Osgoode Hall Law Journal

Volume 25, Number 2 (Summer 1987)

Article 4

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Abstract
The Supreme Court of Canada's initial interpretations of the Canadian Charter of Rights and Freedoms were as broad and liberal as could possibly have been expected. Invoking the metaphor of the constitution as a living tree and dismissing concerns about the legitimacy of its expanded role, the Court upheld the Charter arguments in the majority of the cases it decided during this first period. Even in those cases where the claim was denied, the Court made it clear that the Charter was to be taken very seriously. No one could mistake the Court's message: the Charter was to be liberally interpreted and enthusiastically applied.

THE RHETORIC OF RIGHTS: THE SUPREME COURT AND THE CHARTER*

BY MARC GOLD**

I. INTRODUCTION

The Supreme Court of Canada's initial interpretations of the *Canadian Charter of Rights and Freedoms*[1] were as broad and liberal as could possibly have been expected. Invoking the metaphor of the constitution as a living tree and dismissing concerns about the legitimacy of its expanded role, the Court upheld the Charter arguments in the majority of the cases it decided during this first period.[2] Even in those cases where the claim was denied, the Court

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The research for this paper was supported by a grant from the Social Science and Humanities Research Council and was pursued at the Centre de Recherche en droit public, Faculte de droit, Universite de Montreal. An earlier version was presented in French at the C.R.D.P. in November 1986, and will appear under the title "La rhetorique des droits constitutionnels" (1988) 22 Themis (forthcoming).

[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, ss.1-34 (hereinafter the Charter).

[2] The following cases are considered in this paper: *The Law Society of Upper Canada* v. *Skapinker* (1984), [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481 (hereinafter *Skapinker*); *A.G. Quebec* v. *Quebec Association of Protestant School Boards* (1984), [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321; *Hunter* v. *Southam Inc.* (1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 (hereinafter *Hunter* v. *Southam*); *Re Singh and Minister of Employment and Immigration* (1985), [1985] 1 S.C.R. 177, 58 N.R. 1 (hereinafter *Singh*); *R.* v. *Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 (hereinafter *Big M Drug Mart*); *Staranchuk* v. *R.* (1985), [1985] 1 S.C.R. 439, 22 D.L.R. (4th) 480; *Operation Dismantle Inc.* v. *R.* (1985), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 (hereinafter *Operation Dismantle*); *R.* v. *Therens* (1985), [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655; *Trask* v. *R.* (1985), [1985] 1 S.C.R. 655, 19 D.L.R. (4th) 123; *Rahn* v. *R.* (1985), [1985] 1 S.C.R. 659, 19 D.L.R. (4th) 126; *Krug* v. *R.* (1985), [1985] 2 S.C.R. 255, 21 D.L.R. (4th) 161; *Spencer*

made it clear that the Charter was to be taken very seriously.[3] No one could mistake the Court's message: the Charter was to be liberally interpreted and enthusiastically applied.

This paper examines the rhetoric used by the Supreme Court of Canada in its first applications of the Charter. Part I reviews the basic principles of the rhetorical analysis of law and sets out the context within which the rhetoric of the Court must be situated. Part II examines various ways in which the Court attempts to legitimate the broad role it has assumed under the Charter, while Part III analyses the rhetoric of the Court used to justify particular case results. I conclude with some brief observations on the judicial activism of the Court as manifested in these early cases, and I comment on the direction that future work on Charter rhetoric should take.

II. THE RHETORICAL CONTEXT

A. *Rhetorical Analysis of Law*

The study of rhetoric currently enjoys a Renaissance in a variety of disciplines.[4] No longer pejoratively considered to be

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v. *R.* (1985), [1985] 2 S.C.R. 278, 21 D.L.R. (4th) 756; *Dubois* v. *R.* (1985), [1985] 2 S.C.R. 350, 23 D.L.R. (4th) 503; *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)* (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536; *Valente* v. *R.* (1985), [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161; and *R.* v. *Oakes* (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 (hereinafter *Oakes*).

[3] For example, although denying the Charter claim in *Skapinker*, the opinion of Mr. Justice Estey is replete with references to the need to interpret the Charter broadly. *Supra*, note 2, 365-67. Similarly, in *Operation Dismantle*, the Court affirmed the application of the Charter to exercises of the royal prerogative, and dismissed as inappropriate the limiting doctrines of non-justiciability and "political questions," all in the context of rejecting the Charter argument on its merits. See *infra*, Part II(A).

[4] In philosophy, a rhetorical perspective underlies the work of Richard Rorty. See, for example, R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979); R. Rorty, "Epistemological Behaviourism and the De-Transcendentalization of Analytic Philosophy" in R. Hollinger ed., *Hermeneutics and Praxis* (Notre Dame, Ind.: Notre Dame University Press, 1985) 89. Indeed, it has been observed that modern hermeneutics is predicated upon the theoretical tools of rhetoric. See Hans Georg Gadamer, "On the Scope and Function of Hermeneutical Reflection" in H.G. Gadamer, ed., *Philosophical Hermeneutics*, trans. D.E. Linge (Berkeley: University of California Press, 1976) 18 at 24. Recently, rhetorical

ornamental and usually misleading speech, rhetoric is now understood to be an indispensible and inescapable tool of practical reason in all domains of human activity. Indeed, there is a growing literature on law and rhetoric that offers the interested reader a number of useful case studies and introductions to rhetorical analysis as applied to law.[5] This obviates the need for more than a few words of introduction to this way of looking at the law.

There are two related foci of rhetorical analysis. The first is based upon the Aristotelian definition of rhetoric as the faculty of discovering the available means of persuasion in a given case.[6] Rhetorical analysis thus conceived involves the analysis of the means used to persuade the audience that the result in a given case or set of cases was justified. The second dimension to rhetorical analysis is based upon a conception of rhetoric as the way in which we constitute ourselves as a community through language.[7] Understood

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analysis has been applied to modern economic theory: see Donald N. McCloskey, *The Rhetoric of Economics* (Madison, Wis.: University of Wisconsin Press, 1985). For an examination of the role of rhetoric in the natural sciences, see Stephen Toulmin, "The Construal of Reality: Criticism in Modern and Postmodern Science", in W.J. Thomas Mitchell, ed., *The Politics of Interpretation* (Chicago: University of Chicago Press, 1983) 99. See also S. Toulmin, *The Uses of Argument* (Cambridge, Eng.: University Press, 1958).

[5] For a variety of perspectives on the relationship of rhetoric to law, see Chaim Perelman, *Logique juridique* 2d ed., (Bruxelles: Etablissements Emile Bruylant, Societe anonyme d'editions juridiques et scientifiques, 1979); J. White, *Heracles Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, Wis.: University of Wisconsin Press, 1985); M. Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison, Wis.: University of Wisconsin Press, 1985); P. Goodrich, *Reading the Law* (Oxford: Basil Blackwell, 1986). For case studies of judicial rhetoric, see L. LaRue, "The Rhetoric of Powell's *Bakke*," [1981] Wash. & Lee L. Rev. 43; Erwin Chemerinsky, "Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy" (1982) 31 Buffalo L. Rev. 107; Robert A. Prentice, "Supreme Court Rhetoric" (1983) 25 Ariz. L. Rev. 85; M. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" (1985) 7 Sup. Ct. L. Rev. 455.

[6] Aristotle, *Rhetoric*, trans. W. Rhys Roberts (New York: Modern Library, 1954) at 1355. On rhetoric generally, see C. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: Treatise on Argumentation* (Notre Dame, Ind.: University of Notre Dame, 1958); Kenneth Burke, *A Rhetoric of Motives* (New York: Braziller, 1955); Maurice Nathanson and Henry W. Johnstone, Jr., eds., *Philosophy, Rhetoric and Argumentation* (University Park: Pennsylvania State University Press, 1965); Lloyd F. Bitzer and Edwin Black, eds., *The Prospect of Rhetoric* (Englewood Cliffs, N.J.: Prentice-Hall, 1971); Thomas R. Nilsen, ed., *Essays on Rhetorical Criticism* (New York: Random House, 1968); and E. Black, *Rhetorical Criticism: A Study in Method* (New York: Macmillan, 1965).

[7] See White, *supra*, note 5. This conception of rhetoric can be seen as a subset or outgrowth of the more traditional conception outlined above. See Gold, *supra*, note 5 at 459-460.

in this way, a rhetorical analysis of Charter cases would concentrate on the political visions expressed by these judgments.

