The *Charter* at 30: A Reflection

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I The *Charter* as Canadian political expression

The addition of the *Canadian Charter of Rights and Freedoms*[1] to Canadian constitutionalism was transformative, bringing to the fore a constitutional relationship that, although not entirely absent, had been considerably overshadowed by the focus on institutional and jurisdictional structures and relationships. The new paradigm—a range of constitution-based controls of the relationship between state and citizen—not only shifted a significant class of personal interests from the domain of politics to that of law, it also generated a feedback effect on Canadian constitutional jurisprudence, an effect that might be considered, not altogether flatteringly, modernizing.

This shift in constitutionalism can initially be approached through a technical provision in Canada's 1982 constitutional reforms. Section 58 of the *Constitution Act, 1982*[2] states that the Act will come into force on a day fixed by a proclamation issued by either the Queen or the Governor General. The Act was proclaimed in force on April 17, 1982,[3] and it was the Queen who issued the proclamation. There is irony in this choice—and likely the irony was intended. Two highly significant elements of Canada's new constitutional provisions were, first, the amending formula, which established a purely domestic process for altering the constitution, and in doing so, finally allowed (after a half century of waiting) constitutional patriation and, second, the *Charter,* which constitutionalized, but not fully entrenched,[4] an extensive regime of civil liberties.

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

2 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 58 [*Constitution Act, 1982*].

3 Elizabeth R, Proclamation, 17 April 1982, SI/82-97, reprinted in RSC 1985, App II, No 45.

4 Section 33 of the *Charter* grants Parliament and each provincial Legislature the power to provide that any of its enactments shall operate in spite of any *Charter* provision contained in ss 2 and 7 to 15 of the *Charter*. Given the normal vagaries of interpretation and application of constitu-

Canada's campaign to decolonize and become sovereign had been protracted and difficult. Of course, under some conceptions of the pre-1982 amending process, Canada's capacity for making constitutional changes was already completely domestic, and British parliamentary formalization was accepted, if not originally prescribed, by Canadian constitutional law.[5] Nevertheless, Canadian constitutional self-determination was fully and unambiguously realized in the *Constitution Act, 1982*. As well, it was a purely Canadian political process that established the terms of these constitutional reforms. Resurrecting a monarchical form that had, in the ordinary course of events, remained unexercised for over a third of a century was a slightly mocking punctuation to mark the end of imperial influence over Canada.[6]

The other dominant element of the 1982 amendments, the *Charter*, also expressed a deep constitutional shift—from citizens as subjects, with their interests protected through democratic structures, to self governance rooted in the essential self-governing conditions of citizens' liberty and entitlement to fair treatment. The *Charter* brought Canada in line with the world-wide post-war political idealism that shaped constitutional development at the time (and still does) and created, as human rights regimes do, a change in the sense of the basis for political legitimacy. Republicanism, no more than democracy, is not a single political structure that demands the presence of necessary elements. It carries within it the idea of political authority and responsibility grounded in a strong conception of a self-governing state whose legitimacy is dependent on citizens' unfettered political capacity and their entitlement to a degree of personal autonomy. Of course, the 1982 constitutional reforms did not establish republicanism, or eradicate the Canadian monarchy, nor

tional texts, "entrenchment" is hardly a clear concept. Nevertheless, constitutional entrenchment suggests, among other things, a regime under which legislation must comply with constitutional standards as determined through some process other than the process of legislation itself. This is precisely the condition that, for a limited period, s 33 removes—with the result that the rights in ss 2 and 7 to 15 are constitutionally recognized, and may even be carefully considered by legislatures when overriding the *Charter*, but are not fully entrenched.

5 This is exactly what the Supreme Court of Canada did not agree with in its remarkably decontextualized majority opinion on the law of constitutional amendment in *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753.

