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RIGHTS IN CONFLICT: THE DILEMMA OF CHARTER LEGITIMACY

ANDREW PETTER† and ALLAN C. HUTCHINSON††

"All colours will agree in the dark"
FRANCIS BACON

I. INTRODUCTION

For an aristocrat, Lord Acton has had a profound influence on the development of popular democratic theory and practice. His famous aphorism that "power tends to corrupt and absolute power corrupts absolutely" is regarded today as common wisdom. Some might even regard it as the first principle of democratic government, that is, a society must be organized so that the corrupting influence of power is reduced to an operative minimum.

Despite its popular appeal, this Actonion axiom is too limited in scope and too negative in character to warrant exclusive loyalty. In any organized society, the exercise of power is constant and inevitable. Power does not so much lead to corruption as provide the framework within which corruption, or enlightenment, is achieved.[1] Nevertheless, Lord Acton's principle underscores the need to guard against the accumulation of power and emphasizes the attraction of democracy as a device for ensuring that power is widely shared. In short, he has provided an important, if rudimentary, benchmark against which to measure the organization of bureaucratic power and governmental authority.

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[1] See A. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: Carswell, 1988) at 261-93.

In the contemporary Canadian state, democracy is the primary mechanism used to justify the power and legitimacy of government. Although government exercises vast power, its authority is warranted by the fact that those with ultimate responsibility for governmental action are elected officials. While these representatives may not exactly qualify as the public's alter ego, they are considered to owe a responsibility to Canadian electors and are accountable to them. Whatever the shortcomings of the actual practice,[2] the moral authority and political legitimacy of government rests largely on a principle of democratic representation.

For this reason, the enactment in 1982 of the *Canadian Charter of Rights and Freedoms* created something of a dilemma for the theoretical apologists of Canadian politics and democracy. Their task was to demonstrate that, although its function was to withdraw large areas of social regulation from the legislative reach of elected bodies, the *Charter* remained faithful to the ideals of democratic government. This apprehended crisis in legitimacy was heightened by the fact that the *Charter* was to be interpreted and enforced by the judiciary, a small and unrepresentative group of appointed officials. Thus the challenge for supporters of the *Charter* was to explain the seeming paradox that democracy was best promoted by a reduction in popular sovereignty and the transfer of power to a small coterie of unelected bureaucrats. In Actonian terms, why is it that, while power tends to corrupt, the absolute exercise of judicial power not only fails to corrupt, but actually guards against the corrupt exercise of legislative power?

In this short essay, we intend to show that the traditional defence of *Charter* adjudication in the name of democracy is more of a contradiction than a paradox. We will comment upon the primary justification offered by the commentators and courts to defend the legitimacy of *Charter* adjudication. The only real difference between scholarly and judicial writings is that the former are more explicit and less superficial than the latter. Although there are many subtle shadings, the unifying theme of the academic literature is the reliance upon a combination of liberal rights theory and conservative resort to conventional morality. By reference to the growing body of court decisions, our intention is to demonstrate that this theoretical amalgam fails to provide a satisfactory account of *Charter* legitimacy.

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[2] For a critique, see A. Hutchinson and P. Monahan, "Democracy and the Rule of Law" in A. Hutchinson and P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 97-123.

II. THE DEFENCE OF CHARTER LEGITIMACY

In most writings on the *Charter*, the structural framework within which judicial decisions are made is too often taken for granted. The *Charter of Rights and Freedoms* is regarded as "fundamental law" because it is entrenched within the nation's Constitution. Thus it is more difficult to amend than regularly enacted laws; moreover, it takes priority over those laws. As a broad-ranging document, it sets out certain general rights, such as equality, liberty and freedom of association, which it guarantees to all citizens. However, while these rights are fundamental, they are not absolute. They almost always are subject to limitations, either implied within the right or imposed upon it by means of the "reasonable limits" proviso in s. 1. The task of interpreting these rights and their limits rests ultimately with the courts. Yet judges do not have a roving commission. The agenda is set on a case-by-case basis in response to claims brought before the courts, for the most part, by private litigants at their own expense.

The *Charter* raises special concerns about the interpretive method of judges and the legitimacy of their role. These concerns are made more pressing by the open-ended nature of *Charter* rights and the invitation to the courts to place "reasonable limits" upon those rights. Thus the problem is not about *who* should interpret, but rather about *how* judges should interpret the *Charter*.