This paper pursues both aspects of rhetorical analysis, but for reasons more practical than theoretical, it concentrates more on the means of persuasion than on the political visions articulated by the Court. Because this study examines only a very limited set of cases, any evaluation of the Court's overall political vision risks being incomplete and ultimately misleading. For example, although it will be suggested later that the Court projects a highly individualistic image of Canadian society in its initial opinions, it would seem premature to conclude that this image will persist without qualification as the Court proceeds through its docket. A complete and balanced analysis of this dimension of the Court's rhetoric must therefore be based upon a larger set of cases decided over a longer period of time, and must await another occasion.

To understand the rhetoric of the Court, one must examine what Lloyd Bitzer has called "the rhetorical situation," that is, the concrete situation confronting the Court, the audiences to whom the Court's opinions are directed, and the constraints imposed on the Court by the expectations of those audiences.[8] The following section addresses the audiences of the Court and the expectations they had regarding the Charter's interpretation.

B. *The Audiences and Their Expectations*

The Supreme Court has a variety of audiences to whom its opinions may be directed: the parties to the case, Parliament, legislatures and other governmental institutions, the bench, the bar, the academic community, the public, and the media.[9] When the Court first embarked upon its interpretations of the Charter, it is striking that there appeared to be a consensus amongst the various audiences that the Charter ought to be interpreted in a liberal and activist fashion. At the same time, there was an expectation that the Court would decide the cases in a judicial, and not political manner.

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[8] L. Bitzer, "The Rhetorical Situation" (1968) 1 Philosophy & Rhetoric 1.

[9] On the audiences of the Court, see Gold, *supra*, note 5 at 460-61.

These two expectations significantly influenced the rhetoric of the Court.

There can be little doubt that a large number of groups both wanted and expected the Court to give a large and liberal interpretation to the Charter. The public favoured the entrenchment of the Charter, influenced in this respect by the large-scale advertising programme initiated by the federal government to promote its virtues. Presented as a way in which the citizen would be protected from the abuses of government, the idea of the Charter was popular amongst Canadians.

At the same time, there was no substantial or sustained debate on the merits of entrenching the Charter and the increase in judicial power that would accompany it. At the political level, the three federal parties supported the idea of entrenchment notwithstanding the opposition of the Conservatives and some New Democrats to the unilateralism of the process. At the provincial level, it was the process that dominated the debate.[10] A number of provincial premiers, notably Premiers Lyon of Manitoba and Blakeney of Saskatchewan, expressed their opposition to the idea of an entrenched Charter, but they proved unable to influence the debate significantly. By ridiculing them as politicians representing narrow and parochial interests, who were prepared to trade individual rights for fish, Prime Minister Trudeau and his colleagues succeeded in delegitimating their principled arguments against the Charter. As a result, the public bought the idea of entrenchment without worrying very much about the question of the enhanced powers of the courts.

As for the expectations of the academic community, most commentators desired to see the Court play an activist role in interpreting the Charter.[11] In this regard, it is impossible to

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[10] On the history preceding patriation, see D. Milne, *The New Canadian Constitution* (Toronto: Lorimer, 1982); K. Banting and R. Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitutional Act* (Toronto: Methuen, 1983); R. Sheppard and M. Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982); and E. McWhinney, *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982).

[11] It would appear that the Court is increasingly sensitive and responsive to the views of legal academics. See, for example, Hon. Mr. Brian Dickson, "The Public Responsibility of Lawyers" (1983) 13 Man. L.J. 175 at 179-80.

overstate the influence of the *Canadian Bill of Rights*[12] on both the Court and the academic community. It was generally agreed that the Court had failed miserably in its application of the Bill of Rights, and the main thrust of most commentary was to encourage the Court to take a more active and liberal role in the protection of rights. Similarly, most of the academic writing on the Charter supported a broad role for the Court.[13] In any event, most commentators assumed that the fact of entrenchment, reinforced by the provisions of sections 24 and 52, would incline the Supreme Court to take a broader view of the Charter than it had of the Bill of Rights.[14] There was thus an appearance of consensus on how the Court would and should approach the interpretation of the Charter.

Also worth underlining was the role played by the various individuals and groups who testified before the Special Joint Committee of the House of Commons and Senate. Those who favoured both the idea of entrenchment and an expanded role for the courts had the largest influence on the final drafting of the Charter.[15] Not only did these "pro-Charter" groups influence the Charter's final text, they also influenced the general political climate surrounding it. It was thus possible to believe that the issues surrounding the Charter had been completely mooted and that a social consensus had crystallized around the idea of an expanded role for the courts.

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[12] R.S.C. 1970, App. III (hereinafter the Bill of Rights).

[13] To be sure, there were some dissenting voices, but they were clearly in the minority. Moreover, some of the most articulate arguments against the Charter were offered by political scientists and not lawyers. See, for example, Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1985) 25 Can. Pub. Admin. 1; D. Smiley, "A Dangerous Deed: The Constitution Act, 1982" in Banting and Simeon, eds., *supra*, note 10 at 74. For those who believe that lawyers understand issues of constitutional rights better than anyone else - and there are a fair number within the legal community - the criticisms of non-lawyers may have been somewhat easy to ignore.

[14] See, for example, W.S. Tarnopolsky and G.A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982). There were some who argued that the fact of entrenchment would not, in and of itself, alter the conservative approach of the Court. See, for example, B. Hovius and R. Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada" (1983) 61 Can. Bar Rev. 354. Nevertheless, this clearly went against the grain of most of the academic writing on the subject.

[15] Milne, *supra*, note 10 at 86-89.

This appearance of a consensus would not have influenced the Supreme Court were it not compatible with its own view of itself as an institution. For some time, however, the Court has seen itself as an increasingly important actor on the political scene.[16] Combined with the expectations of its various audiences, this self-image rendered the idea of an activist and liberal court in Charter matters virtually irresistible.

Also important was the particular judicial context in which the Supreme Court delivered its initial decisions. The Charter had been interpreted by lower courts for some years before the Supreme Court released its own first opinion, and radically different positions had been taken by various courts on virtually every issue that could arise.[17] More specifically, the courts were divided on the question of the extent to which the entrenchment of the Charter had altered the basic principles of Canadian constitutional law. Accordingly, one of the initial tasks of the Supreme Court was to provide guidance to both bench and bar regarding the basic perspective that should be taken in Charter argument and interpretation. The Court clearly believed that the text and history of the Charter required that it be interpreted generously, and that that message had to be conveyed clearly and unambiguously to both bench and bar.

Nevertheless, there existed an important constraint on the ability of the Court to apply the Charter liberally, a constraint flowing from both the expectations of the Court's audiences and the self-image of the Court itself. Simply put, it was expected that the Court would interpret the Charter in a non-political, judicial manner. Accordingly, it was important for the Court to find ways to interpret the Charter generously without putting into question the legitimacy of its role as an adjudicative body. Before considering such matters, however, it is necessary to say a few words about constitutional interpretation in order to provide a benchmark against which the Court's rhetoric may be evaluated.

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[16] For some examples, see M. Gold, "The Rhetoric of Constitutional Argumentation" (1985) 35 U. of Toronto L.J. 154, notes 3-6.

[17] See F.L. Morton and M.J. Withey, *Charting the Charter, 1982-1985: A Statistical Analysis* (Calgary: Research Unit for Socio-Legal Studies, Faculty of Social Sciences, University of Calgary, 1986) and P.J. Monahan, "A Critic's Guide to the Charter" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) at 383-408.

C. *Constitutional Interpretation*

There is a vast literature on the subject of constitutional interpretation, and I do not intend to summarize it (were that possible) or offer any prescriptions about how the Charter ought to be interpreted.[18] Instead, I wish only to describe what necessarily takes place when a text like the Charter is being interpreted.

Let me begin rather dogmatically. The meaning of the Charter is exclusively a function of its interpretation. There is no sense in which the meaning inheres intrinsically in the words of the text, in the minds of the drafters, or anywhere else for that matter, in a manner that is independent from the interpretive process.[19] Accordingly, the judges are responsible for the meaning given to the rights and freedoms set out in the Charter, however much they may tie their interpretations to the views of others. Moreover, the meaning to be given to a particular phrase or text will vary with the interpreter's conception of both the nature of the text and the purposes to be served by its interpretation.