6 *Letters Patent Constituting the Office of the Governor-General*, George R, Proclamation, 1 October 1947 C Gaz LXXXI, No 12. The Sovereign's powers were, by this document, assigned to the Governor General, allowing for provincial "deputies" and for the performance of several residual functions, until amended by the Sovereign which amendment has not occurred. A full description of the 1947 Letters Patent is found in Christopher McCreery, "Myth and Misunderstanding: The Origins and Meaning of the Letters Patent Constituting the Office of the Governor General 1947" in Jennifer Smith & D Michael Jackson, eds, *The Evolving Canadian Crown (*Montreal & Kingston: McGill-Queen's University Press, 2012) 31.

were they necessary in order to create a new and coherent constitutional regime. They did, however, place the monarchy even more outside the stream of Canada's organic political development and moved the country toward a participatory (or a "We the People") democracy. Having the Queen proclaim our new constitutional order may have served to assure Canadians that, while Canada had significantly shifted its constitutional basis, there had been no revolution; that fundamental change can occur while retaining continuity with the existing political order. On the other hand, perhaps having the symbol of the old regime usher in the new regime was designed to dramatize the deep constitutional transformation that was taking place.

The juxtaposition of constitutional precepts that thirty years ago attended the inception of clear national sovereignty and constitutionalized human rights both replicates, and has been perpetuated in, Canada's tireless (and, one is forced to accept, tiresome) *Charter* debate—the debate over whether the democratic instrument of parliamentary sovereignty is the citizens' best defence against state violation of key interests. Academic Canada, as opposed to popular Canada, has not fallen into the *Charter* culture; it has become locked in a *Charter* preoccupation.

The political agreement that included the *Charter* in the patriation amendments emerged from a clash over the essence of liberal democracy that was intense and has proven to be durable. For a while, the strongest opposition to entrenched rights came not from social conservatism (although that perspective, too, saw the *Charter* as damaging society through licensing the pursuit of under-socialized interests and excessive individualism[7]), but from the champions of social democracy who feared that the *Charter* would bring about the judicial roll-back of socially progressive legislation and the withering of political activism on behalf of the socially disadvantaged. The rallying point for the latter group was a United States Supreme Court judgment from 1905 that reflected the primacy of market values from that earlier age.[8] Those concerns were displaced by a new sense of government that saw protective legislation of the modern activist state develop. That half century of development

7 The force of political voices is never easy to assess precisely, but social conservatism's critique of the *Charter* has not actually fallen away; its expression is commonly couched in claims of "judicial activism". See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, (Toronto: Irwin Law, 2001). A series of judicial activism claims is described in ch 10, "Dialogue between Courts and Legislatures" at 175.

8 *Lochner v New York*, 198 US 45 (1905). The US Supreme Court struck down a law to limit the work week to sixty hours as a violation of the Fourteenth Amendment's due process clause. This case is a long-standing symbol of a judicial tendency to *laissez-faire* jurisprudence, even, it seems, in jurisdictions that have constitutionalized neither property rights nor freedom of contract.

also seemed to provide no reason not to insist on the danger that the *Charter* might restore *laissez-faire* policies.[9]

However, other arguments presented by social democrats were more structural: legislatures can make allocative and regulatory decisions from a broader context than judges can and, so it is claimed, with a better real-world sense of social and economic conditions;[10] judges make rights decisions that shape how society deals with some of society's most controversial issues, yet there is no mechanism for holding them politically accountable; constitutional rights might deflect public engagement away from politics; and, finally, *Charter* terms are hugely indeterminate and this gives scope to judicial activism and subjectivism. The case in favour of constitutional rights was simply this: a liberal democratic state tries to implement the decisions of majorities and yet national majorities may well prefer to impose on elected representatives a structure of restraint based on long-term values and principles.[11] In fact, there is more than enough evidence in Canadian history (and in the history of democracies generally) to suggest that this would be a prudent democratic choice. Moreover, the rule of law lies at the heart of liberal democratic government, and this principle ensures that power-holders exercise only those powers assigned to them by constitutions and statutes. Adopting a richer range of constitutional restraints, including barriers to governmental oppression of individual liberties, the loss of due process, denials of equality and oppression of vulnerable minorities, is precisely the constitutional agenda that addresses the greatest threats that have been posed by states' coercive capacities.