A variety of answers are offered. The most general and common is that judicial decision-making retains an essential degree of functional autonomy. Legal interpretation can and should be performed in a way that distinguishes it from ideological debate. The role of traditional jurists has been to give theoretical substance to these ideas and intuitions. Although this endeavour has assumed a higher profile since the advent of the *Charter*, the task of legitimizing judicial interpretation has been the abiding preoccupation of common law jurisprudence. In the first half of this century, the dispute was over the possibility of establishing a mode of judicial activity that was completely separate from politics. However, in the past couple of decades, the jurisprudential focus has shifted subtly but substantially.[3] The contemporary view is to fashion an interpretive theory that recognizes that judicial decision-making does not operate independently

[3] See A. Hutchinson and P. Monahan, "The Unfolding Drama of American Legal Thought: Law, Politics and Critical Legal Scholars" (1984) 34 Stan L.R. 199 at 202-8; and, M. Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988).

of politics, but neither does it reduce entirely to politics. Acknowledging the intimate relation between law and politics, theorists search for an explanation that both unifies and distinguishes legal and political method. Nonetheless, the ultimate goal of the enterprise remains the same: to establish a meaningful division between law and politics. Formalism, that is, the belief in a mode of legal justification distinct from open ideological debate that represents a workable scheme of social justice, continues to cast its long shadow over the modern terrain.

While there are as many jurisprudential theories as there are theorists, two general themes emerge from the literature defending the legitimacy of constitutionally entrenched rights. One line of argument suggests that such rights reflect some transcendent set of norms or values, rooted in Nature, God or some lesser philosophical deity. According to this naturalist vision, the role of the courts is simply to identify and give interpretive effect to these higher norms and values. Another school of thought proceeds from the assumption that such rights reflect the shared values and aspirations of the community from which they arise. According to this positivist perspective, the role of the courts is confined to locating these values and applying them to litigated cases.

Within the Canadian genre of rights jurisprudence, the positivist and naturalist tendencies do not run in competing lines, but weave together in an effort to avoid the shortcomings of each. With characteristic genius for pragmatic compromise, Canadian theorists have recognized that invoking a vision of natural rights — be it John Stuart Mill's, Brian Mulroney's or Ayatollah Khomeini's — would do little to bolster the *Charter*'s legitimacy, unless that vision could be tied to some social consensus concerning the scope and identity of those rights. This recognition has been reinforced by the strong positivist tradition in Anglo-Canadian law. Accordingly, the naturalist impulse in Canadian jurisprudence has been accommodated and subsumed within an indigenous and cultural account of entrenched rights.

As a result of this theoretical merger, Canadian defenders of *Charter* adjudication tend to differ more in emphasis than in kind. For example, Brian Slattery gravitates towards the naturalist pole. He contends that *Charter* rights are "anchored in a belief in the equal worth of the individual human being, a worth that has a transcendent, and not merely a conventional status". Yet even Slattery feels compelled to seek refuge in a positivist account of *Charter* interpreta-

tion, arguing that "constitutional adjudication involves contextual decision-making within a particular tradition by reference to values and principles that represent aspects of the tradition without exhausting it".[4] John Whyte and David Beatty are more willing to consolidate their naturalist impulses within a positivist account of rights. Whyte maintains that *Charter* rights embody the enduring principles of liberal politics. According to Whyte, such rights are justified "on the basis of the necessary conditions for representative democracy" and "on the basis of the ideas of security and autonomy which are the underlying justifications for representative democracy".[5] Beatty adopts a variation on this theme. In elaborating a constitutional labour code, he suggests that the liberal vision of rights he espouses is found within and has informed Anglo-Canadian law over the past century. Thus the *Charter* has imposed an organic logic upon the future means and ends of legislators who must now engage in a "conversation of justification" with the courts.[6] Patrick Monahan pursues a similar idea of "constitutional conversation", but his presentation is more overtly positivist. Espousing a form of democratic communitarianism, Monahan contends that a legitimate mode of judicial review must confine itself to nurturing and protecting active participation in public decision-making; this is a goal that is integral to the Canadian political tradition.[7] Whereas Slattery, Whyte and Beatty want to hold the courts to the substantive dictates of an individualist ethic, Monahan seeks to enlist courts in the procedural ambition to maximize openness and revision in community relations.

All of these scholars intend their theories to check and legitimize the potentially limitless and undemocratic authority of judicial review. At the same time, each justifies the vision of *Charter* rights he espouses by reference to values that are said to characterize Canada as a community. At the root of these theories is the notion that *Charter* rights reflect some form of social consensus, whether grounded in conventional norms, community relations or an evolving tradition.

