for their side of the debate.

So, on the assumption that on our two principles of constitutional review, the Courts will strike down one of the longest standing parts of our Workers' Compensation laws⁶¹, what remains to be considered is whether such a result would be consistent with or a refutation of the thesis I have proposed of the judicial branch of our government playing the role of social critic or moral conscience in a way which furthers the deepest values implicit in our liberal democratic tradition of government. Would such a ruling show that individuals who have neither been particularly influential in nor particularly well treated by the processes of politics will be

⁶⁰ See text accompanying notes 63-67 *infra*.

⁶¹ The only other argument against such a conclusion would be that because the discrimination that is effected by these sections is directed to workers as a class, rather than to one of the enumerated grounds set out in s. 15, the *Charter* does not reach discrimination of this kind. The language of s. 15 does not encourage such an interpretation and most courts which have addressed this question have rejected the view that the enumerated grounds are exhaustive of the kinds of discrimination that s. 15 prescribes: see *Re Andrews and Law Society of British Columbia et al.*, *supra*, note 55; *Smith Kline and French Laboratories Ltd. v. A.-G. Canada*, *supra*, note 55; *Streng et al. v. Corporation of the Township of Winchester*, *supra*, note 4.

In determining what other acts of discrimination are prohibited beyond those enumerated in the text it seems certain that the treatment these sections purport to allow can no longer be tolerated under s. 15. These sections deny workers the benefit and protection of that body of law which is central to the inherent dignity, and the physical and psychological integrity of the person. They deny them the benefit and protection of some of the most basic and long-standing sets of civil and legal rights which are directly related to the general purposes and entitlements the *Charter* is, on the interpretation we are following, meant to protect. See *Kask v. Shimizu et al.*, *supra*, note 31.

able to do much better for themselves in the courts? Whose interpretation of such a decision — the critics or the defenders of judicial review — is the more plausible understanding of the event?

How you answer that question depends on the consequences you expect will flow from such a decision. Whether a judgment which says these sections of our Workers' Compensation Acts violate section 15 of the *Charter* is a good or bad thing depends, once again, on how you think the legislative and executive branches of government will likely react to it. Some think that workers as a group, and on the whole, will suffer from such a ruling because they say that legislatures can be expected to allow their compensatory systems of no-fault relief to atrophy on the basis that workers have new opportunities to seek relief in tort.⁶² They predict that legislators and their executives will succumb to pressures from employers, who are faced with the increased cost of insuring against such liability, to reduce benefit levels under Workers' Compensation. Dual systems, integrating both no-fault and fault based principles of relief, they say, unambiguously provide lower benefits to those workers whose loss either can not be attributed to anyone's irresponsibility or else can be directly attributed to their own. Indeed, in terms of the standard formulations all constitutional conversations will follow, they would say, even the possibility of such an eventuality would provide adequate justification for their validation under section 1.

In a sense, the thinking which underlies this interpretation of a decision by the courts that these sections of our Workers' Compensation system are constitutionally invalid parallels the fear that annulling our current rules on mandatory retirement would enure to the benefit of those already very powerful and well advantaged. Both are predicated on a theory of politics in which the judicial branch of our government is at war with and frustrating

⁶² Many of these opinions have been set out in affidavits commissioned specifically to defend the constitutional challenge to these sections rather than in independent reports and studies published in academic journals. See *Re s. 32 and 34 of Newfoundland Workers' Compensation Act, supra*, note 55. For some, paid-for, solicited affidavits are less impartial and objective than independent scholarly works and reports and so are, *prima facie* at least, deserving of less weight and respect. See K. Swinton, "What Do The Courts Want From The Social Sciences" and B. Morgan, "Proof of Facts in Charter Litigation" in Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 159, 187.

the valid and important purposes of the other two. In different ways, and for different reasons, each implicitly rejects the cooperative model of intra-governmental relations that I have postulated at the start.

In this case, the supposition is that legislatures and their executives have neither the political means nor ethical will to resist the pressures of employers to reduce benefits paid under the legislation so that their costs will not be increased. The sceptics say that even if a few individuals who were injured through the wrongdoing of their employers might do better, workers as a whole would be affected adversely. Even if a few might secure more compensation on principles of tort, most injured workers would end up getting less under the no-fault scheme.

If space allowed, and one were able to follow a conversation about the constitutionality of this aspect of our Workers' Compensation systems through to its natural conclusion, it could be shown there is no logical, historical or empirical basis to ground this belief. Logically, the supposition makes no sense. From the inception of Workers' Compensation everyone has assumed that all costs of accident compensation (the insurance premiums) would be passed on to consumers in the form of higher prices or back to workers in the form of lower wages and benefits, depending on the relative elasticities of supply and demand, just like any other factor of production.⁶³ The force of this logic should be as compelling to politicians today as it was when these laws were first introduced, so that however much pressure employers might consider applying to the legislatures, the latter can be expected to resist. It makes no ethical or political sense for politicians to abandon this logic and reduce the benefits paid to people who are injured as a result of pure accidents or their own fault rather than insist that any additional costs will be passed on to consumers or all workers like any other labour cost is.

⁶³ See Ontario, *Final Report on Laws Relating to the Liability of Employers* (Toronto: King's Printer, 1913) at 5-6; R.C.B. Risk, "This Nuisance of Litigation: The Origins of Workers' Compensation in Ontario" in Flaherty, ed., *Essays in the History of Canadian Law* vol. 2 (Toronto: University Press, 1983) 418 at 458; T.G. Ison, *The Forensic Lottery* (London: Staples Press, 1967) at 35-36.

Moreover, if that were not enough, there is a good deal of empirical and analytical evidence available to suggest that dual systems, which integrate both tort and no-fault principles of relief are, on all of the relevant criteria, unambiguously superior to systems, like our own, which make no-fault compensation the sole basis of relief.⁶⁴ In virtually every country which we recognize as being free and democratic, as well as in many we would not,⁶⁵ lawmakers have designed systems of providing relief to some victims of accidents which integrate some principles of tort with a broader, no-fault social insurance scheme. A verbatim transcript of such a constitutional conversation would show that both empirical evidence and logical analysis support the conclusion that dual systems of accident compensation, incorporating both fault and no-fault principles of relief, do operate smoothly and in a coordinated rather than an internally conflicting way.