One might have hoped that this hard-fought debate over the place of constitutional rights would have ended with the resolution reached between the prime minister and premiers in Ottawa in November 1981. But it has not.[12] This would have been a sensible response for three reasons. First, further constitutional change is not easy (and, perhaps, not even likely) and, even if it were, the one thing that is not remotely likely to be altered is the terms of

9 The great moment of vindication for those holding this anxiety came in the Supreme Court of Canada's majority decision in *Chaoulli v Quebec (Attorney General)*, 1 [2005] SCR 791, which held that the prohibition against private health care insurance violated the notion of personal security. In fact, the *ratio decidendi* of this case is not *Charter*-based, nor has this decision been the cause of privatization encroachments on Canada's public health care system.

10 This view, of course, ignores the inevitable force of political ideology on the legislative attention that is paid to policy issues addressing human condition and meeting human needs.

11 In sophisticated democracies it is not usual to believe that there is just one process for discerning popular support. This explains the complexities of the constitutional amendment process found in Part V of the *Constitution Act, 1982*, *supra* n 2.

12 See e.g., Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

the *Charter*. Second, the endless political debate over "entrenched" rights has served no real purpose. A constitutional reform agreement was reached in 1982 and we now have a new basic public law. What a mature polity and a mature legal community would normally do is try to understand it and its implications for state structures and relationships, and seek to understand—and criticize—the development of legal doctrine under it. Third, this criticism of the political project behind the *Charter* has been mustered to counsel a particular form of interpretation—interpretation that limits court findings of a *Charter* breach. This campaign represents a politicization of the judiciary that those who recommend it would normally decry.[13] It is judicial activism when judicial application is governed by a political agenda—including the political agenda that judicial supervision of political choices undermines democracy.[14]

The *Charter*, then, was born in the conflict that reflects Canada's long-standing constitutional irresolution—the conflict between the doctrines of separation of powers and parliamentary supremacy—as if, in modern constitutionalized liberal democracies, there can be doubt about the former or any thoroughgoing reality to the latter. And it continues to the present in scholarship and in decisions. The debate might appear to be about the strength of our actual commitment to human rights, or about appropriate judicial methods. In truth, however, it is about structures for holding political power accountable, and the tide of history—as well as the tide of popular conceptions of political legitimacy—is against the idea that political majorities provide all the legitimacy that political power requires. The *Charter* both reshaped Canada and reflected Canada's shifting and modern political sensibility.

13 This approach is examined (and cautiously criticized) by Aileen Kavanagh, "Deference or Defiance?: The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) 184 at 200.

14 My own track record in accepting the terms of the political agreement that led to the *Constitution Act, 1982* is less than perfect. I have continued arguing that including the rights override provision—s 33 of the *Charter*—was a mistake on the grounds that it exposes vulnerable and unpopular minorities to legislative scapegoating and that it creates constitutional unintelligibility through telling legislatures that there are constitutional limits to their powers, except when they decide they wish to exercise their powers without regard for such limits. See John D Whyte, "On Not Standing For Notwithstanding" (1990) 28:2 Alta L Rev 347 and John D Whyte, "Sometimes Constitutions Are Made in the Streets: the Future of the *Charter's* Notwithstanding Clause" (2007), 16:2 Const Forum Const 79. These articles do not, however, suggest direct constitutional reform or a particular judicial stance with respect to the interpretation of s 33.