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[4] B. Slattery, "Are Constitutional Cases Political?" (1989) 11 Supreme Court L.R. (forthcoming).

[5] J. Whyte, "Legality and Legitimacy: The Problem of Judicial Review of Legislation" (1987) 12 Queen's L.J. 1 at 9.

[6] D. Beatty, *Putting The Charter To Work* (Montreal: McGill-Queen's University Press, 1987) at 53.

[7] P. Monahan, *Politics and The Constitution: The Charter, Federalism and The Supreme Court of Canada* (Toronto: Carswell, 1987).

III. THE CONFLICTING NATURE OF RIGHTS CLAIMS

The suggestion, sophisticately expressed and elegantly packaged, that the rights expressed in the *Charter* reflect the abiding values and shared aspirations of the Canadian community has an appealing ring to it. Moreover, it is a view that appears, at first glance, to have much to recommend it. Public opinion polls show that the vast majority of Canadians favour the *Charter*. In addition, the rights contained in the *Charter*, such as equality, liberty and freedom of association, are ones to which most Canadians appear to subscribe.[8] Yet first glances can be deceiving. As attractive and plausible as the suggestion may seem, it does not withstand close scrutiny. What it offers in style, it lacks in substance. The very fact that there is strong disagreement among *Charter* theorists over the source and nature of the community values to which they refer hints at the paper-thin cogency of their jurisprudential strategy.

The fallacy upon which these theorists depend is that the existence of broad public support for *Charter* rights is evidence that those rights reflect a normative consensus. If anything, the opposite is true. Far from representing a consensus, the rights in the *Charter* mask fundamental social and political conflicts. Rights-talk is more a medium of dispute than an instrument of discovery. So long as these conflicts remain buried, the appearance of consensus, and thus of legitimacy, is maintained. However, as soon as they are exposed, that appearance quickly evaporates. Once the Pandora's box of *Charter* adjudication is thrown open, pressing its lid back down becomes impossible. The objectivity of *Charter* interpretation ceases to be credible, and the legitimacy of the *Charter* is once again called into question.

In the remainder of this essay, we outline the conflicts that arise in rights adjudication and discuss the inability of orthodox theory to account for or respond to these conflicts. While such conflicts are numerous, they can be grouped into three categories: conflicts that occur within rights; conflicts that occur between rights; and conflicts that occur between rights and competing social interests. In tracing these conflicts, our purpose is to build upon and extend a democratic critique of liberal jurisprudence and legal practice in a post-*Charter*

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[8] See P. Sniderman, J. Fletcher, P. H. Russell and P. Tetlock, "Liberty, Authority and Community: Civil Liberties and the Canadian Political Community" (Paper presented at the annual meeting of the Canadian Political Science Association, Windsor, Ontario 9 June 1988) [unpublished].

Canada.[9] While a more thorough embracing of democratic politics cannot resolve these conflicts, the abandonment of rights-talk may at least clear the ground for more promising and progressive efforts to achieve a genuine sense of community and common social purpose.

A. Conflicts Within Rights

Although the *Charter* lists clearly the rights to which people are entitled, the content of those entitlements is anything but clear. The rights in the *Charter* are characterized by their indeterminacy: they mean different things to different people at different times. Indeed, the malleable nature of *Charter* rights is one of the reasons that they enjoy such a widespread public support. While such malleability may prove an inconvenience in specific disputes, it helps to explain the attraction of those rights in general terms.

Consider the rights we mentioned earlier: equality, liberty and freedom of association. These rights are central to the *Charter* and its political appeal. Yet they have no definite or uncontroversial meaning. They are contested concepts whose interpretation is a major and elusive preoccupation of political debate. They are like empty sacks that cannot stand up on their own until they have been filled with political content. "Who fills them" and "with what" are the key questions for Canadian politics. Nevertheless, *Charter* proponents seem more concerned with finessing than facing these disturbing issues.

The best example of rights indeterminacy is the popular principle of equality. Although this principle receives almost universal approval, there is very little agreement on its scope and meaning. For example, some commentators espouse a formal vision of equality, one requiring that individuals be subject to equal treatment. Others urge a substantive vision of equality, one demanding that individuals be made equal in their condition. These alternative visions of equality are not only distinct, but potentially contradictory. It is obvious, for example, that governments cannot assist the poor to become equal in condition to the rich by subjecting both groups to equal treatment. Thus, while women's rights groups invoke substantive equality to support special programs for women, men's rights groups invoke formal equality to attack special programs for women.