Nor is there anything in the history of this provision to suggest the contrary. As an historical matter, this provision was included in the first *Workers' Compensation Act* without much discussion or debate.⁶⁶ For employers, the issue was not raised frequently and when it was there was no attempt to justify it as a necessary or vital ingredient of the scheme. For organized labour, because the remedies in tort were of no assistance to the vast majority of their members, the matter was hardly mentioned at all. Contrary to popular belief, there was not an "historic trade off" of relief in tort for compensation under the Act, because from labour's

⁶⁴ Some of the analytical and empirical evidence that supports the position that no-fault and fault based principles of accident compensation are compatible can be found in A.M. Linden, "Faulty No-Fault: A Critique of the Ontario Law Reform Commission Report on Motor Vehicle Accident Compensation" (1975) 13 Osgoode Hall L.J. 449; (U.K.) Royal Commission on Civil Liability and Compensation for Personal Injury, Vol. 1 (London: Her Majesty's Stationary Office, 1978); G.W.R. Palmer, *Compensation for Incapacity* (Wellington: Oxford University Press, 1979) at 271-278. For a brief summary of how these two principles are integrated in Western Europe, see Barth & Hunt, *Workers Compensation and Work Related Illnesses and Diseases* (Cambridge, Mass.: M.I.T. Press, 1981).

⁶⁵ A.E.S. Tay, "The Foundation of Tort Liability in a Socialist Legal System: Fault vs. Social Insurance in Soviet Law" (1969) 19 U.T.L.J. 1.

⁶⁶ R.C.B. Risk, *supra*, note 63. In his final report Chief Justice Meredith only mentions the immunity discussions once and then only in response to the submissions of the Canadian Manufacturers Association. See Ontario, *supra*, note 63 at 15.

point of view they were not really giving up anything of any value by accepting a rule that workers could no longer sue in tort. Replacing an utterly inadequate system of relief in tort, Workers' Compensation offered most workers financial compensation and rehabilitative assistance for injuries they suffered in the course of their employment for the very first time.

In the end then, a successful challenge to this statutory prohibition against workers suing their employers in tort should support the thesis of judicial review that I advanced at the outset. By insisting on their rights under section 15 of the *Charter*, workers would be able to take the benefit of all of the rules and principles of corrective justice that are available to everyone else. This example also shows that it is not just minorities who can make use of constitutional conversations to enhance their participation in the community's processes of government. The imperfections of the political process are such that on occasion even majorities can be treated unjustly by those they have elected (consented) to govern them. Workers at the turn of the century, like women today, were much less influential in the processes of politics than their numbers and simplistic ideas of majority rule might suggest. By initiating a conversation of justification in the courts, workers can remove a section, in what otherwise is a constitutionally vital policy of accident compensation, which never needed to have been included in the first place and which was in fact recognized to be an injustice by the person who is responsible for it being included in the original scheme.⁶⁷

So, even in a case which seems quite controversial and counterintuitive in the beginning, we find we have a third example in which the potential of the judiciary, to enhance the possibility of

⁶⁷ In the course of securing evidence prior to producing his report which led to the enactment of the first Workers' Compensation Law in Ontario, and which provided a model for everyone else, Chief Justice Meredith is reported to have said, with respect to the immunity from tort provisions:

One of the justifications for this law is to get rid of the nuisance of litigation, and I think even if injustice is done in a few cases it is better to have it done and have swift justice meted out to the great body of men.

Workmens' Compensation Commission, *Minutes of Evidence*, (Toronto: King's Printer, 1913) (Commissioner: W.R. Meredith) at 511-12.

each person maintaining the maximum control over his or her destiny that can be enjoyed equally by everyone else, is confirmed. Through reasoned discourse, workers can demand that legislators who are committed to respecting our constitutional values in the laws they enact, repeal or reformulate this rule which unnecessarily, and therefore unreasonably, limits their right to be treated as equals. Through dispassionate dialogue, workers can explain to our lawmakers that the inclusion of these sections in the original Workers' Compensation schemes was not a matter which was integral or central to their policy objectives and that today there is no adequate reason to allow this compromise of the constitutionality of our labour laws to endure any longer. It was a (relatively little noticed and considered) political compromise, like other parts of the recommended scheme,⁶⁸ and it lacks the moral integrity necessary to qualify as part of what we now consider to be a constitutional labour code.

IV. THE UNSKILLED, THE UNLUCKY, AND THE ORGANIZED

We now have worked through three fairly straightforward cases, currently being litigated, in which, constrained only by two principles of constitutional interpretation, our third branch of government can facilitate our liberal democratic tradition of political organization. Agricultural workers, women, our youth, and even workers as a class can initiate conversations with those who enacted laws which unfairly burden them and, through a process of reasoned dialogue, explain why such practices can no longer, if they could

⁶⁸ As we have already noted, Workers Compensation laws across the country commonly exclude disadvantaged groups from their benefit and protection. In explaining why he was not recommending agricultural workers be included within his scheme, Chief Justice Meredith was quite explicit about the "political" constraints under which he was operating. He wrote:

The principal industries excluded are the farming, wholesale and retail establishments, and domestic service. There is, I admit, no logical reason why, if any, all should not be included, but I greatly doubt whether the state of public opinion is such as to justify such a comprehensive scheme....

Ontario, *supra*, note 63 at 9.

ever, be justified. In these three relatively simple examples we can see how, acting in the role of moral conscience or social critic the courts can offer ethically powerful (though not, ultimately, legally binding) opinions which can further our democratic ideal of each person exercising the maximum control in the formulation of the rules which govern his life.

While the three examples we have worked through are important in confirming the theoretical possibility of integrating a process of judicial review with our other democratic institutions and processes of government, none of them are concerned with rules or policies which could be said to be at the core of our labour code. Though the reformulation of each of them would enhance the democratic quality of our system of social relations somewhat, none would result in a substantial alteration either in the shape or content of our labour code or in a much greater opportunity for individuals to participate in the processes of social cooperation of the society at large.

In this section I want to follow, in more detail, the initial stages of a conversation that I believe could have that effect. I want to construct the first part of a dialogue about one of the most central principles of our system of collective bargaining.⁶⁹ The principle, known as "exclusivity," governs the way in which employee interests are represented in our system of collective labour relations. This central rule of our labour law is an important example because it will give us an indication of just how significant an instrument of social justice the *Charter* can be in ameliorating the condition of those who are relatively less advantaged in our community.