II The *Charter* in Canadian politics

In *Charter* cases, the courts judge the legality of Canadian public policies—the public policies behind legislation and administrative practices and behind implementing, applying and enforcing laws. In this way, the decisions from *Charter*-applying courts set the scope of our political program and shape the actions of public government. The list of changes that *Charter* decisions have made to how Canada is governed is lengthy and significant and touches on every aspect of social life that is mediated through the legal process—both the legal processes of state action in civil and criminal regulation and, more uncertainly and more controversially, the legal processes bearing on private action.[15]

There are, of course, dramatic instances of court interruption of governmental programs, including regulation of abortion, health care delivery, suppression of smoking, restrictions to provide school safety, minority language school regimes, restriction of same-sex marriages, election regulation, and anti-discrimination policies. What sometimes seems even more surprising are the instances in which the Supreme Court of Canada has decided that the *Charter*'s protections should not extend to checking governmental actions that limit liberties or deny equality or due process, such as the prohibition of assisted death, denying equal pay to women, imposing state burdens on exercises of religious commandments, limiting labour rights, or imposing mandatory retirement. Naturally, listing results of *Charter* cases in this allusive and decontextualized way reveals little about either the legal content of the *Charter* or the actual force of the *Charter* on Canadian public regulation. It does, however, say something about the ubiquity of *Charter* values in assessing public policy and, therefore, something about the heightened role of the judiciary in monitoring the choices made by governments. Perhaps this only confirms what we already well know: the legal process engages society in action and if the norms for state conduct are expanded to include the grand and broad themes of liberty, justice, fairness and equal respect, there will be no end of instances in which these ideas are salient. On the other hand, there is a tremendous amount of governmental regulation that does not touch on *Charter* protections and it would be a mistake to portray Canadian political life as having become haunted or undermined by the spectre of *Charter* claims.[16]

15 A list of *Charter* impacts on policy is efficiently provided in Kent Roach, "The government v the *Charter*" *Ottawa Citizen* (14 April 2012), online: Ottawa Citizen <http://www.ottawacitizen.com/news/government+Charter/6458497/story.html>.

16 This view is not shared by Andrew Petter. See Andrew Petter "Legalise This: The *Chartering* of Canadian Politics" in James B Kelly and Christopher P Manfredi, eds, *Contested Constitutionalism:*

Questions about the impact of the *Charter* on political life remain. Has the vitality of the *Charter* in the relationship between government and citizen proven to be a frustration to governments' regulatory ambitions—ambitions, for instance, over national security, immigration, crime and corrections and state confidences? Has the *Charter* dampened public engagement in political processes, as the social democrats feared, with the result that the country has been made more prone to political fundamentalism and manipulation? Has the *Charter* really worked in Canada to produce more open, more just and fairer political communities, or for that matter, a more caring and equal society?[17] Answers to these questions are not obvious. We certainly live in an age of more acute political partisanship in which the both the force of the conventions of restraint on political power and the effectiveness of democratic processes have weakened. We seem also to live in an age in which governmental concern over the conditions of social vulnerability, social need and social exclusion has largely vacated the political stage. We are in an age in which the sources of social disorder are more located in human frailty than in systemic social dysfunction. These trends, if accurate, have come during Canada's *Charter* era. In fact, the aphorism that, in a just society, rights are not needed and in an unjust society rights will not cure injustice[18] seems apt for our time. But surely it is also overstated; the *Charter* in Canada has cured injustices and stopped human rights violations. But, we can also wonder if it has contributed to a climate of political indifference to individual and minority group entitlements. Although it is appropriate to wonder about the state of our political community and what has influenced it, these issues of the current nature of our politics and the causes of it lie beyond certain analysis.

It does seem possible, however, to identify a political regulatory effect to the *Charter*, namely the Supreme Court's carefully wrought restraints on the federal government's campaign against wrong-doers pursued through

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Reflections on the Canadian Charter of Rights and Freedoms (Vancouver: UBC Press, 2009) 33 at 48. Petter laments the intrusion of legal restraints into political discourse over policy choices, especially resort to assumed legal limits to avoid taking political responsibility for contentious policy decisions. On the other hand, some, including me, might point to the experience of political indifference to constitutional limits.