This general view of the relationship between meaning and interpretation is consistent with the way in which the Supreme Court has treated its earlier decisions under the Bill of Rights when interpreting analogous clauses of the Charter. For example, the Court has refused to follow the definition of freedom of religion it had previously adopted under the Bill of Rights, arguing that the narrow interpretation it gave to the Bill of Rights was a function of the Court's view of its non-constitutional nature.[20] Thus the Court

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[18] For my views concerning the interpretation of the equality rights guarantees in the Charter, see M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Sup. Ct. L.R. 131; M. Gold, "Moral and Political Theories in Equality 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. On constitutional interpretation more generally, see Gold, *supra*, note 16.

[19] See generally H.G. Gadamer, *Truth and Method*, trans. G. Barden and J. Cumming (New York: Crossroad, 1985). For a useful account of hermeneutical theories, see Richard Palmer, *Hermeneutics* (Evanston Il.: Northwestern University Press, 1969).

[20] *Big M Drug Mart*, *supra*, note 2 at 342-344. See also *R.* v. *Therens*, *supra*, note 2 at 638-640.

recognizes that the meaning of a text is a function of the relationship between the text and the interpreter, not something that inheres naturally in the text, and that in the process of interpretation one is inevitably influenced by one's view of that text's nature and status.

It is also the case that the materials that judges bring to bear on their interpretation of the Charter necessarily go beyond strictly legal considerations. The very act of understanding engages the personal values, experience, and prejudices of the interpreter.[21] We simply cannot understand anything without relying upon our accumulated stock of knowledge, much of which is tacit rather than explicit. It follows that no judge can ever be aware of all of the forces influencing the interpretations given to the Charter, much less set them out on paper. In this respect, written reasons for judgment are necessarily incomplete.

In giving meaning to the Charter the Court works with a relatively discrete set of argumentative conventions, by which I mean forms of argument through which the interpretation of the Charter is effected. As has been discussed elsewhere, one can identify six basic kinds of arguments in our constitutional jurisprudence: textual, historical, structural, doctrinal, prudential, and ethical.[22] Although all are legitimate in the sense that they can all claim some plausible link with certain features of the Charter, no one form of argument can claim an *a priori* superiority over the others. What can be said, however, is that different forms of argument suggest different images of the Court as constitutional interpreter. For example, arguments based upon the text of the Charter, its history, or on judicial precedents tend to suggest an image of interpretation that minimizes, if not obscures, the creative role of the Court in giving the Charter meaning. On the other hand, the remaining forms of argument more clearly implicate the Court's responsibility for the interpretations rendered.[23]

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[21] On the centrality of one's prejudices, see Gadamer, *supra*, note 19 at 238ff.

[22] Gold, *supra* note 16. This taxonomy was adopted from P. Bobbitt, *Constitutional Fate* (New York: Oxford University Press, 1982).

[23] Gold, *supra*, note 16.

Just as there are a number of argumentative conventions available to a Court, so too are there a number of different functions that a Court performs in reviewing the constitutionality of legislation. They include the functions of policing the boundaries of governmental power set out in the constitution, legitimating the exercise of such power within its limits, "cueing" other institutions of government, including lower courts, as to how the Charter is to be understood, and expressing through its opinions its conception of the basic values underlying Canadian society.[24] These functions appear to flow inevitably from the role assumed by the Supreme Court in our constitutional system.

None of this is meant to suggest that the interpretation of the Charter is necessarily subjective or arbitrary, or that the text exercises no influence on the interpreter. Indeed, to put it in such terms implies that there is some "objective" way to interpret a text that could somehow escape the influence of these factors. Such is not the case.[25] What is important is the rhetorical force of appeals to objectivity in interpretation, because the legitimacy of the judicial role depends to no small extent on the perception that the judiciary is applying rules and principles of the law, rather than deciding cases based on personal political preferences. Thus we can distinguish between different styles of opinion writing and different images projected by the Court as an institution.

The more traditional style can be termed formalistic in the sense that decisions are portrayed as following from the impartial application of pre-existing rules. The image of the Court implied by this style is that of a neutral, reactive institution. It engages what Abram Chayes has called the classical image of adjudication.[26] The competing style portrays adjudication not as a matter of applying rules, but as a matter of balancing competing interests: the Court appears actively and personally involved in the resolution of the issues, and does not pretend simply to apply the will of others in

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[24] On the functions of the Court see Gold, *supra*, note 16. For a more complete account, see Bobbitt, *supra*, note 22.

[25] Gold, *supra*, note 16.

[26] A. Chayes, "Foreward: Public Law Litigation and the Burger Court" (1982) 96 Harv. L. Rev. 4. For a fuller account, see Gold, *supra*, note 5.

resolving the case. Chayes has termed this the public law image of adjudication and one could also call it a political image of adjudication.[27]

These admittedly rough distinctions between judicial styles will prove useful in evaluating the Court's rhetoric. To legitimate judicial review under the Charter, the Court tended to invoke the rhetoric of the classical image, thereby avoiding the appearance that the Court itself was playing a major political role. In this way the Court responded to the central expectations of its audiences: that it interpret the Charter generously without moving from the judicial arena to the political.

III. THE RHETORIC OF LEGITIMACY

A. *Establishing the Legitimacy of Judicial Review*

As important as it was for the Court to set out the basic principles of Charter interpretation in the early cases, it was equally important for the Court to establish the legitimacy of the broad interpretive role it had chosen for itself. To this end, the Court invoked a series of arguments based upon the text and history of the Charter, the main thrust of which were to show that the Court had no choice but to assume the role imposed upon it.

The Court's reliance upon the provisions of section 24 of the Charter and section 52 of the *Constitution Act, 1982* to justify judicial review under the Charter was predictable and appropriate. Entrenchment of the Charter, reflected in section 52, was the principal reason cited by the academic commentators in defence of a broad role for the courts, and section 24 makes it clear that the courts possess a broad remedial authority with regard to Charter breaches. Nevertheless, it is illuminating that the Court chose to rely upon textual arguments to support its new role. By so doing,

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[27] Chayes, *ibid.*

the Court appears to have exercised no choice in the matter, and to have acted simply as the constitutional text dictated.

In this respect, consider how the Court used these textual arguments to reject any limitations to the exercise of its mandate for judicial review. For example, in *Operation Dismantle*, counsel for the federal government argued that the issues raised were inherently non-justiciable and were outside the ambit of judicial review by virtue of their political nature. Madame Justice Wilson relied upon section 24 of the Charter not only to reject these arguments, but to reject as inappropriate the notion that doctrines of non-justiciability and "political questions" ought to be part of the jurisprudence of the Charter. Characterizing the issue as whether or not the government's defence policy violates section 7 of the Charter, she wrote:

> I do not think there can be any doubt that this is a question for the courts. Indeed, s.24(1) of the *Charter*...makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question"....[28]

By invoking the text of the Charter, Madame Justice Wilson secured a large role for the courts without appearing in any way responsible for the assumption of that role. It was the Charter itself, we are told, that obliged the Court to respond to the questions posed in the case.[29]

Historical arguments also figured prominently in the early cases. For example, in *Reference Re Section 94(2) of the Motor Vehicle Act (B. C.)*, Mr. Justice Lamer justified a broad interpretation of section 7 by drawing a parallel between judicial review under the Charter and judicial review of the division of legislative powers in the Constitution: "[i]t is the scope of constitutional adjudication which has been altered rather than its nature, at least, as regards the right to consider the content of legislation."[30] By establishing a

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[28] *Operation Dismantle*, *supra*, note 2 at 472.

[29] "It is therefore, in my view, not only appropriate that we decide the matter; it is our constitutional obligation to do so." *Ibid.*, 473-474.

[30] *Supra*, note 2 at 496.

continuity between its role before and after entrenchment, the Court attempted to legitimate judicial review under the Charter by minimizing its novelty.

In any event, the Court tells us, it had no choice but to assume the role thrust upon it. As Mr. Justice Lamer wrote:

> It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.[31]

It is true, of course, that the "historic decision" was taken by elected officials and not by the Court. At the same time, one should not forget the important role played by the Court in the patriation process, a role that legitimated the entrenchment of the Charter itself.[32] Just as textual argument can obscure the Court's responsibility for the result reached, this historical argument avoids reference to the Court's pre-entrenchment role.