The principle of exclusive representation stipulates that whenever a majority of a group of workers, which is determined by a government agency to be appropriate to associate together for purposes of collective bargaining, chooses one union to represent them in the decision-making processes of the enterprise, that union becomes the exclusive bargaining agent for all of the workers in that group. As a corollary of this principle it is unlawful for an employer to negotiate with any other union or association or individual in the

⁶⁹ The full dialogue is set out in D. Beatty, *supra*, note 3 at 135-79.

group unless the union so "certified" consents to such arrangements.⁷⁰

So described, it will not, I trust, be a matter of serious debate that, *prima facie* at least, the principle of exclusive representation does fundamental violence to a person's freedom to associate only with those persons in the enterprise with whom he chooses to join.⁷¹ In the first place, legislative adoption of a principle of exclusive representation means that *all* workers who want to participate in the formulation and administration of the rules which will govern how they must pursue their occupational objectives — including those who voted against and do not want to belong to the union — must take out membership in the association so certified. Because the principle makes the union chosen by the majority of workers in the specified group the exclusive agent for all dealings between employees and their employer, for a worker to be able to participate in these processes of industrial government he must join that particular union. He has, *practically speaking*, no other choice. If the Teamsters are the union of choice of a majority of the persons with whom you work, becoming a Teamster yourself will be a condition precedent to all future involvement in settling and applying the rules which govern your life while you are at work. If a person insists on his freedom to remain outside that organization he cannot, by definition, have any further involvement in the decision-making processes which govern the workplace except in trivial and peripheral ways (for example, casting a ballot where a strike vote is held). Membership in the union (for example Teamsters) chosen by the majority is made a condition precedent to all further participation in the processes of industrial self-government. Because exclusivity gives one union a monopoly on access to the decision-making processes in the workplace, only if

⁷⁰ The principle of exclusivity is an integral part of every collective bargaining statute in Canada. In Ontario the *Labour Relations Act*, R.S.O. 1980, c. 228, s. 67(1) provides: "No employer ... shall ... bargain with or enter a collective agreement with any other person or another trade union ... on behalf of ... the employees in the bargaining unit."

⁷¹ This conception of freedom of association, the freedom to remain apart from associations to which one does not want to belong (sometimes referred to as "negative freedom") was not at issue in any of the cases dealing with the constitutional validity of laws which limited the rights of workers to bargain, strike and engage in other forms of protected activity. See *Re Alberta Public Service Employee Regulations Act*, *supra*, note 30.

they are prepared to deny themselves the even more basic entitlement of participating in the settlement and administration of all the terms and conditions which govern their lives while at work (*viz.* deny themselves the benefit and protection of the legislation), can the equal freedom of these individuals to associate only with those of their own choosing actually be preserved. To be able to participate at all, as the legislation anticipates, many workers must take out membership in a union they otherwise do not want to join. If the parallel principle were applied to the decision-making processes of our society at large, it would mean all opposition members in a legislature would have to take out membership in the governing party if they wished to have any further involvement in the legislative and executive processes of government.

Another way to describe the constitutional defect which renders the principle of exclusive representation null and void is to point out that it violates a person's freedom of association in exactly the same manner as an employer does when it insists, as a condition of employment, that an individual sign a so-called "yellow-dog" contract in which she agrees not to join any union.⁷² In both cases, while the person or agency doing the coercing obviously differs, employees are denied a freedom to control their own development to the extent they are prevented from forming associations with other workers of their own choosing to pursue their occupational objectives. In both cases the workers are denied the (positive) right to determine for themselves the associations through which they will participate in the decision-making processes (both legislative and adjudicative) which settle the rules which regulate their lives in the places they work.

So described, it is not just the case that many individuals will be required to join associations to which they do not want to belong. Co-incidently, their (positive) freedom to form associations with other workers who, for example, share a particular skill or trade

⁷² It is conventional wisdom of virtually all systems of collective labour relations that such terms of employment cannot fairly be regarded as the product of the employee's true consent. Even the most conservative interpretations of liberal political theory recognize that holders of "private" power, like employers, can act coercively towards those to whom they offer employment. See Hayek, *The Constitution of Liberty* (London: Gateway Edition, 1960) at 136-37.

(for example law or nursing), or specific philosophy or world view (for example social democrat or christian), or theory of dispute resolution (for example strike or arbitration) for purposes of participating in the decision-making process, will have been drastically curtailed. Because the principle of exclusive representation requires the interest of every employee to be represented through the union which has been certified as the sole bargaining agent for the group as a whole, the very — indeed only — reasons such employees would have to form associations with those who have a common skill, philosophy etc. will have been lost. Because any other association formed by these employees could not perform the very (legislative, adjudicative) functions they would want it to serve, the "freedom" to organize such groups is made an utterly empty and meaningless one.⁷³

Now even if it is clear and straightforward that the principle of exclusive representation interferes with and limits the freedom of some employees, we know from our earlier examples that such a conclusion cannot be determinative of the question of whether this principle can pass constitutional scrutiny. As we have observed, rights collide (here between those who want to bargain collectively through a particular association/union and those who do not) and, on such occasions, one or other or both of these competing rights, of necessity, will have to give way. In the language of section one, the difficult question is whether the principle of exclusive representation is the kind of limitation on a person's freedom of association which can be defended as a reasonable limit; one which can be "demonstrably justified" in a society which considers itself democratic and free.

It is to be expected that many of those institutions and organizations which have a vested interest in the retention of the present system and in particular in the principle of exclusive representation will argue that it can. Their argument will be that exclusivity is essential if the (positive) freedom (of association) of those who want to bargain collectively is to be protected and made secure. The claim will be that a principle like exclusivity is

⁷³ The interpretation given by the majority of the Supreme Court of Canada in *Re Alberta Public Service Employee Regulations*, *supra*, note 30, may preclude such a purposive analysis of s. 2(d) of the *Charter*.

necessary to ensure the workers and the labour movement are not hopelessly and helplessly divided and, in the final analysis, to make certain that working people remain sufficiently united that they can, as a group, have some meaningful control over the kinds of lives that they ultimately will lead. If the principle of exclusivity compromises freedom of association, it will be said, it does so for the greater good of workers as a whole, including those whose freedom of association may be marginally compromised. As the challenge to the immunity section of Workers' Compensation was said to threaten the entire system of no fault relief, so the prediction will be that without a principle of exclusive representation our whole system of collective bargaining and the freedom of those who choose to associate and bargain collectively would be seriously threatened and subject to complete collapse. In pursuing such purposes as these, it will be said, exclusivity is clearly consistent with and indeed ultimately derived from the ideals which underlie our constitutional regime.

Now in evaluating the response of those who favour the retention of our current system of collective bargaining and the principle of exclusivity on which it rests, it is not difficult to see how the analysis we have been employing repeats itself. In the first place, as with virtually every part of our labour code which we have considered, it is apparent that the exclusivity principle can fairly claim to be pursuing constitutionally valid ends. Reduced to its essentials, the principle of exclusivity can be said to be one means by which the solidarity principle, which is at the core of *all systems of collective labour relations*, is secured.

