Constitutionalizing Everything: The Role of "*Charter* Values"

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Explicit constitutional provisions can be seen as mere examples of broader zones of constitutional protection based on underlying values or principles, in which case the constitution has a broad, elastic scope. Alternatively, a constitution might protect only the explicit examples of its underlying values, thus leaving much of public importance beyond its reach. In Canada, controversy about these different understandings revolves in part around the appropriate judicial use of "Charter values," an issue that most recently divided the Supreme Court in Ontario (Attorney General) v. Fraser, 2011. *While "constitutionalizing everything" — or nearly everything of public importance — in the name of underlying values has become an increasingly dominant international perspective, it remains a matter of significant and enduring controversy. We explore this controversy by setting the Charter-values debate in* Fraser *in the context of similar debates in other cases.*

On peut voir les dispositions constitutionnelles explicites comme de simples exemples de zones plus larges de protection constitutionnelle fondées sur des valeurs ou des principes sous-jacents, auquel cas la portée de la constitution est générale et élastique. Il se peut aussi qu'une constitution protège uniquement les exemples explicites de ses valeurs sous-jacentes, laissant ainsi beaucoup de choses ayant une importance pour le public hors de sa portée. Au Canada, la controverse au sujet de ces différentes compréhensions tourne, en partie, autour de l'utilisation judiciaire appropriée des « valeurs consacrées par la Charte », une question qui a récemment divisé la Cour suprême dans Ontario (procureur général) c. Fraser, 2011. *Bien que le fait de « tout constitutionnaliser » — ou la presque totalité des choses ayant une importance pour le public — au nom de valeurs sous-jacentes soit devenu une perspective internationale de plus en plus dominante, cela demeure une question de controverse significative et persistante. Nous examinons cette controverse en présentant la discussion sur les valeurs consacrées par la Charte de* Fraser *dans le contexte de discussions similaires dans d'autres cas.*

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Introduction

The concept of "*Charter* values" — expressed either in that very term or closely related language — has appeared in more than one hundred Supreme Court of Canada decisions[1] since the *Charter of Rights and Freedoms*[2] was adopted in 1982. Why? The *Charter* protects "rights and freedoms"; what, if anything, is added by the idea of *Charter values*?

It turns out that in many instances quite a bit is added. While the term *Charter* values is sometimes used simply as a synonym for *Charter* rights and freedoms,[3] it often serves an independent jurisprudential purpose. In some instances, the term denotes a jurisprudential strategy to make a law *Charter* compliant without resorting to the sledgehammer of invalidation.[4] In other cases, *Charter* values are invoked as underlying concepts that help judges give meaning to, and sometimes expand, the *Charter*'s explicit rights and freedoms.[5] This last usage of *Charter* values — what might be called the underlying-concepts usage — is the focus of this article. In this sense, *Charter* values are part of the legally "unwritten" and "underlying" principles used to decide such cases as the *Quebec Secession Reference* (1998);[6] indeed the "underlying principles" identified by the Court in the *Secession Reference* are also referred to

1 This figure is derived from the Canadian Legal Information Institute's (CanLII) database (www.canlii.org) in late 2013. A total of 105 of the Supreme Court of Canada's decisions contain the phrase "*Charter* values." This total increases by 36 when "values of the *Charter*" and "*Charter* principles" are also contained in the search.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being scheduled B of the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 For instance, in *Rodriguez v British Columbia (AG)* [1993] 3 SCR 519, 107 DLR (4th) 342 at 388 the Court used section 7's rights to life, liberty, and security of the person interchangeability with the values of life, liberty, and security of the person.

4 *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174; *R v Swain*, 63 CCC (3rd) 481, [1991] 1 SCR 933; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 [*Bell ExpressVu*]; Mark S Harding & Rainer Knopff "'*Charter* Values' vs *Charter* Dialogue" (2013) 31 NJCL 161.

5 In reflecting on the significance of section 1 of the *Charter* in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 at para 64, the Court stated:

> [It] must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, 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. The underlying values and principles of a free and democratic society are the genesis of rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown despite its effect, to be reasonable and demonstrably justified.

6 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at paras 67, 149 [*Secession Reference*].

as "constitutional values" throughout the judgment, and some of those principles are clearly *Charter* values. *Charter* values in this sense are also akin to the penumbral rights used by the United States Supreme Court in famous privacy rights cases.[7]

To avoid confusion, the constitutional values or principles we are concerned with should be distinguished from constitutional conventions. Although conventions — politically generated, extra-legal constitutional rules — are also generally described as "unwritten" parts of our Constitution, courts consistently deem them to be judicially unenforceable (though judges sometimes recognize and help to define them).[8] By contrast, the issue posed by the values or principles that underlie written constitutional provisions is precisely whether they are as judicially enforceable as their explicit legal examples.

In other words, while it is undeniable that explicit constitutional provisions reflect underlying values or principles, the question is whether, or to what extent, these values are themselves judicially enforceable constitutional law. There exists an expansive view of constitutionalism according to which explicit provisions are mere examples of broader zones of judicial protection based on underlying principles. In this view, most issues of public importance have a fully legal constitutional dimension. A more restrictive view insists that constitutional law protects only the explicit examples; this understanding distinguishes between the legitimate use of underlying values to construe explicit provisions and their illegitimate use to create entirely new rules of constitutional law. In this view, the democratic side of a "constitutional democracy" can persist only if some publicly important issues lie beyond the reach of the legal Constitution — only, that is, if we do not constitutionalize everything. The clash between these two perspectives about the proper scope and reach of constitutional law is one of enduring controversy, not only in Canada but also throughout the liberal democratic world.[9] The central question is how much we want to constitutionalize in the legal, judicially enforceable sense.