The rhetorical significance of all these arguments is two-fold. First, the Court uses those forms of argument that place the responsibility for the Court's expanded role on others, and portrays itself as merely responding to the will of others. Although this positivist image contrasts sharply with what the Court actually has done in the exercise of judicial review, it does function to legitimate the Court's role in the eyes of its audiences, notably those in the legal community.

Second, the Court's concern with removing any doubts about the legitimacy of its role is telling. This goal was pursued in a number of additional ways. One recurring technique was to invoke a distinction between proper and improper approaches to constitutional interpretation in order to reassure its audiences that the Court was following the proper and legitimate approach. This is the subject of the following section.

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[31] *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, *supra*, note 2 at 497.

[32] See *Reference Re Amendment to the Constitution of Canada (Nos. 1, 2 and 3)* (1981), [1981] 1 S.C.R. 753, [1981] 1 W.W.R. 1; *Re A.G. Quebec and A.G. Canada* (1982), [1982] 2 S.C.R. 793, 140 D.L.R. (3d) 385.

B. "*Courts Do Not Question the Wisdom of Legislation.*"[33]

In virtually all of its decisions, the Court insisted on the distinction between assessing the constitutionality and questioning the wisdom of legislation. Indeed, this is invoked in the first paragraph of the first case decided by the Court under the Charter.[34]

This distinction cannot be maintained in any strong sense with regard to Charter interpretation. To the extent that the distinction implies only that a judge does not decide a case explicitly on the basis of his or her personal preferences, it is possible to believe that judges can and do honour it. It seems to me, however, that the Court invokes this distinction in a stronger and more controversial sense than this. The core idea appears to be that there is something intrinsically different about judging the wisdom of legislation and assessing its constitutionality so that the former role is entrusted to the political branches of government while the latter is ultimately a matter for the courts.[35] The maintenance of this distinction is necessary in order to legitimate the Court's role.

Consider the opinion of Mr. Justice Lamer in *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, where the absolute

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[33] *Amax Potash Ltd.* v. *Saskatchewan* (1976), [1977] 2 S.C.R. 576 at 590, [1976] 6 W.W.R. 61.

[34] "At the outset, let it be emphasized in the clearest possible language that the issue before this Court in this appeal is not whether it is or is not in the interest of this community to require Canadian citizenship as a precondition to membership in the bar. Rather, the only issue is whether s. 28(c) of the *Law Society Act, supra*, is inconsistent with s. 6(2)(b) of the *Canadian Charter of Rights and Freedoms*." *Skapinker, supra*, note 2 at 359-360.

[35] Madame Justice Wilson appears to embrace this conception of the distinction when she states, in *Operation Dismantle, supra*, note 2 at 472: "[I]f the court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution." For a similar view of the impossibility of maintaining the distinction beteen wisdom and constitutionality, see Patrick J. Monahan and Andrew Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 Sup. Ct. L. Rev. 69.

liability provisions of the *Motor Vehicle Act*[36] were held to violate section 7 of the Charter and were not justified under section 1 as being necessary to keep bad drivers off the road. Having invoked the distinction between the constitutionality and wisdom of legislation at least four times in the course of his reasons for judgment, Mr. Justice Lamer wrote:

> I do not take issue with the fact that it is highly desirable that "bad drivers" be kept off the road. I do not take issue either with the desirability of punishing severely bad drivers who are in contempt of prohibitions against driving. The bottom line of the question to be addressed here is: whether the Government of British Columbia has demonstrated as justifiable that the risk of imprisonment of a few innocent is, given the desirability of ridding the roads of British Columbia of bad drivers, a reasonable limit in a free and democratic society. That result is to be measured against the offence being one of strict liability open to a defence of due diligence, the success of which does nothing more than let those few who did nothing wrong remain free.[37]

One might be tempted to argue that Mr. Justice Lamer was not questioning the wisdom of the legislation inasmuch as he accepted the objectives underlying it and only questioned the means chosen by which to realize them. Nonetheless, by drawing the comparison between absolute and strict liability, he is saying that it was unwise to have opted for a regime of absolute liability in this case. If this is so, wherein lies the distinction between the wisdom and the constitutionality of legislation?

Simply put, the distinction cannot be maintained in the face of section 1 of the Charter. According to the Chief Justice in *R.* v. *Oakes*, section 1 addresses both the objectives of legislation and the means used to achieve those objectives. Regarding the former, the objective must relate to "concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important."[38] But how can a court decide that an objective is sufficiently important without putting into question the wisdom of the legislation itself? It seems obvious that the wisdom

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[36] R.S.B.C. 1979, c. 288, s. 94, amended by *Motor Vehicle Amendment Act, 1982*, S.B.C. 1982, c. 36, s. 19. The Act contemplated a minimum period of imprisonment for those who drove without a valid driver's licence or who drove while their license was under suspension.

[37] *Supra*, note 2 at 521.

[38] *R.* v. *Oakes*, *supra*, note 2 at 138-139.

of legislation is a function, in part, of what it tries to accomplish. For a court to weigh this on its scale is to question its wisdom.

Even if one takes the rather dubious position that the wisdom of legislation is exclusively a function of the legislative means chosen, and not of the ends pursued, the result is the same. According to *Oakes*, the test to be applied with regard to the legislative means is one of proportionality: "in each case courts will be required to balance the interests of society with those of individuals and groups."[39] More specifically, there must be a rational connection between means and ends, the legislation must not impose upon constitutional rights to a greater extent than is necessary to achieve the objective pursued, and one must balance the importance of the governmental objective against the importance and degree of violation of the constitutional right at issue.[40]

How can it be said that this does not involve the Court in questioning the wisdom of legislation? When legislators consider the enactment of a given law, they ask themselves whether the ends to be realized by the law are justified by the costs entailed by the legislation. Responsible legislators consider the impact on rights as one such cost in their evaluation of the wisdom of their legislation; the fact that legislation has been passed is evidence that the legislators believed that the benefits outweighed the costs and that the balance of interests struck in the legislation was justified. Is that not what we mean when we talk of the wisdom of a law? And yet, this is precisely what is entailed in the application of the proportionality test under section 1.

Lest this be misunderstood, I am not suggesting that the Court is aware that it is invoking a distinction that is impossible to maintain. On the contrary, I have no doubt that the Court sincerely believes that it can exercise judicial review under the Charter without questioning the wisdom of legislation. Nevertheless, the Court's good faith cannot transform an illusory distinction into a real one.

What is real, of course, is the rhetorical function of invoking the distinction. By drawing a line between permissible and

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[39] *Ibid.* at 139.

[40] *Ibid.*

impermissible approaches to constitutional interpretation, the Court reassures its audiences (and itself) that it is acting judicially and not politically. As suggested earlier, it is the legitimacy of judicial review itself that is ultimately at stake. Unless the role of the judge can be distinguished from that of legislator, the power of the courts under the Charter cannot easily be justified in a democratic society.

C. *Limiting the Appearance of Balancing Interests*

To the extent that a court appears to be deciding cases by defining legal rights and applying legal rules, it acts consistently with the traditional image of adjudication. In the eyes of much of the legal community, this rather formalistic style needs no elaborate defence – it is itself a legitimating ideal of adjudication. Where a court appears to be engaged in a process of openly balancing competing interests, however, the image of adjudication becomes much more political and, amongst many, more controversial.[41] The purpose of this section is to show how the Court depoliticised its early interpretations of the Charter by limiting the extent to which it had to balance interests openly.

The most striking example is provided by the Court's opinion in *Quebec Association of Protestant School Boards* v. *A.G. Quebec (No. 2)*. Having set out the conflicts between the provisions of Quebec's *Charter of the French Language*[42] ("Bill 101") and section 23 of the Charter, the Court held that it was unnecessary to consider any of the arguments submitted by Quebec under section 1. The Court reasoned that the drafters of the Charter clearly had Quebec's legislation in mind when they drafted section 23, thereby intending to limit the scope of Quebec's language legislation as it related to the language of instruction in schools. Accordingly, the drafters

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[41] See Gold, *supra*, note 5.