17 As Christopher Manfredi has observed, some believe that "too great a reliance on the private processes of litigation can both exacerbate social conflict and enervate public discussion of important political questions." Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed (Don Mills, ON: Oxford University Press, 2001) at xii.

18 This sentiment was expressed (more eloquently) by Learned Hand, "The Contribution of an Independent Judiciary to Civilization [1942]" reproduced in Irving Dilliard, ed, *The Spirit of Liberty: Papers and Addresses of Learned Hand*, 3d ed (Chicago: University of Chicago Press, 1977) 155 at 164.

abridgements in the standards of fair process and fair treatment in criminal justice. For instance, in the *Charkaoui* case[19] the Court held that keeping all access to the evidence that grounded a certificate of detention from a person who is detained under the *Immigration and Refugee Protection Act,*[20] or his advocates, violated a principle of fundamental justice. The Court's view was that expecting a reviewing judge to evaluate the evidence in the certificate without any possibility of analysis or argument presented from the detained person's perspective keeps the process from being the "fair hearing" that principles of fundamental justice require. However, the claims of the government based on the imperatives of national security did not go unheeded by the Court. It was willing to entertain a process of limited disclosure under which the detained person had access to the information on which the certificate was based, but not personally or even through his counsel. Access was granted only through the eyes of a "special counsel" who could, on the detained person's behalf, challenge the meaning given to the evidence by the government. This case hardly stands as a resounding victory for the basic right to have a full defence, but it does preserve an important sliver of due process in that it guarantees that a reviewing judge hears a perspective other than the Crown's on the evidence's significance. The judgment preserves the basic idea that judging between formally presented competing claims of law and evidence is an indispensable condition in preserving the rule of law.

Likewise, in the *Tse*[21] decision of April 2012, the Court struck down a section of the *Criminal Code*[22] that allowed interception of private communications without either judicial authorization or, at any time, disclosing to the person whose communications were intercepted that an interception had taken place. Although the Court recognized the need for speed and secrecy in exigent circumstances, it felt that the open-endedness of such interceptions and the total lack of accountability for them, even after exigent circumstances had ended, amounted to an unreasonable search and seizure. The provision therefore violated Section 8 of the *Charter*. The case does not significantly restrict police powers—and certainly does not in any way impede the ability of the police to investigate in an emergency[23]—but it does stand up for the thin tenet of privacy that persons who have been intruded upon by the state, have a right to know that they have been the subject of state surveillance.

19 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*].
20 SC 2001, c 27.
21 *R v Tse*, 2012 SCC 16, [2012] SCJ no 16 (QL) [*Tse*].
22 RSC 1985, c C-46, s 184.4.
23 *Ibid* at para 98.

These cases do not frustrate the functioning of the administration of justice. They represent defences of core ideas of due process, fair hearing and privacy. What are saved for the citizen are rudimentary aspects of the principles of fair government. Perhaps this is what the *Charter* can do in an age of strong state power—remind governments that basic principles and basic conditions of good government must be respected and not be gratuitously overridden. Admittedly, this is not a stout defence of liberty, but in the liberal democratic project of constructing balanced governmental powers, it is certainly something of value.

III The *Charter* and rights law

Perhaps the aspect of the *Charter* age in Canada that raises the most concern is the weakness of the *Charter* jurisprudence that has developed. This is not to say that there are not plenty of well-written judgments, but the most ordinary of jurisprudential hopes—that a coherent body of legal doctrine that begins to shed light on the range of constitutionally protected citizen liberties, human rights and minority group rights—has not been met. One cannot say that this is the result of the Court's indifference to the importance of legal doctrine to maintaining the rule of law and judicial legitimacy; the Court has often tried hard to set out clear doctrines for approaching the *Charter*'s terms, but these decisions have had an indifferent record of disciplining subsequent decision-making. While some decisions seem rigorously principled, the influences of conventional thought and political expectations seem to be dominant in others.