In our own system of collective bargaining the solidarity principle is manifested both in the principle of exclusivity and in the rules used to designate which employees will be grouped together in a unit appropriate for bargaining. In essence, the solidarity principle is expressed both in the rules which define the boundaries of an industrial community and in the exclusivity principle which specifies how the wishes of the employees within that community will be represented collectively. So described, it can, I think easily be shown that even though the solidarity principle (and therefore all systems of collective labour relations) itself restricts the freedom (of association) of those who would rather bargain as individuals and apart from their fellow employees, it (and therefore any collective

bargaining system) does conform to our first principle of constitutional review. Reduced to its essentials, solidarity protects an equality in the opportunity to participate in the decision making process between the interests of capital and labour as well as between the interests of workers themselves.

First by promoting the equal liberty of those employees who want to form associations with those with whom they work, the principle of solidarity ensures many more individuals will be able to participate more equally with their employer in settling the terms and conditions on which they work. Solidarity ensures more workers will have more control over the direction their lives will take. Secondly, drawing on the exit-voice analysis developed by Hirschman⁷⁴ and applied by Freeman and Medhoff⁷⁵ it can also be said, in support of any institution or process which incorporates the solidarity principle, that it tends to equalize the extent to which each worker can participate in the government of her working life by making the preference of the average rather than the marginal worker the effective criterion of decision. On both accounts solidarity is a principle which is compatible with and supportive of the ethic of equal personhood which is at the root of our constitutional system of government.⁷⁶ Once again, as with all of the other examples we have considered, the limitation that this aspect of our labour code imposes on the fundamental freedoms of some workers in our community can be derived from and justified by the deepest values on which the constitution itself rests.

However, and for reasons which by now I trust are quite familiar, it will not suffice for Canadian legislators to justify encroachments on the fundamental freedoms and rights enshrined by the *Charter* by pointing to the integrity of their objectives. As constitutionally pure as the inspiration for such initiatives may be,

⁷⁴ A. Hirschman, *Exit, Voice and Loyalty* (Cambridge, Mass.: Harvard Press, 1970).

⁷⁵ R.B. Freeman & J.L. Medhoff, "Two Faces of Unionism" (1979) *Pub. Int.* 69, and R.B. Freeman & J.L. Medhoff, *What Do Unions Do* (New York: Basic Books Inc., 1984).

⁷⁶ It might be noted that when the parallel question was posed in Ireland the Courts held the solidarity principle was compatible with a constitutional commitment to freedom of association by deciding that the latter does not entitle each worker to create his own negotiating unit for himself. See *International Encyclopedia for Labour Law and Industrial Relations*, Kluwar vol. 6 at 141.

Canadian legislators must also establish that the (legislative) method they have chosen to realize their objectives is itself appropriate — that it meets the principle of reasonable alternative means. Thus, again, if there were more than one way of accomplishing valid social objectives — in this case worker solidarity, the elimination of "free riders," industrial peace and stability, etc. — one of which invaded our explicit constitutional rights less than others, that alternative would have to be chosen by the legislature to accomplish these purposes.

Once one accepts that our second, means-oriented principle of "the reasonable alternative" will figure prominently in any future analysis of the exclusivity principle, there can be little doubt that what admittedly is one of the cornerstones of Canadian industrial relations policy will be found to be constitutionally flawed. Quite simply, alternate means, by which Canadian legislators could accomplish the objectives that are common to all systems of collective labour relations, abound. Specifically, there exists in Western Europe today a large number of "free and democratic" countries as diverse as Austria, Belgium, the Federal Republic of Germany, France, Ireland, Italy, the Netherlands, and Switzerland which have organized their systems of collective labour relations around principles of employee representation which either respect, without limitation, an individual's freedom to belong only to those organizations he or she chooses to join or, and in all events, provide a good deal more freedom than the exclusivity principle allows.⁷⁷

The existence and viable operation of these models of industrial relations, organized around more liberal principles of representing the collective interests of employees, presents a decisive argument against any claim that the principle of exclusive representation can be accepted as a reasonable limitation on a

⁷⁷ Both academic writers and courts support the wisdom and propriety of turning to the experience of other "free and democratic" societies which have already considered the constitutionality of social policies, like the collective representation of employee interests, against criteria similar to those which are set out in the *Charter*. See generally P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 619, where many of these authorities are collected. It should be emphasized that in the vast majority of these countries which have incorporated a more liberal principle of employee representation into their models of industrial relations, there exists a strong constitutional (and/or statutory) commitment to freedom of association which parallels s. 2(d) of our *Charter*.

person's fundamental freedom of association in a society which considers itself as being *both* free and democratic. These systems, which are highly diverse in their detail and unique in their historical origins, represent operational, alternate principles or means around which the representation of employee interests in the decision-making processes at the workplace can be collectively organized in a way which is more consistent with the constitutional commitments we are bound now to respect. They are predicated on alternate legal rules or institutions which actually guarantee an individual the freedom of participating in the decision-making processes at the workplace only through those organizations he or she chooses to belong to or, at the very least, to guarantee considerably more freedom than our existing system allows. As such, each of these systems of collective labour relations represents a less drastic, *viz.* more reasonable, alternative which is available to our legislators to accomplish the objectives of industrial stability and worker solidarity which are at the heart of all collective decision-making structures. To paraphrase a familiar comment, if all of these societies can manage without imposing any or much milder limitations on the freedom of workers to join only those associations of their own choosing, it is difficult to argue that a principle like exclusivity is necessary in a free and democratic society such as our own.

Although in their details and in the historical circumstances which gave rise to their development, each of the eight national systems I have identified is unique, on closer examination it can be seen that they actually fall into or, more properly, are organized around, one of two broad principles of representing employee interests in the decision-making processes of enterprises. According to one principle, which governs the industrial relations systems in Belgium, France, Ireland, and Switzerland, for example, and which we might characterize as plural or multiple (as opposed to exclusive) representation, in order to be able to fully participate in the various decision-making processes of the workplace a worker must join a union, but he or she is given a choice as to which of several competing unions he or she may become a member of.

On this principle, which has had a long history in European labour relations at the levels of national and industry-wide bargaining, it is true that those who are opposed to joining any trade union as a condition of participating in the decision-making

processes of the enterprise, as well as those who claim membership in smaller, independent, "less representative" unions, are not able to enjoy the same (equal) degree of freedom (of association) as those who are committed to trade unions which are more in the mainstream — unless, of course, they are prepared to compromise or abandon their beliefs. Nevertheless and while acknowledging that this principle of employee representation does not allow for a full or absolute freedom of association for all workers it is apparent that, to the extent it offers workers a wide variety of choice in the organizations to which they must, as a practical matter, belong, it infringes a person's freedom of association much less drastically than our own principle of exclusive or monopolistic representation and so would be constitutionally preferred.⁷⁸

In terms of the collective decision-making processes and institutions we employ to govern our societies at large, the industrial relations systems in operation at the level of the enterprise in these countries parallel closely and compare favourably with our institutions of representative, parliamentary democracy. By contrast, the principle of exclusivity could be said to mirror, in one important respect at least, the one-party state.⁷⁹ In the former, even if a

⁷⁸ In Belgium, for example, where this system seems most highly developed, typically a worker would have a choice between five different trade union groups, while in Switzerland, where there is no governmental restriction on which unions are entitled to participate in these decision-making processes, the choice would be practically unlimited.