[42] R.S.Q. 1977, c. C-11.

could not have contemplated that section 1 could save the legislation.[43]

For a Court determined to give a liberal interpretion to the Charter while maintaining its image as a judicial and non-political body, the avoidance of any analysis of section 1 in this case was a brilliant stroke of rhetorical strategy. If one recalls the lengthy reasons for judgment written by Chief Justice Deschênes of the Superior Court of Quebec in that case, one can appreciate why the Supreme Court was eager to avoid a similar analysis.[44] Simply put, to have entered into a section 1 analysis would have required the Court to pass judgment on the conflicting evidence concerning demographic trends in the province, and more to the point, on the importance of promoting French in Quebec as compared with the burden on minority language rights imposed by Bill 101. To observe that these are matters of intense political importance in Quebec understates the obvious: no other issue is as potentially explosive as language. In my view, the Court did not want to be seen as responsible for a decision adverse to the government of Quebec.[45] Far better to have a judgment — and an anonymous one at that — that allowed the Court to say as little as possible, and which placed the responsibility for the decision squarely on the drafters of the Charter and not on the Court.

There are other examples, albeit less highly charged, where the Court limited the circumstances under which it will be forced, in future, to balance interests openly. For example, in *Re Singh and Minister of Employment and Immigration*, Madame Justice Wilson held that the lack of an oral hearing for the adjudication of refugee claims under the *Immigration Act, 1976*[46] violated section 7 of the

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[43] *Supra*, note 2 at 79-84. The Court also reasoned that the impugned provisions of Quebec's legislation, if upheld, would amount in effect to an amendment of section 23. Amendments must be pursued through the amending formulae set out in the constitution and cannot be effected via the terms of section 1 of the Charter. *Ibid.* at 86-88.

[44] *Quebec Association of Protestant School Boards* v. *A.G. Que. (No. 2)* (1982), 140 D.L.R. (3d) 33, 3 C.R.R. 114 (Que. Sup. Ct.).

[45] On this issue, an analogy can be drawn between this case and the second patriation case concerning Quebec's putative veto over constitutional change. See Gold, *supra*, note 5.

[46] S.C. 1976-77, c. 52, ss. 2 and 71.

Charter. The government argued, *inter alia*, that the procedures were justified under section 1, given that the Immigration Appeal Board had too many cases and too few resources to be able to accord an oral hearing in each case. Rejecting this argument, Madame Justice Wilson expressed her doubts that such "utilitarian consideration[s]" could support the limitation of constitutional rights under section 1.[47] By dismissing arguments of this kind as illegitimate, Madame Justice Wilson avoided having to weigh the competing interests in the case.

The opinions of Madame Justice Wilson provide an example of another way in which the need to balance interests overtly is minimized. For example, in both *Operation Dismantle* and the *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, Madame Justice Wilson defined the concept of liberty as set out in section 7 in non-absolute terms, thus recognizing limits to liberty without having to employ the rather political language of section 1.[48] To be sure, this general approach to the conception of rights and their limits has a very respectable philosophical pedigree.[49] Moreover, it may be that the very same considerations enter into the analysis regardless of whether one defines rights absolutely and limits them through section 1, or defines the rights more narrowly without reference to section 1. At the rhetorical level, however, there is a difference between the two approaches: the process of defining rights appears paradigmatically judicial, whereas balancing interests appears more political.

Consider finally the conception of legislative purpose as advanced by the Chief Justice in the *Big M Drug Mart* case. Having affirmed that legislative purpose is constitutionally relevant, the Chief Justice rejected the idea that the purpose might change over time.[50]

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[47] *Singh*, *supra*, note 2 at 218-219.

[48] *Operation Dismantle*, *supra*, note 2 at 488; *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, *supra*, note 2 at 529.

[49] See, for example, Joel Feinberg, *Social Philosophy* (Englewood Cliffs, N.J.: Prentice-Hall, 1973).

[50] "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable." *Big M Drug Mart*, *supra*, note 2 at 335.

To the extent that legislation can be struck down on the basis of an original legislative purpose found to contravene the Charter, as was the case in *Big M Drug Mart* itself, this tends to limit the need to balance interests overtly. Moreover, the reasons given for rejecting the notion of a shifting legislative purpose illuminate the Court's rhetorical design:

> No legislation would be safe from a revised judicial assessment of purpose. Laws assumed valid on the basis of persuasive and powerful authority could, at any time, be struck down as invalid. Not only would this create uncertainty in the law, but it would encourage re-litigation of the same issues and, it could be argued, provide the courts with a means by which to arrive at a result dictated by other than legal considerations.[51]

By invoking the dangers of uncertainty and instability, the Chief Justice addresses the deep concerns of his audiences, notably the legal community.[52] Indeed, by raising the spectre of decisions "dictated by other than legal considerations," he suggests the distinction between permissible and impermissible approaches to constitutional interpretation – between judging the wisdom of legislation as opposed to its constitutionality. Although it is unclear why the "shifting purpose" approach raises this danger more in this than in any other case, the reference to the danger reassures the reader that the decision reached by the Court was based upon proper considerations.

D. *Invoking and Rejecting the Intent of the Drafters*

The final matter to be considered here is the role played by the concept of the drafters' intentions. In the great majority of cases considered here, the Court appealed to an assumed drafters' intention to justify the interpretations given to the Charter. For example, in *A.G. Quebec* v. *Quebec Association of Protestant School Boards* the Court relied upon the drafters' intent to justify the

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[51] *Supra*, note 2 at 334-335.

[52] This passage gestures towards a set of values associated with the ideal of the Rule of Law. See, for example, J. Raz, "The Rule of Law and its Virtue" (1977) 93 L.Q. Rev. 195. The Rule of Law remains an ideal around which the legal community is organized and will rally. See generally A. Hutchinson and P. Monahan, eds., *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987).

avoidance of a section 1 analysis.[53] In other cases the Court invoked what might be termed a negative intention of the drafters in support of its Charter interpretation. For example, in *R.* v. *Therens*, Mr Justice Le Dain justified his definition of the term "detention" in section 10 by observing that it was unreasonable to assume that the drafters intended that the term be defined in the same way as it had been by the courts under the Bill of Rights.[54] Similarly, in *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, Mr. Justice Lamer invoked the intention of the drafters to reject an interpretation of section 7 that would have equated it with the principles of natural justice as understood in administrative law.

> It is, in my view, that precise and somewhat narrow meaning that the legislator avoided, clearly indicating thereby a will to give greater content to the words "principles of fundamental justice", the limits of which were left for the courts to develop....[55]

In light of all of these allusions, it is easy to conclude that the drafters' intentions were to govern the Court's interpretations of the Charter. Nothing, however, is quite so simple. Every time that the drafters' actual intentions were established through evidence, the Court refused to consider them.[56] The clearest example of this is also the most telling.

In *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, counsel for British Columbia provided evidence of the testimony of the Minister of Justice, the Deputy Minister, and the Assistant Deputy Minister, Public Law, before the Special Joint Committee on the Constitution, to the effect that section 7 was intended to refer to procedure only. Notwithstanding his reliance on the assumed intent of the drafters when rejecting the argument that would define section 7 in terms of natural justice, Mr. Justice Lamer ignored the

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[53] *Supra*, note 2 at 82, 84, 87-88.

[54] *Supra*, note 2 at 639-640. He applied the same form of reasoning in interpreting section 24 of the Charter, holding that it was not intended that evidence could be excluded pursuant to section 24(1). *Ibid.* at 647-648.

[55] *Supra*, note 2 at 504.

[56] In *Skapinker, supra*, note 2 at 382, Mr. Justice Estey stated that it was unnecessary to consider the legislative history of section 6. See also *R.* v. *Therens, supra*, note 2 at 647.

submitted testimony by giving it virtually no probative value whatsoever.[57] As a result, section 7 was defined in terms much broader than appears to have been intended by those who drafted the clause, thereby increasing the range of circumstances in which it could be used to strike down legislation.

The rhetorical perspective provides the key to what would otherwise appear as a logical contradiction, for there is indeed a rhetorical logic to the way that the Court treats the question of the drafters' intent. The rejection of the evidence of the Minister and his colleagues was a response to the expectation that the Charter be interpreted liberally by the Court. After all, in a judicial world-view dominated by the image of the living tree, there is little allure in the idea of tying constitutional interpretation to the original intent of the drafters. At the same time, rhetorical considerations explain why the reasons for judgment so regularly invoke the drafters' intentions to justify the interpretations given. This is not only a convention of style, but is rooted in our positivist legal culture.[58] By appealing to the intentions of others, the Court distances itself from responsibility for the interpretations actually given, thereby invoking a traditional and non-political image of itself — the Court is not making interpretive choices at all, but merely deferring to the will of others. At the level of rhetoric, who can say that the Court lacks finesse?