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[9] See: A. Petter, "The Politics of the Charter" (1986) 8 Supreme Court L.R. 473; A. Hutchinson and A. Petter, "The Liberal Lie of the Charter: Private Rights and Public Wrongs" (1988) 38 U. T. L.J. 278; A. Petter, "Legitimizing Sexual Inequality: Three Early Charter Cases" (1989) 34 McGill L.J. 358 and, A. Petter "Canada's Charter Flight: Soaring Backwards Into the Future" (1989) 16 J. Law & Soc. 151.

A good illustration of the conflict between formal and substantive equality is provided by *Re Tomen and Federation of Women Teachers' Associations of Ontario*.[10] In that case, the Ontario Public School Teachers' Federation (OPSTF), a predominantly male organization, assisted Margaret Tomen to challenge an Ontario Teachers' Federation regulation requiring women teachers in public elementary schools to belong to the Federation of Women Teachers' Associations of Ontario (FWTAO). The FWTAO had fought long and hard on behalf of women teachers and, in doing so, had become something of a thorn in the side of the male organization.[11] Tomen and the OPSTF maintained that the regulation contravened the *Charter*'s guarantee of equality in that it subjected teachers to unequal treatment on the basis of their sex. The FWTAO responded that, far from denying sexual equality, the regulation sought to advance equality. The membership requirement ensured that the FWTAO would remain an effective instrument for promoting equal conditions for women teachers. Both sides invoked equality: one to attack the regulation, the other to defend it.[12]

The *Tomen* case shows how formal and substantive visions of equality can pull in opposite directions. But the problem does not end there. Conflicts arise not only between these alternative visions, but even within them. For instance, proponents of formal equality maintain that the principle of equal treatment applies only to persons who are "similarly situated". Those who are differently situated should be dealt with differently. Yet the question of whether one person is similarly situated with another is a highly controversial one. Thus even formal equality theorists can reach contradictory conclusions depending upon their answer to this prior question.

An example of this form of conflict is provided by *Andrews v. Minister of Health for Ontario*.[13] The issue in that case was whether the Ontario Hospital Insurance Plan (OHIP) contravened the *Charter*'s guarantee of equality by providing medical coverage to couples who were of the opposite sex, but not to those who were of the same sex. Karen Andrews and her partner, Mary Trenholm,

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[10] (1987) 61 O.R. (2d) 489 (H.C.), 43 D.L.R. (4th) 255.

[11] See M. Lansberg, "The Charter: Herald of Fairness or Weapon against Women?" *The Globe and Mail* (30 May 1987) 2.

[12] Rather than confronting this conflict, the Court sidestepped the issue, holding that the *Charter* did not apply to the bylaw in question because the Ontario Teacher's Federation, although regulated by statute, was a private rather than a governmental body.

[13] (1988) 49 D.L.R. (4th) 584 (Ont. H.C.).

argued that the right to equal treatment implied that lesbian couples should be provided the same benefits as heterosexual couples. OHIP disagreed, arguing that, because lesbian couples are not similarly situated to heterosexual couples, the equality guarantee in the *Charter* mandated that each be treated differently. This latter view was the one adopted by the Court.

As the *Tomen* and *Andrews* cases demonstrate, the enduring attraction of the right to equality does not lie in its content, but in its lack of content. In both cases, the contending parties — Tomen and the FWTAO, Andrews and OHIP — espoused a common belief in the principle of equality. Yet the meaning that they attached to that principle reflected fundamental differences in political outlook. The message of these cases is clear. To become intelligible, the idea of equality must draw upon external political values to determine which visions and categories are to be employed. However, once these external values are identified, equality itself becomes a superfluous principle that amounts to nothing more than window-dressing. As Marc Gold has succinctly noted: "... any given law can be both defended and attacked in the name of equality. ... To choose one conception of equality over another is to choose between competing political or moral theories."[14]

The right to liberty is similarly indeterminate. Those who subscribe to a negative vision of liberty conceive of it as a right not to be interfered with by others. Those who subscribe to a positive vision of liberty see it as the right to demand from others a greater share of social resources. Again, these visions are not only distinct, but mutually contradictory. While property owners claim the liberty to exclude people from their land, others claim the liberty to enter that land. In *R.W.D.S.U.* v. *Dolphin Delivery*,[15] for example, a trade union invoked the *Charter* to challenge an injunction preventing it from picketing the premises of a courier company. The union claimed that the injunction violated the liberty of its members to engage in peaceful protest, thus affecting their freedom of expression. The company, on the other hand, argued that the court should uphold the injunction on the basis that the proposed picketing would interfere with its liberty to conduct business, thus affecting its freedom to contract.