The *Charter* era started out well with three early judgments giving clear recognition that the *Charter*'s role is to control legislative abridgments of rights. These judgments applied a purposive analysis to the *Charter*'s protections, and the application of the *Charter*'s terms tracked the reasons why a nation would think it sensible to create relevant restrictions on governmental power. In *R v Big M Drug Mart*[24] the Court connected personal religious freedom to the need to preserve state neutrality towards religious faiths. In this way, the somewhat obscurely composed Section 2(a) gained clarity of purpose and meaning. The Court read the provision not just as a personal right but as a precept of just state ordering. In addition, the Court came to the important conclusion that, under rule of law doctrine, when a law is invalid because it violates a term of the constitution, no person (including corporate persons) should be made subject to the invalid law's application.

24 [1985] 1 SCR 295.

In *Hunter et al v Southam Inc*[25] the Court clearly grounded the *Charter*'s prohibition against unreasonable search and seizure in the purpose of protecting individuals' privacy against the mechanisms of the state. It may be that the *Charter* claimant in this case, and the material in respect of which the privacy right was claimed, were not particularly sympathetic, but the Court recognized that groundless invasions by state agents of a persons' property (or invasions whose reasonableness has not established by a warrant) and seizures of property that are not shown to be based on reasonable suspicion, are among the worst of the state's oppressive practices.

In *Andrews v Law Society of British Columbia*[26] the Court began the long process of fixing the equal protection guarantee of the *Charter* in a specific historic and social type of unequal treatment, but at the heart of the decision was a straightforward analysis that showed that barring landed immigrants from the legal profession served no intelligible state purpose. Canadian equality jurisprudence has, of course, never been this simply put and perhaps that has been a wise move, constitutionally speaking, but *Andrews* had the virtue of going directly to the problem of discrimination that arises from differential treatment of distinct groups for no apparent or convincing reason. Since then, equality jurisprudence has spun and floundered, but as is evident in the reasons given in *R v Kapp*,[27] there exists the core constitutional idea of preventing legislative classifications that trade not on the idea of regulatory coherence, but on the adoption of facile and destructive social assumptions.

The reasons for the uneven development of *Charter* jurisprudence may be numerous. One reason may be that law itself has grown less doctrinal and increasingly contextual. For the application of laws to lead to just outcomes, principle (or doctrine) must be balanced with context, and it is no defeat of justice that there is sensitivity to how a judgment will work out from the perspective of common humanity and everyday experience. Nevertheless, in law, as in many other areas of society that operate within normative understandings, the influence of acceptable answers, right outcomes, common understandings and experiential perspectives seems to grow stronger. This is a social phenomenon too vast and too uncertain to explore well here. However, confidence in the wisdom of inherited forms and precepts seems weakened. Perhaps this is due to the speed at which knowledge changes and, with knowledge, values. Possibly, it is the result of the deconstruction of institutional roles and rules

25 [1984] 2 SCR 145.
26 [1989] 1 SCR 143 [*Andrews*].
27 2008 SCC 41, [2008] 2 SCR 483.

under which the neutrality—and the good faith—of ordering principles are challenged, although this is hardly a new intellectual practice. In any event, eminent texts and textualism more generally have lost their authority, and have lost their grip on the idea of what is entailed in being educated. It should not be surprising that their normative influence has also waned. Nor is it surprising that law texts also compel less fidelity. And this tendency is bound to be more pronounced when a legal text is expressed generally and draws on trans-contextual notions so openly that its force must always be calculated with some degree of recognition of immediate needs and conditions.