IV. THE RHETORIC OF ACTIVISM

The preceding part suggested that the Court invoked the traditional image of itself as an adjudicative institution in order to legitimate its expanded role under the Charter. The Court had to

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[57] *Supra*, note 2 at 507-509. There are a number of compelling reasons for rejecting the intent of the drafters as a decisive, or even weighty, element in constitutional interpretation. These are well known and need not be rehearsed here. See P. Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 Bos. U.L. Rev. 204 and R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 33-71.

[58] The core idea is that the Charter is valid, and hence to be applied, only because of the process through which it came to be enacted, and not because of any transcendant correspondence between it and natural law. See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). It would appear to be a short step from this positivist foundation to the proposition that a court ought to be following the views of those who brought the Charter into being.

do more, however, than merely convince its audiences of the legitimacy of judicial review in general. First, it had to persuade its audiences that its decisions in particular cases were correct and appropriate; second, it had to satisfy the pervasive expectation that the Charter would be an instrument used for the vigorous protection of individual rights. Beginning with the latter, the following sections consider some of the ways in which the Court pursued these objectives.

A. *The Rhetoric of Individualism*

Given both the expectations surrounding the Charter and the need to provide guidance to its audiences, the Court quickly set out to establish its preferred approach to Charter interpretation. Advancing the general principle that the Charter must be interpreted "purposively," both with respect to the nature of the interests underlying a particular section of the Charter and to the "character and the larger objects of the *Charter* itself,"[59] the Court made it clear that the Charter would not suffer the same fate as had the Bill of Rights.

Two complementary conceptions of the Charter underlie the Court's opinions in these early cases. The first is the image of the Charter as a living tree, and the second is the idea that the Charter was designed for "the unremitting protection of individual rights and liberties."[60] These two conceptions function rhetorically to support those readings of the Charter that favour and expand the protection of rights over those which would limit the scope of the rights protected. For example, in *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, Mr. Justice Lamer invoked the living tree metaphor to deny probative value to the statements of the

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[59] *Big M Drug Mart*, *supra*, note 2 at 344.

[60] *Hunter* v. *Southam*, *supra*, note 2 at 155.

government officials concerning the meaning of section 7,[61] and he reinforced his preferred interpretation with the argument that a broader reading of section 7 is to be preferred over a narrower one.[62] Similar considerations informed the opinion of Mr. Justice Le Dain in *Therens* where he rejected the definition of "detention" advanced by the Court under the Bill of Rights as inappropriately narrow for the Charter.[63] Indeed, even when Mr. Justice Beetz resuscitated the Bill of Rights in the *Singh* case, he justified it by observing that it would serve the "better protection of rights and freedoms."[64] The Court clearly has based its jurisprudence on the proposition that the interpretation that best promotes rights is the one to be preferred.[65]

Informing this jurisprudence is a highly individualistic, almost classical liberal vision of the Charter and of Canadian society. By classical liberalism I refer to a tradition of social thought that is constituted by a number of related ideas: the primacy of the individual over community and the State, the mistrust of if not hostility toward a broad role for government, and a general faith in judges and the Rule of Law as protection against the collectivist pretensions of modern democratic government.[66] All of these ideas can be found prominently in the cases.

The dominant tone in the judgments is highly individualistic. For example, in *Hunter* v. *Southam*, notwithstanding that it was a

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[61] "If the newly planted 'living tree' which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth." *Supra*, note 2 at 509.

[62] *Ibid.* at 500-502.

[63] *Supra* at note 2 at 638-40.

[64] *Supra* at note 2 at 224.

[65] See, for example, *Big M Drug Mart, supra*, note 2 at 331, where Chief Justice Dickson defends the independent relevance of legislative purpose in Charter adjudication, by arguing that rights will be better protected in this way.

[66] See, for example, F. A. von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960) and Hayek, *Law, Legislation and Liberty* (London: Routledge & K. Paul, 1973; Chicago: University of Chicago Press, 1976; and Chicago: University of Chicago Press, 1979).

corporation which invoked the protection against unreasonable search or seizure as guaranteed by section 8 of the Charter, the reasons for judgment are dominated by references to individual rights to privacy and so on.[67] Similarly, in the *Big M Drug Mart* case, the Chief Justice wrote at length about respect for human dignity and the valuation of individual conscience, notwithstanding that it was a corporation that brought the action challenging the *Lord's Day Act*. Through the constant affirmation of the virtues and values of individual rights, the Court not only adds to the persuasive force of its opinions, it also encourages us to see ourselves as rights-holders, thereby transforming the language of political discourse in Canada.[68]

Consistent with the classical liberal tradition, the Court defines individual rights in opposition to the interests and claims of government. For example, freedom is defined as the absence of coercion or constraint, but it is government, typically, that is presented as the enemy of freedom.[69] Even the Court's conception of democracy is tied to notions of individual rights. As the Chief Justice wrote:

> It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.[70]

More generally, the opinions can be read as evidencing a general antipathy towards government. For example, to limit rights under section 1 the government must satisfy the very stringent test as set out in the *Oakes* case, including the requirement that the governmental objective relate to "concerns which are pressing and

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[67] For a critique of the individualistic tenor of the case, see A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct. L. Rev. 473.

[68] See J. White, *When Words Lose Their Meaning* (Chicago: University of Chicago Press, 1984) 218.

[69] See, for example, the opinion of Madame Justice Wilson in *Operation Dismantle*, *supra*, note 2 at 488. See also Mr. Justice Dickson's opinion in *Hunter* v. *Southam*, *supra*, note 2 at 156: the Charter "is intended to constrain governmental action inconsistent with those rights and freedoms."

[70] *Big M Drug Mart*, *supra*, note 2 at 346.

substantial in a free and democratic society before it can be characterized as sufficiently important."[71] Moreover, the Court offers a fairly individualistic interpretation in setting out the values and principles essential to a free and democratic society, the values said to govern the evaluation of government's submissions under section 1:

> ...respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[72]

Finally, the nature of the governmental interests at stake in the cases are rarely elaborated with the same precision or detail as are the individual interests affected. The best example may be found in *Hunter* v. *Southam*, where the Court characterized the government's interest in the *Combines Investigation Act* as "simply law enforcement."[73] In all of this we can see the suspicious attitude towards government that lies at the heart of classical liberal thought.

The individualistic thrust of the Court's rhetoric is reinforced by what appears to be a deontological conception of individual rights that appears in some of the cases.[74] For example, as noted earlier, Madame Justice Wilson appears to reject the idea that arguments of efficiency or administrative convenience can be invoked legitimately in order to limit rights set out in the Charter,[75] and in *Big M Drug*

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[71] *Supra*, note 2 at 138-39.

[72] *Oakes*, *supra*, note 2 at 136.

[73] *Supra*, note 2 at 168. See Petter, *supra*, note 67.

[74] Within the liberal tradition one can distinguish between deontological and utilitarian conceptions of rights. A deontological conception admits that rights may be limited in the interest of securing the rights of others, but denies that it is appropriate to limit individual rights in the name of general societal welfare. John Rawls is the best known contemporary exponent of a deontological theory of rights. See J. Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971). A sophisticated form of utilitarianism is advanced in R.M. Hare, *Freedom and Reason* (Oxford: Clarendon Press, 1963). In the context of constitutional interpretation, the conception of rights chosen will determine what kinds of arguments are deemed legitimate and which are to be rejected as inadmissible. See M. Gold, "Equality before the Law in the Supreme Court of Canada: A Case Study" (1980) 18 Osgoode Hall L.J. 336 at 364-366.

[75] *Singh*, *supra*, note 2 at 218-219.