[14] M. Gold, "Moral and Political Theories in Equalities Rights Adjudication" in J. Weiler and R. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 85 at 88-9.

[15] [1986] 2 S.C.R. 573, (1986) 33 D.L.R. (4th) 174.

The validity of these competing assertions cannot be resolved by reference to the right to liberty. Rather, their validity depends entirely upon the background conditions that are seen to support and inform the operation of that right. As with equality, competing liberty claims can be resolved only by reference to extraneous values.

Freedom of association is another *Charter* right that is susceptible to conflicting interpretations. Those who subscribe to an individualistic conception of freedom of association interpret that freedom as conferring upon individuals the right to associate or disassociate as they see fit. According to this conception, the associated individuals have no more rights as a group than they do as individuals acting on their own account. Those who subscribe to a collectivist conception of freedom of association interpret that freedom as conferring upon groups and organizations the right to act in concert to protect and promote their associational activities. According to this conception, the association's interests are seen as distinct from and greater than those of its individual members. Again, these positions can be invoked to support contradictory conclusions. For instance, while trade unionists look to freedom of association to support the power of unions to act on behalf of all employees at a workplace,[16] those who oppose trade unions point to the same freedom to support the right of individual employees to disassociate themselves from unionized activity.[17] In the words of one commentator, freedom of association is a "double-edged constitutional sword".[18]

Rights are like tools. The purposes they serve depend upon the hands that are placed upon them and the minds that direct those hands. The veneer of consensus concerning the existence and desirability of rights masks deeper antagonisms concerning their meaning and application. Such tensions represent profound disagreements about the operative assumptions and informing visions of political life and justice. At bottom, they are matters of "deep-seated preferences".[19] Thus the contention that *Charter* rights reflect shared assumptions and values ceases to be credible *even at the point of definition.*

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[16] *Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313, (1987) 38 D.L.R. (4th) 161.

[17] See *Lavigne* v. *O.P.S.E.U.* (1989) 56 D.L.R. (4th) 474 (Ont. C.A.).

[18] P. Gall, "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword" in J. Weiler and R. Elliot, eds., *supra*, note 14 at 245.

[19] O. Holmes, *Collected Legal Papers* (New York: P. Smith, 1920) at 312.

Just because rights are indeterminate in theory, however, does not mean that they are indeterminate in practice. On the contrary, given that their meaning is governed by those who have custody over them, it is safe to assume that the interpretation placed upon *Charter* rights will reflect and reinforce the established values of the legal system and of legal elites. With respect to the rights we have discussed, these values pull strongly in the direction of formal equality, negative liberty and an individualistic conception of associational rights.[20] This is the *Charter's* hidden agenda. So long as it remains hidden, people of all stations and political persuasions will see in the *Charter* something to soothe them. It is only when groups like women, homosexuals and trade unionists experience that agenda first hand that the illusion of social consensus engendered by the abstract rights becomes threatened. Like all illusions, the determinacy of rights-talk is suspended in the minds of citizens rather than grounded in the imperatives of social conditions.

B. Conflicts Between Rights

Conflicts arise not solely within rights; there are also tensions between rights. Here, as before, these tensions cannot be resolved by some vague and hopeful appeal to social values or community consensus. The courts can serve only as a venue for the ceaseless efforts to negotiate competing claims. The temporary accommodations made are more a result of political expediency than moral purity. For instance, the tension between the right to liberty and the right to equality represents a fundamental conflict in ideological values, one that has energized a whole tradition of political theory and debate. Under the *Charter*, the courts are entrusted with the thankless task of providing an answer to this conceptual conundrum. The *Charter* text offers no guidance as to how claims framed in the competing rhetoric of "liberty" and "equality" are to be resolved. The judges are on a sleeveless errand.

A prime example of this dilemma is provided by the pre-*Charter* decision in *Gay Alliance Toward Equality* v. *Vancouver Sun*.[21] In this case, a gay rights group relied on the British Columbia *Human Rights Code* to attack the Vancouver Sun's policy of denying gay publications access to the classified advertising section of the newspaper. A Board of Inquiry found for the Alliance, holding that the

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[20] *Supra*, note 9.

[21] [1979] 2 S.C.R. 435, [1979] 4 W.W.R. 118.