Another reason for the *Charter*'s doctrinal weakness may be an unfortunate effect of the way the Supreme Court constructed the analytic approach to be used in applying Section 1 of the *Charter*. That section says that *Charter* rights are subject to limitations that can be justified in a free and democratic society. One way to understand this provision is that it is a warning to *Charter* readers that the rights listed will necessarily have their application limited by the general idea that recognition of constitutionally protected activity must accommodate others' interests, as well as broad social interests. The underlying question presented by the *Charter*'s open expression of the need for social limits on rights is which interpretive approach is likely to produce the best—the most illuminating and most directive—body of rights jurisprudence. Does better jurisprudence arise through systematizing the process for weighing the case for the legislative limitation placed on a right and focusing on the elements prescribed by that system, or through calculating the scope and weight that ought to be given to a protected right in both the context of the rights-based activity that is being restricted and the context in which it has been exercised? In Canada, we have chosen the former analytic route.[28]

As a concomitant of this approach, courts have given listed rights, especially Section 2 rights, broad scope.[29] From that position, almost all judicial attention is given to the case that has been made for the governments' limitations on rights. This judicial attention to governments' claims may have caused rights to be limited. The focus on governmental calculation for rights limitations is well-suited to grasping this specific project of governments and

28 See, *R v Oakes*, [1986] 1 SCR 103.

29 See Bradley W Miller "Justification and Rights Limitations" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) 93 at 115. Miller argues that this effect of placing doctrinal emphasis on s 1 of the *Charter* has led to reasoning that is "unreasonably fettered or deflected by an unwarranted ascription of conclusory force to preliminary findings of rights infringement."

close examination of the government's purposes in restricting rights might buttress the reason and logic behind those restrictions. Furthermore, the purposes of liberties and the ideas of constitutional justice that lie behind their recognition are not articulated. Without this liturgical reminder of the place rights have, a sense of their value can fade.[30]

Of course, it cannot be demonstrated that the dominant approach to *Charter* application, with its focus on governmental purposes, has worked to the advantage of governments. Certainly, there are cases in which governmental goals seem to have been given an easy ride as they have destroyed a religious community's economic structure[31] or have wiped away a hard-fought gain in the form of a pay equity agreement.[32] However, it is not clear that these conclusions were inevitable twists that flowed from the primacy of Section 1 in the *Charter*'s application and in the weighing of competing interests. There have been cases in which the demonstration of a reasonable limit has been subject to rigorous scrutiny.[33]

What is clear is that this approach has intensified analysis of the contextual conditions of regulation and appears to have defeated the development of a rights jurisprudence that is rooted in each case in the social and political value of the protected right and in the legal question of what is the appropriate range of a constitutionally protected right. It is certainly true that state and social needs may properly circumscribe the exercise of any activity that falls within the general description of a *Charter* right, but the legal question is not just whether the state has good reason to abridge it but whether the purposes behind the constitutional recognition are not valuably served by its protection in that context.

The meanings given to constitutions are subject to a high level of dynamism. The structures of legal argument and interpretive principles shift. For instance, both Section 7 and Section 15 might seem to have settled into a

30 See Alex Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum J Transnat'l L 73 at 77. The authors defend rights jurisprudence that centres on balancing rights claims against social claims. They point out that proportionality analysis has become the dominant interpretive technique of rights adjudication throughout the world. They also note, without alarm, that proportionality analysis is the most intrusive basis of judicial review: "PA [proportionality analysis] does not camouflage judicial lawmaking. … [I]t requires courts to acknowledge and defend—honestly and openly—the policy choices that they make when they make constitutional choices."

31 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.

32 *Newfoundland (Treasury Board) v NAPE*, 2004 SSC 66, [2004] 3 SCR 381.

33 Perhaps the most famous of such cases is *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199.

pattern of restricted application, letting these basic constitutional goals of fair and equal treatment reach into the general territories of regulatory unfairness or unjust distinctions between people. But, in truth, the structures around the guarantee of equal protection and principles of fundamental justice are anything but fixed for the ages. Notions of what is egregious public regulation will change and judicial willingness to intervene on the basis of these general principles of just government will also alter as social values and interests evolve. The *Charter* is, after all, part of our constitution. It is meant to serve the nation's most eminent political needs over a long period. How it should meet this task is bound to develop in response to the always changing ideas of political need. We can only guess at the future course of its impact on Canadian politics and law.