Mart, Chief Justice Dickson dismissed one of the government's submissions under section 1 as "no more than an argument of convenience and expediency."[76] Even when it is acknowledged that arguments of administrative convenience can possibly justify the limitation of rights, the circumstances are narrowly conceived. As Mr. Justice Lamer put it, such arguments could justify absolute liability offences (in the face of section 7 of the Charter) "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[77]

Finally, consistent with the liberal faith in courts and mistrust of other governmental institutions, the decisions affirm the priority of the judicial world-view. In *Hunter* v. *Southam* the Court insisted on a quasi-judicial regime for the authorization of searches under the *Combines Investigation Act*,[78] notwithstanding rather compelling arguments that this would impair the effectiveness of the legislation as enforced. Similarly, in the *Singh* case, the Court required that there be an open hearing for the redetermination of refugee claims, notwithstanding the burden that this imposed on the entire system. Are these not examples of the traditional antipathy of judges to administrative processes, informed by a sense that the judicial way is the best way?[79]

The Court's individualistic rhetoric is easily explained. The idea of a constitutional Bill of Rights limiting government is paradigmatically a liberal one, reflecting a vision of society in which the individual is central. Moreover, it is fair to say that most judges, by virtue of their professional training and experience, are rather comfortable with a liberal conception of the world and would find the basic premises of classical liberalism to be almost self-evident. Finally, generations of legal scholars have been pleading with the

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[76] *Supra*, note 2 at 352.

[77] *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, *supra*, note 2 at 518.

[78] R.S.C. 1970, c. C-23.

[79] See H. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1. It is not surprising that the Court appears to favour judicial models to administrative ones. The Charter itself is a testament to the faith we have that judges can and will decide issues of rights not only in a fair way, but in a way that is superior to legislative or administrative bodies.

Court to take individual rights more seriously, and once the Court decided to apply the Charter generously, it had to communicate that message strongly and unequivocally to its various audiences. Whatever one's views on such matters, it should be acknowledged that the Court is doing essentially what we asked and apparently desired it to do.

Given the popular and professional understanding of the Charter as designed to protect individuals from the excesses of government, the Court's individualistic rhetoric performed a legitimating function for its activism in these early cases. The Court also deployed other rhetorical techniques in combination with the rhetoric of individualism to enhance the persuasiveness of its opinions in particular cases. These techniques are the subject of the following sections.

B. *The Rhetoric of Facts*

It is a commonplace among experienced counsel that the manner in which one presents the facts of the case can be crucial to the success of one's cause. Experienced judges are no less sensitive to the rhetorical dimension of how the facts are presented, as is illustrated by the reasons for judgment in *Hunter* v. *Southam.*

The offices of the Edmonton Journal were the object of a search authorized under section 10 of the *Combines Investigation Act.*[80] Of the authorization for the search, Mr. Justice Dickson (as he then was) wrote:

> The authorization has a breath-taking sweep; it is tantamount to a licence to roam at large on the premises of Southam Inc. at the stated address "and elsewhere in Canada"....
> [The officials] declined to give the name of any person whose complaint had initiated the inquiry, or to say under which section of the Act the inquiry had been begun. They also declined to give more specific information as to the subject matter of the inquiry than that contained in the authorization to search.[81]

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[80] R.S.C. 1970, c. C-23. The Court held that the provisions authorizing the search violated the right to be secure against unreasonable search or seizure as guaranteed by section 8 of the Charter.

[81] *Hunter* v. *Southam, supra,* note 2 at 150.

What do these passages mean? They cannot mean that it was the scope of the authorization or the behaviour of the officials that rendered the law unconstitutional, for Mr. Justice Dickson insisted otherwise:

> At the outset it is important to note that the issue in this appeal concerns the constitutional validity of a statute authorizing a search and seizure. It does not concern the reasonableness or otherwise of the manner in which the appellants carried out their statutory authority. It is not the conduct of the appellants, but rather the legislation under which they acted, to which attention must be directed.[82]

The rhetorical perspective provides the key to the meaning of these passages. The exposition of the facts suggests the dangers associated with administrative regimes and implies that a judicial process would not have produced such a sweeping authorization. Moreover, the description of the actions of the officials invites the reader to view the entire process in a bad light. Why did the officials fail to divulge the name of the complainant? Why did they fail to specify the section of the Act, or to provide "more specific information as to the subject-matter of the inquiry than that contained in the authorization"? Let us leave aside any questions about their obligation to provide such information, for in the absence of any such obligation, they were only doing their job, however ungraciously. The rhetorical object was to describe the administrative process in as negative terms as possible, in order to persuade us that the Court was right to strike it down.

Another example is provided by *Big M Drug Mart* where the Court struck down those provisions of the *Lord's Day Act*[83] that prohibited commercial activity on Sunday. As in *Hunter* v. *Southam*, the particular facts of the case were irrelevant; it was the law itself that was impugned. Nevertheless, early in his opinion Chief Justice Dickson wrote that the police who were in the store on Sunday "witnessed several transactions including the sale of groceries, plastic cups and a bicycle lock."[84] Except to confirm the fact that the store was open on Sunday, these facts are beside the point. From the

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[82] *Ibid.* at 154.

[83] R.S.C. 1970, c. L-13.

[84] *Supra*, note 2 at 301.

rhetorical perspective, however, the recitation of these facts suggest the banality of the law as it is applied. Imagine, for a moment, that the transactions did not involve the sale of some plastic cups, but rather the sale of pornographic magazines, or of some other material deemed offensive. Would the Court have been so quick to specify the nature of the transactions in such a case?[85]

C. *The Rhetoric of Characterization*

Students of constitutional law quickly appreciate that the way in which a judge characterizes legislation under review can determine whether it will be upheld or struck down.[86] To illustrate the rhetorical dimension of the characterization of legislation, consider the opinion of Chief Justice Dickson in the *Big M Drug Mart* case.

At the beginning of his opinion the Chief Justice presents the *Lord's Day Act* in fairly neutral terms, as legislation prohibiting commercial activity on Sundays.[87] The tone begins to shift as a subsequent passage speaks of the "acknowledged purpose of the *Lord's Day Act* [as] the compulsion of sabbatical observance."[88] As the reasons develop, the characterizations become increasingly harsh, so that by the end of the opinion, the Act has been characterized in terms so exceptionally negative that one has no doubt that it must offend the Charter:

> To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-

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[85] The case also provides an example of another technique analogous to the rhetoric of facts. Speaking of the *Lord's Day Act*, the Chief Justice wrote: "It is important to note that any person may be exempted from the operation of ss. 4, 6, and 7 by provincial legislation or municipal charter." *Supra*, note 2 at 302. Why was it important to note these exemptions? In terms of the strict holding of the case, it would appear irrelevant. But from the point of view of rhetoric, it encourages the reader to wonder if the social purpose underlying the law can be so important given the possibility of so many exemptions from the law. Accordingly, how much of value really is being lost when the Court strikes down the law?

[86] P. Hogg, *Constitutional Law of Canada*, 2d ed., (Toronto: Carswell, 1985) at 313-314.

[87] *Big M Drug Mart*, *supra*, note 2 at 301.

[88] *Ibid.* at 333.

> Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike...The arm of the State requires all to remember the Lord's day of the Christians and to keep it holy. The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity....[89]

and

> ...[T]he true purpose of the *Lord's Day Act* is to compel the observance of the Christian Sabbath....[90]

These characterizations are reinforced by the terms used to describe the Act. For example, count the number of times the terms coercion, compulsion, and constraint appear in the opinion. These terms have a negative connotation in our language, so much so that they have been dubbed "vice words" by Professor Westen.[91] Given that the Court adopted a definition of freedom as the absence of coercion or constraint, every invocation of such a negative term as "coercion" tends to suggest that its opposite concept, freedom, is being infringed. This tends to enhance the persuasiveness of the result.

Given all of this, the conclusion that the *Lord's Day Act* offends the freedom of religion guaranteed by section 2 of the Charter seems unimpeachable. At the same time, one might question the accuracy of the Chief Justice's latter descriptions of the Act – that it requires one to keep the Christian Sabbath holy, and so on. In fact, nothing in the law requires one to keep Sunday holy or otherwise to compel the observance of the Sabbath. Nevertheless, from the rhetorical point of view, however accurate or overstated one might judge these characterizations of the Act to be, the way in which they are structured is most effective.

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[89] *Ibid.* at 337.

[90] *Ibid.* at 351.

[91] P. Westen, "'Freedom' and 'Coercion' - Virtue Words and Vice Words" [1985] Duke L.J. 541.

D. *The Rhetoric of Denigration*

A successful judicial opinion persuades its readers that the arguments accepted by the court were superior to those rejected. Typically this is achieved by arguments directed specifically to the merits of the opposing positions, but judges sometimes pursue the task of persuasion in less direct if not unconscious ways. This section considers two techniques by means of which the force of the rejected arguments can be blunted: the manner in which the issue is posed, and the manner in which the losing party is portrayed.