⁷⁹ Though the analogy is, I believe, close and informative, I do not intend to claim that it is exact. In the first place, unions obviously do not have the same sovereign authority in the rule-making processes of the workplace that a governing party does in the legislative processes of the state. However, it is also true and widely recognized that a union which is granted the exclusive authority to represent the interests of all workers in an enterprise (or some segment thereof) is in fact and in law "clothed with a power not unlike that of a legislature [in] its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates." *Steele v. Louisville and Nashville Railroad Co. et al.*, 323 U.S. 192 (1944) at 202. See also the concurring judgment of Mr. Justice Powell in *Abood et al. v. Detroit Board of Education et al.*, 431 US 209 (1976) at 244ff, where the analogy between trade unions and political parties in a legislative, decision-making process is developed further. The same parallel is also discussed in R. Weyand, "Majority Rule in Collective Bargaining" (1985) 45 Col. L. Rev. 556 and G. Schatzki, "Majority Rule, Exclusive Representation and the Interests of Individual Workers: Should Exclusivity be Abolished?" (1975) 123 U. Penn. L. Rev. 897. For a similar analysis of the West German model, see R. Richardi, "Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany" 5 (1982) Comp. Lab. L. 23.

worker is not a member of the (governing) organization or association (whether a party or union) which commands the support of the majority of the community (whether social or industrial), he or she is able to remain a member of his or her own ("most representative") organization or association, *and no other*, and continue to participate fully in the processes and institutions of decision-making. By contrast, in a community — be it political or economic — which vests exclusive and absolute control over the decision-making process in one association — whether party or union — which enjoys the support of a majority of persons in the relevant unit, membership in that organization becomes a condition precedent to all forms of participation and possibilities of self-government.

To some, the analogy between the principle of exclusive representation and participation in the wider political processes which govern our society at large may not have been drawn with sufficient care. It might be argued that the impairment of a person's freedom of association that is caused by the principle of exclusive representation is more properly compared to that of the citizen in a general election who casts a losing vote in the constituency in which he or she lives. But a moment's reflection shows why the suggested parallel is itself wide of the mark. In analyzing how individual workers participate in a system of collective labour relations, our concern is with a person's involvement in the institutions of industrial self-government after and not simply when they cast their votes. Exclusive representation is a rule which regulates participation by employees in the legislative and adjudicative processes through which laws are enacted for and applied to the workplace. In the democratic, parliamentary processes we use to control our social relations in the community at large, while it is obviously true that not everyone casts a "winning vote," it is also the fact that persons whose preferences and politics are different from the majority of their neighbours are not

A second difference between the position of an exclusive bargaining representative in our "private" system of industrial government and the ruling organization in a one-party state is, of course, the provision in law in the former but not the latter of the governing association being replaced by a competing organization. However, when one contemplates the enduring security of major unions such as the Autoworkers, Steelworkers, Postal Workers, and Teamsters in the major units in which they hold bargaining rights, this difference is in practice only one of degree and one which could easily be exaggerated.

compelled to join the party of the successful candidate in order to continue their participation in the processes of government. The process itself retains its pluralistic character. By contrast, in the legislative and adjudicative institutions we currently use to govern social relations in the workplace, only one party is permitted to participate by law (of exclusive representation). No one who voted against and who belongs to a union (party) other than that which secured majority support will be allowed to participate in the decision making processes unless and until he or she joins the union to which the state has granted a monopoly in the representation of everyone's interest in the enterprise.

As solicitous of the freedom of workers to join only those associations of their own choosing as the principle of plural representation may be, the second principle of employee representation around which the other European communities I have identified have organized their systems of collective labour relations (and in particular Austria, the Federal Republic of Germany, Italy and the Netherlands) is even more congenial to this political and ethical ideal. This principle, which we might characterize as purely voluntary or consensual representation, ensures that every worker in an enterprise is entitled to vote for, be represented on and/or elected to the institution through which the interests of workers must be expressed to those who employ or consume their services. In the systems of collective labour relations in these countries, freedom of association is guaranteed equally to those individuals who do not want to join any association (to remain and/or run as independents as it were) as well as to those whose religious or political or nationalist views incline them to join unions which do not attract sufficient support in the community at large to be designated as "most representative" by the relevant government authorities. Every individual whether or not he or she belongs to the association which commands the support of a majority of employees in the plant, or indeed to any association at all, is entitled to participate as an equal in the election and *operation* of the institutions through which employees are integrated collectively into the decision-making processes of the firm.

In drawing attention to the existence of this large group of European communities which have organized their systems of collective labour relations around one of these two distinct principles

of representing employees' interests in the decision-making processes which govern the places where they work, it is not my intention to review all or indeed any of them in any detail. For the purposes of the present analysis it is sufficient — indeed to be consistent with its whole tenor and approach it is necessary — to limit our focus, at least initially, to the model which represents the "least drastic" means of accomplishing the objectives legislators pursue in developing a system of collective labour relations. For purposes of drawing out the policy implications and the pragmatic possibilities of the present analysis, it is appropriate to focus our attention, at this stage, to the model which seems *most* faithful to the ideals we have entrenched in the *Charter* and simply to note the existence of the wide diversity of alternate principles and legal institutions through which these ethical standards might also be expressed.

Of the various legal regimes that I have identified, there would seem little doubt that the West German system of representing employee interests in the collective decision-making processes at the places they work is the model which would be most easily integrated with and sympathetic to our new constitutional environment. Of the various systems which incorporate the more liberal principle of voluntary representation, the German system is the one most fully developed. It is the one with which we have the most experience, and it has, as well, received the most extensive academic scrutiny by far. And, compared to the systems of plural or multiple representation, it not only carries the principle of freedom of association further, especially for those who do not want to join any association, but it does so in a way which is entirely consistent with the ethic of solidarity which is so integral to our own model of collective bargaining.