Sun's policy denied gays equal access to a "service ... customarily available to the public". When the case reached the courts, the Sun argued that the *Code* should be interpreted as not applying to its classified services, since such application would encroach upon its common law right to freedom of the press. The judges were forced to choose between competing rights: the equality of gays versus the liberty of newspaper publishers. In the Supreme Court of Canada, the majority plumbed for liberty, the minority for equality. To talk of shared values or consensus in such circumstances is far-fetched; there was no agreement even among the members of the Court, let alone among the community at large.

The conflict between equality and liberty rights has also arisen in *Charter* cases concerning pornography. For instance, in *R.* v. *Red Hot Video Ltd.*,[22] the British Columbia Court of Appeal rejected arguments that the obscenity provision of the *Criminal Code* contravened the *Charter* right to freedom of expression. According to the Court, the provision was justified because the form of expression it prohibited was demeaning to women and therefore undermined sexual equality rights. In this case, unlike *Gay Alliance*, the judges opted for equality over liberty.[23]

Both *Gay Alliance* and *Red Hot Video* required the courts to confront a basic tension between competing individual rights. Another tension that has driven debate in political theory is the conflict between the rights of individuals and those of groups. We have already seen how this conflict can be played out in the context of a single right, such as freedom of association; however, it also arises in the interaction between competing rights.

The recent controversy concerning Quebec's language laws testifies to the enduring and pervasive irreconcilability of this conflict. In *A.G. Quebec* v. *La Chaussure Brown's Inc.*,[24] store owners challenged the constitutional authority of the Quebec legislature to require that commercial signs in the province be posted in French

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[22] (1985) 18 C.C.C. (3d) 1, 45 C.R. (3d) 36.

[23] The same tension underlies *Charter* cases concerning hate propaganda. For example, in *R.* v. *Keegstra* (1988) 43 C.C.C. (3d) 150, the Alberta Court of Appeal struck down the *Criminal Code* provision making it an offence to wilfully promote hatred against an identifiable group. According to the Court, the provision violated the *Charter*'s right to freedom of expression. However, in *R.* v. *Andrews* (1988) 43 C.C.C. (3d) 193, the Ontario Court of Appeal ruled that the *Charter* provided no protection for hate propaganda. According to the majority, such propaganda "is entirely antithetical to our very notion of freedom".

[24] (1989) 54 D.L.R. 577 (S.C.C.).

only. The province defended its law as a measure necessary to protect the linguistic and cultural rights of a francophone collectivity isolated within a predominantly English-speaking North America. The store owners, on the other hand, resorted to the familiar rhetoric of individual freedom. They contended that the cultural rights of the collectivity were secondary to the speech rights of individuals in the province. The response of the Supreme Court of Canada was to try to effect a compromise between these competing positions. The Court struck down the law as it stood, but held that the legislature could enact a new provision requiring that French be the predominant, though not exclusive, language on commercial signs. Ironically, even this transparent attempt at political accommodation was unsuccessful as an exercise in consensus building. Not only did the Court's compromise fail to satisfy the francophone majority in Quebec, it outraged at least one of the store owners who had initiated the court action.

Conflicts occur not only between individual rights and between individual and group rights; they also arise between the rights of competing groups. This form of conflict arose in the Ontario *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*.[25] When the Ontario government extended full public funding to Roman Catholic high schools, it defended its action on the basis that such funding was required by the rights afforded to denominational schools under the original Confederation compact. Other religious groups, however, took a different view. They contended that the *Charter* right to equality prohibited the government from extending funding to one religious organization without providing comparable funding to all religious organizations. It was left to the Supreme Court of Canada to choose between these competing group claims. The Court came down on the side of denominational school rights, although the reasons it offered for doing so were more conclusory than explanatory. Certainly, it would take an inspired or desperate imagination to argue that its choice was based upon a consensus of values that the judges were able to detect within the larger Canadian community.

In each of these disputes, the court was presented with an unenviable task. In order to meet the challenge, judges have increasingly fallen back on the interpretive practice of "balancing". The major thrust of this rudimentary methodology is to identify different interests, attributed respective values to each, and then weigh them on

[25] [1987] 1 S.C.R. 1148.

a constitutional scale. However, rather than comprising a solution to the dilemma of constitutional legitimacy, balancing seems to concede the fundamental incommensurability of constitutional argument. It seeks to make the political best of a bad legal job. For all its open-endedness, balancing is little more than a convenient device enabling the judiciary to place its political thumb upon the illusory constitutional scales of social justice.