Experienced trial counsel appreciate that the way one asks a question can have a significant influence on the answer provided.[92] Judges know this too, as is evidenced by Madame Justice Wilson's opinion concerning section 1 of the Charter in *Singh*.

To justify the lack of a hearing before the Immigration Appeal Board as a reasonable limit to the rights guaranteed by section 7, the government argued that the Canadian procedures had been approved of by the office of the United Nations High Commissioner for Refugees, that it was common in western countries to deal with such matters administratively without hearings, and that the volume of cases before the Immigration Appeal Board was so large that it was impossible to accord a hearing in each case. In response, Madame Justice Wilson characterized the question raised by section 1 in the following terms:

> The issue in the present case is not simply whether the procedures set out in the *Immigration Act, 1976* for the adjudication of refugee claims are reasonable; it is whether it is reasonable to deprive the appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice.[93]

At the semantic and doctrinal level, there does not appear to be any difference between the two ways of posing the question. Whether or not the procedure is reasonable is a function not only

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[92] This underlies the general rule limiting the leading of witnesses in direct examination. See S.A. Schiff, *Evidence in the Litigation Process*, 2d ed., vol. 1 (Toronto: Carswell, 1983) at 178-186.

[93] *Supra*, note 2 at 218.

of the financial costs associated with holding hearings, but of the consequences to the individuals affected by the process. After all, the nature of the individual interests at stake is one of the relevant factors courts consider when determining the content of "natural justice" applicable in the circumstances.[94] If this is so, it would seem that both of the ways in which the question was posed by Madame Justice Wilson oblige us to consider the very same factors.

At the rhetorical level, however, there is a considerable difference between the two formulations. The first directs our attention towards the law and the governmental interests underlying it, while the second focusses our attention on the individuals who have been denied their rights. Moreover, the way Madame Justice Wilson states the issue implies that the decision to establish the impugned procedure was taken in full knowledge that it was contrary to the principles of fundamental justice, when it is just as plausible to assume that the drafters honestly believed that it was both reasonable and just to proceed administratively. By posing the question as she did, Madame Justice Wilson directs our attention to those features of the issue that support her ultimate conclusions.

Another technique of reinforcing one's own position is to denigrate the character or competence of those who advanced the opposing arguments. Consider the way that Chief Justice Dickson introduced the appellant's (ultimately unsuccessful) arguments in the *Operation Dismantle* case:

> As a preliminary matter, it should be noted that the exact nature of the deprivation of life and security of the person that the appellants rely upon as the legal foundation for the violation of s.7 they allege is not clear.[95]

Later in the opinion he writes:

> I believe that we are obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies.[96]

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[94] See, for example, J.M. Evans, ed., *de Smith's Judicial Review of Administrative Action*, 4th ed., (London: Stevens, 1980) at 156-240.

[95] *Supra*, note 2 at 450.

[96] *Ibid.* at 451.

The contrast between the implicit image of the appellants and that of the Court is striking. The appellants failed to argue their position clearly; the Court must make a considerable effort to understand their argument. Moreover, there was certainly a lack of clarity, if not error, in their pleadings. Can it not be said that this suggests a lack of professionalism on their part? In contrast, the Court presents itself as generous and accommodating, ready to go to whatever lengths necessary to understand the appellant's arguments. In this way we are encouraged to view those arguments as weak, and those of the Court as well founded.[97] Moreover, by putting the responsibility for losing on the appellant's counsel, the Court invokes the classical image of adjudication, thereby legitimating the decision and reinforcing its persuasiveness.

V. CONCLUSION

It remains only to conclude with three brief observations on the analysis presented here. The first concerns the benefits of taking a rhetorical perspective on the judicial opinion. It is not only that we gain insights into our legal culture by attending to the argumentative practices that make up that culture: a rhetorical analysis also can provide a perspective through which we can understand what would otherwise appear paradoxical or contradictory. For example, it has been said of the *Skapinker* decision that it "displays a curious disharmony in reasoning and approach" in that it combines broad statements of principle with an approach that is very text-bound.[98] From the rhetorical perspective, however, there is nothing at all curious about the blend of these two styles. The expansive rhetoric on the nature of constitutional interpretation that begins the opinion was a response to the

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[97] A similar denigration of the opposing viewpoint can be seen in Mr. Justice Lamer's opinion in *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)*, *supra*, note 2 at 498, where those who would interpret section 7 procedurally are depicted as viewing the issue in a "narrow and restrictive fashion," while those (including the Court) who take a broader view of section 7 are adopting "an open-minded approach."

[98] H. Scott Fairley, "Developments in Constitutional Law: The 1983-84 Term" (1985) 7 Sup. Ct. L. Rev. 63 at 120.

audience's expectations that the Charter would be interpreted liberally, as well as a signal to bench, bar, and government that the Court was taking the Charter seriously. At the same time, given that the Court did not uphold the Charter argument in *Skapinker*, its text-bound rhetoric can be understood as a response to the expectation that decisions should be rendered in a judicial and non-political manner.

The second observation concerns the role of the Court as revealed in the cases analysed. As suggested earlier, the Court's activism can be understood in terms of the rhetorical situation facing the Court: it had to communicate its view of the Charter unequivocally and unambiguously to its various audiences. It will be appreciated, however, that cases subsequent to those analysed here reveal the Court to have moderated its position somewhat. The Court's cautious interpretations of the language rights guarantees,[99] the upholding of Ontario's Sunday closing legislation,[100] and the Court's generally conservative interpretation of the remedial and jurisdictional scope of the Charter[101] suggest a Court searching for a more balanced approach to its role than its activism in the early cases would have suggested. It may be that future analyses of the Court and the Charter will bracket these initial cases as but the first of many phases through which the Court will have passed.

This leads me to my final point, and it relates to the direction that future work of this kind should take. If the general thrust of this paper has been descriptive and explanatory, it is not to suggest that this exhausts the ways in which rhetorical analysis can or should be practiced. On the contrary, critical evaluation of the political visions expressed in the cases is of central importance to a comprehensive treatment of the Court's rhetoric. It bears repeating, however, that any such analysis should be based upon a

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[99] *Bilodeau* v. *A.G. Manitoba* (1986), [1986] 1 S.C.R. 449, 27 D.L.R. (4th) 39; *MacDonald* v. *City of Montreal* (1986), [1986] 1 S.C.R. 460, 27 D.L.R. (4th) 321; *Societe des Acadiens du Nouveau-Brunswick Inc.* v. *Association of Parents for Fairness in Education* (1986), [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406.

[100] *Edwards Books and Art Ltd.* v. *R.*, (1986), [1986] 2 S.C.R. 713, 71 N.R. 161.

[101] On the scope of the Charter, see *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.* (1986), [1986] 2 S.C.R. 573, 71 N.R. 83. On the question of remedial jurisdiction under the Charter, see *Mills* v. *R.* (1986), [1986] 1 S.C.R. 863, 67 N.R. 241.

representative sample of cases if it is not to be misleading and ultimately irrelevant. Moreover, the issues raised are complex and difficult, and any responsible treatment of them necessarily must be a lengthy one if it is to avoid facile labels and undefended premises.

In this respect, it would be relatively easy to mount a critique against the societal vision expressed in the initial cases, inasmuch as it appears vulnerable to all of the criticisms made against classical liberal theory.[102] To the extent that the Court tempers its individualistic liberalism with a recognition of the claims of government and community, however, a rhetorical analysis of the jurisprudence will engage a richer and more defensible version of the liberal vision.[103] Important as these matters are, my consideration of them must await another occasion.

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[102] One would argue that the individualistic focus in the cases obscures the extent to which we as individuals are constituted socially, that the liberal vision renders other more communal forms of human association less legitimate and less realizable, and so on. See, for example, M. Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982). In my earlier analysis of these cases I was tempted by such a critique. See M. Gold, "La Rhetorique des droits constitutionnels" (1988) 22 Themis 1. I am now of the view that such a critique was premature.

[103] See, for example, J. Rawls, "Justice as Fairness: Political not Metaphysical" (1985) 14 Philosophy & Public Affairs 223. On certain problems with the communitarian perspective, see A. Gutmann, "Communitarian Critics of Liberalism" (1985) 14 Philosophy & Public Affairs 308.