The basic structure of the West German system is now quite familiar.⁸⁰ The cornerstone on which the principle of purely consensual representation has been erected is the works council. Like a union which has been certified as the exclusive bargaining agent for a group of employees, the territorial authority — the sovereignty — of a works council extends to all employees

⁸⁰ A good summary of the German model is contained in M. Pelzer, *The German Labour Management Relations Act* (London: MacDonal and Evans Ltd, 1972).

within its jurisdiction. Unlike the system in North America, however, the scope of its jurisdiction within an enterprise is comprehensive and, at a minimum, will cover all employees in an enterprise including both blue collar and white collar employees and certain strata of middle management as well.⁸¹ Indeed, the works council envisages that proper representation of the different skills, occupations, sections and even sexes within the plant will also be secured.

Like the rules which govern the selection of an exclusive bargaining agent in Canada, essentially all persons who will be governed by the decision of the works council are entitled to vote for its members. Everyone over the age of 18 who has been employed for six months is entitled to vote.⁸² However, again in contrast with our own system, the guarantee of a worker's freedom of association goes well beyond the opportunity to cast a losing ballot. Thus, all workers, regardless of their union affiliation, are able to propose or stand as candidates for the council and, if elected, participate directly in its affairs. In the German model, members are elected as representatives for different sectors of the enterprise for a three-year term during which, except in extreme cases, they cannot be recalled.⁸³ Unless otherwise provided, the statute requires the works council and the employer to meet at least once a month to deal with all matters related to the operation of the enterprise.

⁸¹ The distinction between and segregation of blue-collar and white-collar workers into separate decision-making processes, with separate representation is, by contrast, in Canada, one of the most durable and respected shibboleths. See *Labour Relations Law in Canada: Casebook*, supra, note 32. For a discussion of the feasibility of incorporating interest group representation in the North American model of collective bargaining, see E. Silverstein, "Union Decision on Collective Bargaining Goals: A Proposal for Interest Group Participation" (1985) 77 Mich. L. Rev. 1485 and B. Adell, "Establishing a Collective Employee Voice in the Workplace: How can the Obstacles be Lowered" in G. England, *Essays in Labour Relations Law* (Montreal: C.C.H. Canadian Ltd, 1986) at 3-24.

⁸² In virtue of the fact that some employees may be under the age of eighteen when they first begin to work, special provision for the representation of youth workers is included in the *Works Constitution Act*. See M. Pelzer, supra, note 80.

⁸³ For a brief discussion on the circumstances in which the tenure of a member of a works council can be terminated prematurely – which essentially pertains to situations of unlawful behaviour – see M. Pelzer, *ibid.* at 55-59.

Even from such a skeletal description of the institutional structures through which the principle of voluntary representation is expressed, it is quite apparent how much more the West German model of works councils respects the freedom of those who either do not want to join any union, or want to join one different from that to which a majority of their colleagues want to belong, than our own system of collective bargaining does. Instead of the right to participate in the legislative and adjudicative processes of industrial government being conditioned on membership in the union (association, party) preferred by the majority of employees, each worker would be able to participate through the organization or representative of his or her choice. Of that constitutional advantage there can be no doubt.

In fact, by focusing our attention on the structures and institutions of the West German model of representing employee interests in the decision-making processes of an enterprise, one can see that this is not the only constitutional advantage that this particular system of collective labour relations enjoys. As well, and in large part precisely because this model is so solicitous of a workers' freedom of association, it turns out to be the case that it is able to extend the *benefit* and *protection* of this body of law more evenly, that is more equally, to all of the people who work in that community. Through this model of collective labour relations the state is able to create a legal environment which applies — or more properly is available — to individuals in the society more equally than our own. Indeed as a practical matter, all of the various models of collective labour relations operating in the countries I have identified are generally utilized by a significantly larger percentage of the workforce than our own. Again if, for purposes of illustration, we focus on the West German experience, on the basis of the available evidence it would appear that the percentage of workers governed by and benefiting from their system of collective labour relations is almost double our own. Such a staggering discrepancy in the inequality of treatment that is tolerated by these two competing systems of legal regulation provides a second and equally powerful reason why a system of labour relations modelled on the principles which distinguish the West German method should be constitutionally preferred.

The best evidence of our own circumstances suggests that our system of collective bargaining directly benefits and offers protection to between 35 and 40 percent of our workforce. At the most optimistic, the figure is 45 percent.⁸⁴ The fact is that the greater majority of Canadians, many of whom are among the least well off in our community, simply have not received *any* direct benefit from or been protected by this method of involving employees in the decision-making processes in the places they work. Indeed if one were to exclude the public sector and focus exclusively on individuals working for "private" enterprises, the extent to which our model of collective bargaining could be said to enhance the lives of workers in Canada would be even lower still. By contrast, in Germany over 80 percent of the workforce benefits from being able to participate directly in the decision-making processes which govern their lives in the places they work.⁸⁵

The substantial difference in how far these alternate principles and institutions of collective labour relations are able to reach down to those workers who are least able to claim a meaningful measure of involvement in the systems of decision making which order their lives when they work, allows us to return to the theme which has motivated this essay from the beginning. The very different coverage these two methods of representing employees' interests are able to effect reveals most clearly how dramatically the *Charter* and the process of judicial review can enhance the cause of social justice for the great majority of workers in our country. If the Courts put the *Charter* to work according to the principles we have been using, and our system of collective labour relations were made to conform more closely to the principles of employee representation which underlie the European models I have identified, the prospect of extending processes of democratic self government to those workers our own model has never been able to adequately serve would be one we could contemplate seriously. Institutions of industrial democracy could

⁸⁴ See R.J. Adams, "The Extent of Collective Bargaining in Canada" (1984) 39 *Relations Industrielles* 65.

⁸⁵ See C.W. Summers, "Worker Participation in the U.S. & West Germany: A Comparative Study from an American Perspective" (1980) 28 *Am. J. of Comp. Law* 367 at 377.

finally be made available to protect and for the benefit of the least privileged workers in our midst as well as those whose personal and material resources ensure them a measure of participation even in our less liberal and more unequal processes of industrial self-government.

In focusing on such distinctions between these alternate methods of reconciling the competing interests which are at play in all labour relationships, it is important to emphasize that such differences in coverage can not simply or even largely be attributed to the fact that the West German system in particular and the European models in general offer large numbers of people the choice to remain free from involvement with unions. Although it is true that systems, like the West German model, which are based on a principle of purely voluntary representation, will obviously be more attractive to individuals for whom all unions are an anathema, in the West German experience the non-union group is very much in the minority.

In fact, and almost paradoxically, the much broader reach of these European systems seems to follow directly from the more limited, less intrusive, scope of their organizing principles. Because an institution like the West German works council does not, as the principle of exclusivity effectively does, oblige a person to join a union against his or her will, the legislative framework can, consistently with principles of liberalism (freedom) and democracy, require that it be established as a matter of right at the initiative of a tiny fraction of the workforce. Thus, in West Germany, the *Works Constitution Act* provides that, on the petition of three or more workers in an enterprise, or of a union which is so represented within the staff, the electoral process by which a works council is established can be set in motion.