C. Conflicts Between Rights and Competing Social Interests

In addition to there being competition within and between rights, there is a third category of conflict: conflicts between rights and competing social interests that are not identified as rights. This form of conflict arises in the vast majority of *Charter* cases. It is most explicitly addressed in applying the "reasonable limits" proviso in s. 1, but it also forms an implicit component of the process of ascertaining the scope of the rights themselves.

It might be tempting to think that, whenever there is a conflict between a right and some other interest, the competing interest should give way. But even the strongest rights advocates recognize that there are cases in which rights must yield to competing social considerations.[26] While rights are considered to be fundamental, they are not portrayed as being absolute. For instance, no one would argue that the right to equality entitles a six year old to obtain a driver's licence. The question, therefore, is not whether *Charter* rights should yield to competing social interests, but *when* should they yield. Wherever the answer to this puzzle may lie, it certainly will not be found in a prevailing social consensus or evolving social tradition. In all but the most mundane instances of children who wish to drive, such disputes speak to the fractures in community values, not to their availability as a source of normative resolution.

Three examples will suffice to make the point. The first concerns provincial Sunday closing legislation. Such legislation was challenged in *Edwards Books and Art Ltd.* v. *The Queen*[27] on the basis that it violated the religious freedom of certain Jewish and Seventh Day Adventist store owners. These proprietors were forced to close on Sunday in addition to their regular Saturday sabbath. This placed

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[26] See R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); and, *A Matter of Principle* (Cambridge: Harvard University Press, 1985).

[27] [1986] 2 S.C.R. 713, (1987) 35 D.L.R. (4th) 1.

them at an economic disadvantage in relation to Christian store owners, who were obliged to close on only one day of the week. The majority of the Supreme Court of Canada agreed that the legislation denied religious rights, yet they upheld the law. In their view, the violation of religious rights was reasonable in light of the conflicting value of preserving a common day of rest.

The second example concerns the decision of the Supreme Court of Canada in *Morgentaler* v. *The Queen*.[28] In that case, the Court was called upon to decide whether the *Criminal Code* prohibition on abortion violated the right of women to security of the person within the meaning of s. 7 of the *Charter*. The majority held that it did. However, that was not the end of the matter. Before striking the provision down, the judges were forced to consider, and to reject, submissions that the conflicting value of preserving the lives of fetuses justified the encroachment on women's rights. This they did, although the majority judgments differed in their explanations for rejecting that justification.

The third example concerns s. 195.1 (1) (c) of the *Criminal Code* which makes it an offence to communicate in a public place for the purposes of prostitution. Two provincial courts of appeal have decided that this provision violates the *Charter* guarantee of freedom of expression. In both courts, however, governments argued that the violation was reasonable in order to guard against the public nuisance created by street prostitution. In *R.* v. *Jahelka*,[29] the Alberta Court of Appeal accepted this argument; in *R.* v. *Skinner*,[30] the Nova Scotia Court of Appeal did not.

All of these decisions forced the courts to make difficult trade-offs between *Charter* rights and competing social interests. In *Edwards Books* the competing interest won out; in *Morgentaler* the right prevailed; and *Jahelka* and *Skinner* produced a split decision. However the key question is not "who won", but "on what basis did they win". Is it credible to suggest that the choices made were simply a reflection of deep-rooted community norms? Surely it is not, for it is hard to think of three issues on which there is deeper normative division in Canada than Sunday closing, abortion and prostitution. Even the judges in these cases could not agree. Here, as before, the appeal to community consensus provides a convenient blind that hides the

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28 [1988] 1 S.C.R. 30, (1988) 44 D.L.R. (4th) 385.

29 (1987) 58 C.R. (3d) 164.

30 (1987) 35 C.C.C. (3d) 203, 58 C.R. (3d) 137.

informing values and visions of social justice that drive and determine the controversial choices that have to be made.