Precisely because this model is predicated on a principle of representation which respects the freedom of workers not to join associations to which they do not want to belong, it can be presented and justified as legislation which creates a decision-making structure which promotes an equality between employees in their opportunity to participate in the formulation of the rules which regulate their working lives. The works council system represents a method of industrial self-government through which the position of a worker in an enterprise is shaped in accordance with the basic

values and principles of a free and democratic society. In an important sense, the governing legislation in West Germany can be understood as a kind of employment standard establishing a minimal structure of *procedural due process* in the decision-making institutions of an enterprise. It is precisely because their principles of representing employee interests so closely conform to our policies of pluralism, rather than (like exclusivity) being a variant of the monopolistic or one party state, that legislative provisions of this kind can be enacted to facilitate, if not require, its application in virtually every location in which people work.

Because it can be drafted in such a way as to make it more accessible to individuals regardless of the sector or corner of the labour market in which they work, it follows that in addition to (and largely because of) securing greater freedom (of association) in the places people work, works councils, at least of the West German kind, are also more in keeping with the commitment, in section 15 of the Canadian *Charter*, to formulate laws which impact directly on each person's opportunity for personal autonomy and self control as equally as they possible can. Indeed, in addition to its more extensive coverage, from the skeletal outline of its structure, we can see there is a second dimension to the West German model which promotes our constitutional commitment to justice and equality far more than the system we currently employ. Thus, in addition to the principle of employee representation which it uses, the West German model defines the group of employees that must act collectively in a way which advances the ethic of solidarity and the concept of equal personhood much more than the parallel rules we use to determine what units are appropriate for bargaining. When it is set against the West German model of voluntary representation a vote for a system based on the principle of exclusive representation is a needless restriction on freedom and compromise of equality.

In the result, all of the European systems and in particular the West German model entail more freedom (of association) and greater equality (in participation) than our existing system can ever hope to achieve. The ideals of freedom and democracy, of decisions by consent and consensus, are extended beyond the political institutions which govern their society at large to the vast majority of the economic enterprises in which people actually spend the

majority of their waking lives. On the test I have said will form an important principle of interpretation for the Canadian *Charter* the conclusion follows naturally and unavoidably that such a method of industrial organization must be constitutionally preferred. In the language of section 1 of the *Charter*, the viable existence and demonstrated vitality of a system of collective representation of the interests of workers like the West German works council means that the limitations which are imposed on workers' freedoms and the inequalities which are tolerated by the representation principle of exclusivity can no longer be "demonstrably justified" in a society which claims title to freedom and democracy as the governing criteria of its social relations.⁸⁶

On the thesis we have been testing throughout this analysis, the methods and institutions of collective labour relations in West Germany in particular, and the communities of western Europe in general, offer the most powerful evidence of how, properly interpreted, the *Charter* can work as an instrument of social justice for those, in the unorganized, "secondary," sectors of our labour markets, who suffer most from a lack of equity in and control over their lives when they work. This example illustrates very powerfully how a group of (largely unskilled, unorganized) workers who traditionally have had very little influence in the formulation of the rules which make up our labour code, can secure a measure of social justice through a principled process of decision making in a way they never have been able in the political and legislative arena where their lack of resources — both material and personal — are allowed to count against them.⁸⁷ Their example confirms that groups such as these may have a comparative advantage in the branch of government where the force of one's principle, not the power of one's resources, determines the quality of participation in the processes of law making.

⁸⁶ I should acknowledge that there are a second set of arguments, which question the transplantability of rules of foreign or comparative law. I have canvassed what I believe to be the most important of these in D. Beatty, *supra*, note 3 at 156-79.

⁸⁷ Just how poorly represented workers in the secondary, unorganized labour markets really are can be sensed by the posture of organized labour groups who, at various points in the evolution of our labour laws, have endeavoured to resist the introduction of employment standards pertaining to minimum wages and unjust dismissal.

V. CONCLUSION

Rather than summarize the thrust of the argument I have developed in the preceding parts I want, in this concluding section, to locate my hypothesis about the role of the Courts and judicial review in a larger historical context. Earlier in this essay I drew a distinction between the moral and legal authority of the courts in exercising their powers of constitutional review.⁸⁸ Because section 33 of the *Charter* gives the legislature the final say on whether it will respect most of the substantive rights and freedoms the *Charter* guarantees, the courts' role is ultimately only an advisory one. If a legislature chooses to do so, it can ignore the ethical imperatives the court identifies in our system of social relations. The practical effect of any constitutional conversation ultimately depends on the willingness of the legislature to accept the conclusions the court draws from the dialogue it supervises. The potential of our third branch of government, to enhance the democratic quality of our system of government, depends directly on the force of its reasoning and on its ability to encourage a symbiotic and supportive relationship with the other two branches of government.

If such an attitude were to be embraced in the cases we have reviewed, it can, I think, fairly be said that the kinds of alternative laws and rules that we have identified, which would have to be adopted to bring our labour code in line with the dictates of the *Charter*, would be in keeping with a gradual but pronounced evolution which distinguishes the development of our labour laws over the course of the last six hundred years.⁸⁹ Now at this stage of the essay, it is not my intention to review all of the major rules and regulations which have characterized the various labour codes our ancestors have enacted in the past. Suffice it to say that over the course of the past six centuries, one can discern a constant and significant, though not always conscious, liberalization and democratization in the law of work relations which, on the interpretation we have been following, the *Charter* will substantially

⁸⁸ *Supra*, note 7.

⁸⁹ A brief synopsis of this evolution is set out in D. Beatty, *supra*, note 3 at 21-46.

further. Prior to the Industrial Revolution, the laws regulating labour relationships were drawn decidedly in favour of the consumers and employers of labour rather than in the interests of the workers. Duties not rights, status not freedom, were the hallmarks of the pre-industrial rules used to regulate labour relations. Compulsory labour, maximum wages, minimum hours, apprenticeship rules, settlement laws, and criminal sanctions imposed on workers who dared to exercise their freedom to associate with their fellow workers or leave their employment were the principle features of the labour code of that day.⁹⁰

With the dawn of the Industrial Revolution, and as the implication of moving to a completely unregulated market for labour became (appallingly) clear, a shift in the focus of the legal code gradually evolved. Thus, in the first half of the nineteenth century legislative initiatives were enacted to relieve the most glaring injustices which scarred the social landscape. Acting by-and-large pragmatically, and on an "*ad hoc*" basis,⁹¹ Parliament responded to circumstances of exceptional need, initially for children and then for women, first in the cotton mills and gradually extending their reach to other sectors of the economy. Throughout this period, the practice of Parliament was to act incrementally both in the scope of the protection that was afforded – which related initially to hours of work, periods of rest, education, sanitation, hygiene, accident prevention – as well as with respect to the freedom of workers to associate for their mutual aid and protection, and in the groups of workers who would benefit thereby.

Since the turn of the century, of course, both the nature and focus of social regulation have shifted again. Broadly speaking, the laws, which we have come to rely on to regulate and co-ordinate

⁹⁰ The outlines of the labour codes of pre industrial English society are set out in W.S. Holdsworth, *A History of English Law* vol. 2 (London: Methuen, 1932) at 459-64 and vol. 4 (London: Methuen, 1932) at 340-54, 379-89. For a brief summary, see E. Dodd, "From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts" (1943) 43 Col. L. Rev. 643.

⁹¹ All of the standard accounts of the development of factory legislation underscore this characteristic nature of its evolution. See B.L. Hutchins & A. Harrison, *A History of Factory Legislation*, 3d ed. (New York: A.M. Kelley, 1966). O. Kahn-Freund describes the evolution of this body of law as "trial and error" in *Labour and the Law* (London: Stevens & Sons, 1972) at 37.

work activities in our community can be understood as extending additional forms of protection for workers against arbitrary and abusive assertions of authority. They aim to regulate how some individuals in our community are able to control others. One strand of our labour law continues the tradition of the early factory legislation. It guarantees, essentially on the same grounds of public health and morality, an expanding set of entitlements pertaining to the physical, economic and occupational security of the person. This is the method of our Employment Standards and Human Rights Legislation. In these modern variations our society now insists that workers be provided with those other terms and conditions of work which we have come to realize as being equally essential to a person's maintaining control over the direction and details of his or her life. We have continued the gradual evolution and have moved from protecting the most basic concerns of the worker for his or her physical safety and survival in the original factory legislation, to enacting a set of rules which accommodates the more human aspirations more and more people look for in their work.

In addition to establishing a set of minimum, substantive conditions of employment, our legislatures have employed a second means to permit workers to protect their own interests and purposes more effectively in the "private" processes of law-making where the detailed rules which govern their (working) lives are settled. Rather than relying exclusively on legislative prescriptions to constrain market outcomes, early on our legislators turned to procedural devices through which those who were weakest and most vulnerable to the competitive forces of the market could themselves join together so as to be able to better protect and realize their personal ambitions and purposes in their work.

It is in this tradition of making procedural adjustments to the market model of regulating work that our contemporary collective bargaining laws belong. Collective bargaining statutes, as well as the more recent federal and provincial initiatives in establishing health and safety and redundancy committees, are designed, *inter alia*, to overcome additional social impediments, which can interfere with workers' opportunities to join together, so that they can participate more effectively in the decision-making processes of the workplace. Freedom of association requires, and collective bargaining legislation seeks to provide, active state

encouragement and support to counteract the obstacles which the market and the "private" institutions and organizations of production can themselves create. Collective bargaining legislation is an attempt to ensure that the power of "private" property (the threat advantage), which may otherwise be used in making decisions in the market, cannot be invoked to frustrate or defeat workers' initiatives to form their own associations as a means of creating some measure of countervailing power.

Taken as a whole, the legal regime by which our own society regulates the performance of work can best be understood as endeavouring to provide fair processes of decision-making through which the competing interests of workers and those who purchase their services can be reconciled. Essentially the market model which emerged with the development of industrial society has been adapted so that the balance that is effected is more sensitive to the needs and the purposes people pursue in their work. On the one hand, setting minimum standards of safety, security and physical well-being provides a check on the tyranny which, as we have seen, is the potential of this (as indeed any) decision-making process. On the other, insisting that everyone in the community respects the freedom of workers to associate with whomever they choose ensures that the latter will possess a sufficient measure of countervailing power to enable them to have a more meaningful input in the final balance that is struck. Modern labour legislation, taken as a whole, endeavours to require that all sources of power and influence be used in a way which respects the equal entitlement of everyone to the conditions which are necessary to control or at least be meaningfully involved in the decisions which determine how they will live out their lives.

Characterizing our own legal model of work regulation as an attempt to invoke fair processes to reconcile our differences as employers, consumers and workers offers another perspective⁹² on why, notwithstanding the emphasis in recent times on the legislative instrument, our society is still very much within and furthering what Henry Maine characterized as the "progressive tradition." Our own

⁹² See O. Kahn-Freund, "A Note on Status and Contract in British Labour Law" (1967) 30 *Mod. L. Rev.* 235.

contribution to the chronology of work regulation continues the movement away from status and towards consent as the organizing principle which governs the regulation of work relations. All of the labour legislation enacted since the turn of the century can be seen as instances of social control over how some (employers and consumers) in our community exercise authority over others (workers). As each of the examples we have considered confirms, rather than serving some utilitarian purpose such as freedom to trade or the well-being of the community in the aggregate, individual autonomy and self-government has become an even deeper purpose to which virtually all social regulation of work relationships is now dedicated.

Set within that historical evolution in the laws we have erected to house our labour relationships, it can now be seen how, on the interpretation we have been following, the courts' role can fairly be described as encouraging our legislators to extend this development its next natural and logical step. Especially in the last example we considered, we can see how a principle of voluntary and plural representation of employee interests would result in consent playing an even more meaningful role in the determination of the rules which govern each individual's working life than our present system allows. In the same way the principle of exclusivity was an improvement on the policies which preceded it (from the monopoly of the guilds to the *laissez faire* rules of criminal and civil conspiracy), the entrenchment of the *Charter* should result in even more sophisticated and sensitive rules of employee participation being introduced into the processes in which decisions are made about people's lives at the places they work. On the two principles we have employed, constitutional litigation and judicial review should allow us to move closer to the ideal of industrial self-government towards which the lessons of history seem gradually to have been directing us. On the interpretation I have proposed the entrenchment of the *Charter* and the revitalization of the process of judicial review will allow those individuals, who traditionally have had little involvement in setting the rules which order their lives, to secure a measure of participation and control in the rule-making processes at their workplaces, which, under the existing legal regime, is available only to the most privileged workers in our community. If a legislature were to take seriously the idea of bringing its labour

laws into line with the rights and freedoms the *Charter* guarantees, in the ways we have considered in this essay, Canada could more honestly project an image of itself as a society in which the inner logic of freedom and democracy permeates all of the social relations in which its members were involved, and our courts could fairly claim an important part of the credit for that accomplishment.