IV. THE FAILURE OF CONSENSUS THEORY

Charter adjudication is not about the dispassionate application of constitutional rules to given sets of social facts. Instead, the courts' unavoidable task is to confront and resolve fundamental social and political conflicts, whether they are conflicts within rights, between rights, or between rights and competing social interests. Once this is understood, the justification for the *Charter* and, in particular, the courts' role in interpreting and enforcing *Charter* rights on the basis of community values or on the basis of evolving social tradition becomes profoundly unconvincing. Issues like affirmative action, union rights, language policy and abortion lie at the heart of political controversy in Canada. Whatever the explanation for handing decision-making power over these crucial issues to the courts, it cannot be that of social consensus. If there is a consensus at work in these decisions, it is a consensus only among the community of legal elites.[31]

The irony, of course, is that if there were a true consensus of community values on issues such as these, there would be no need for a *Charter of Rights and Freedoms*. Under the *Charter*, community consensus runs out at the very time that it is most needed, that is, when disputes arise because of a breakdown, gap or shortfall in the extant body of conventional norms. It is not that there is no sense of shared values in Canada, but that there is always one too many sets of such values. Canada is a mosaic of different communities, including natives, Quebecois, women, Westerns, W.A.S.P.s, workers, ethnics, Catholics, Acadians, gays and so on. For instance, in the abortion debate, it is not that there is no sense of social solidarity, but that there are two very strong and largely irreconcilable communities that draw upon and are energized by different visions of individual responsibility and social justice.

One of the unanswerable questions for those who seek to justify the *Charter* on the basis of community consensus is why the community cannot be trusted with its own consensus. If the *Charter* is truly about protecting community values, why can those values not be identified and given voice through democratic means? Recognizing that any consensus is organic and protean, it is difficult to under-

[31] See J. Bakan, "Constitutional Argument: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L.J. 123.

stand why it should be entrenched in a document that is practically impossible to change and enforced by a group of citizens that are unrepresentative of and unaccountable to the community at large. If there is a detailed and uncontroversial body of extant norms, there will be no need for judicial review. But, if there is no such consensus — and surely there is not — the defence of judicial review in terms of such a consensus is futile.

It seems that, inspired rather than disabused by the tribulations of of their American counterparts, Canadian jurists are intent on banging their heads against the proverbial brick wall of constitutional legitimacy. How is it, or how could it ever be, possible to appeal to an idea of community, consensus or tradition to resolve a division of opinion, when that division arises from the inadequacy, indeterminacy or contentiousness of the very idea that it is being invoked? The only benefit of such an exercise is that it might belatedly knock some political sense into those who go through its motions. Unfortunately, the effect to date seems to have been to encourage even more outrageous hallucinatory reveries of theoretical excess.

The point we are making is certainly not new, nor is it particularly radical. Indeed, it is little more than an elaboration on an observation made over a dozen years ago in a case that involved much the same conflict between picketing and property rights that arose in *Dolphin Delivery*:[32]

> The submission that this court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It also raises fundamental questions as to the role of this Court under the Constitution. ... I do not for a moment doubt the power of the Court to act creatively — it has done so on countless occasions; but manifestly one must ask — what are the limits of the judicial function.[33]

Who was this outspoken skeptic of judicial review? Remarkably, it was none other than the Right Honourable Brian Dickson, now Chief Justice of Canada. Has the enactment of the *Charter* transformed the "arbitrary" and "personal" opinions of Chief Justice Dickson and his colleagues into "principled" and "objective" pronouncements based upon community values or an evolving tradition? Lord Acton would not be satisfied by that explanation. Nor should we.

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[32] *Supra*, note 15.

[33] *Harrison* v. *Carswell* [1976] 2 S.C.R. 200 at 218, (1976) 62 D.L.R. (3d) 68 at 82.

V. CONCLUSION

Many seem disheartened by the thought that there may be no principled or non-ideological answers to contentious social issues.[34] Yet there is no warrant for cynicism or despair. Acknowledging people as the makers of decisions, rather than the recipients of received wisdom, marks the first step in the long march toward broadening social responsibility and dispersing political power in Canada. Democracy is not about servitude to academic scribblers or imperial judges; it is about personal participation and social solidarity. Power can never be abolished; it can only be entrusted to those who lives it most directly affects and affirms.

In a world of incorrigible indeterminacy, the sane response is not to collapse in frustration. It is to move forward confidently in the knowledge that decision-making is no more mysterious and no less complex than the rest of life. The present failings of democracy can be overcome not by less popular participation, but by more. People must think, decide and act in the same way in law as they aspire to do in the rest of their lives, that is, through concrete and constitutive action. This recognition and aspiration means that political practice must be given priority over constitutional conversation. The devaluation of the rule of law, in a society in which it has come to signify rule by lawyers, is not an occasion to be lamented. Democracy is about ourselves; not some of us, but all of us.

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[34] See A. Hutchinson, "Democracy and Determinacy: An Essay on Legal Interpretation" (1989) 43 U. Miami L. Rev. 541.