In Canada, the debate between the expansive and restrictive views of constitutionalism arose most recently in the 2011 judicial disagreement about *Charter* values in *Ontario (AG) v Fraser*.[10] Although the expansive view has

7 *Griswold v Connecticut*, 381 US 479, 85 SCt 1678 [*Griswold*].

8 *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*]; *Conacher v Canada (Prime Minister),* [2010] 3 FCR 411, 2009 FC 920.

9 David Robertson, *The Judge as Political Theorist: Contemporary Judicial Review* (Princeton: Princeton University Press, 2010) [Robertson]; Thomas MJ Bateman, "Rights Application Doctrine and the Clash of Constitutionalisms in Canada" (1998) 31 Canadian Journal of Political Science 3.

10 *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

become dominant in recent decades,[11] *Fraser* shows that the debate is unlikely to end anytime soon. *Fraser*, in other words, provides a useful occasion to investigate and analyze the *Charter* values debate. This article does so by setting the *Fraser* disagreement in the context of similar debates in other cases. We begin by showing how the disagreement in *Fraser* arose out of the overall development of *Charter* jurisprudence concerning labour relations. We then situate the *Fraser* debate about *Charter* values in a broader historical and comparative context, using as examples one American case (*Griswold*[12]) and two Canadian cases (the *Provincial Judges Reference*[13] and the *Secession Reference*[14]). These four examples suffice for our limited purpose: to outline the essential contours of the debate about constitutional reach and to establish its ongoing relevance.[15] As we shall see, *Fraser* arguably provides less solid grounding for the restrictive view of constitutional reach than do the other three cases, but the fact that the controversy emerged even in the less propitious circumstances of this case demonstrates the debate's continuing vitality.

Charter values and labour law: The road to Fraser

Fraser is the most recent in a series of cases concerned with whether, and if so to what extent, the *Charter* constitutionalized the common elements of North America's "Wagner model" of labour relations, including compulsory collective bargaining and the right to strike.[16] Section 2(d) of the *Charter* guarantees "freedom of association," but in an early *Charter* decision, *Reference Re Public Service Employee Relations Act (Alta)*, a majority of the Supreme Court determined that this was an individual rather than a collective right.[17] That is, section 2(d) guaranteed the right of individuals to do in association what they were free to do as individuals, but it did not vest rights directly in such groups as unions. Thus collective bargaining and the right to strike were not

11 Robertson, *supra* note 9.

12 *Supra* note 7.

13 *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, 50 DLR (4th) 577 [*Provincial Judges Reference*].

14 *Supra* note 6.

15 A more detailed examination of the occasions on which the underlying values approach arises, and with what success, must await another study.

16 *Supra* note 9.

17 *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161 [*Reference Re Public Service*] is one of the three *Labour Trilogy* Supreme Court decisions handed down on the same day in 1987, see also *Public Service Alliance Canada v Canada*, 1 SCR 424, 38 DLR (4th) 249; *Retail, Wholesale and Department Store Union v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277. These three cases dealt with the following three respective labour issues: provincial legislation prohibiting essential public sector workers from striking, federal legislation altering public sector wages outside of collective bargaining, and back-to-work legislation.

constitutionally mandated. However desirable these rights might be in principle, the *Charter* did not require all desirable things. As Justice McIntyre put it in the majority 1987 judgment, "while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time."[18] From this perspective, labour law, in its collective dimensions, had been left to the legislative arena. As Christopher Hunter puts it, the Court's traditional jurisprudence "viewed the collective bargaining process as a creature of modern legislation, distinct from, and not protected by, the fundamental freedoms envisioned by the *Charter*."[19] As late as 2009, constitutional authority Peter Hogg affirmed the appropriateness of this perspective, arguing that "without any clear prescription in the *Charter*, there is much to be said for leaving the regulation of labour relations to elected legislative bodies (and the sanction of the ballot box)."[20]

This reading of the *Charter*'s s. 2(d) "freedom of association" has been controversial from the beginning. It generated the vigorous dissent of Justices Dickson and Wilson in *Reference Re Public Service*, for example. But it stood the test of time until 2001, when, in *Dunmore v Ontario (AG),* the Court found more scope for collective rights in section 2(d).[21] The issue concerned the legislated rights of Ontario farm workers. Traditionally, agricultural workers had been explicitly excluded from the protections of Ontario's *Labour Relations Act*.[22] In 1994, Ontario's New Democratic government enacted the *Agricultural Labour Relations Act (ALRA)*, giving collective bargaining rights to farm workers for the first time.[23] In 1995, the newly elected Harris Conservatives repealed the *ALRA* and re-subjected farm workers to their prior exclusion from all *LRA* protections. [24] The farm workers went to court to challenge both the Harris government's repeal of the *ALRA* and the section of the *LRA* that excluded agricultural workers from its ambit.

In *Dunmore,* the Court, while not rejecting the individual rights involved in "freedom of association," emphasized that such rights are sometimes best

18 *Reference Re Public Service*, *ibid* at para 149.

19 Christopher Hunter, "Defining the 'Meaningful' — Collective Bargaining and Freedom of Association (Ontario (Attorney General) v. Fraser) Part I" *The Court* (15 September 2011), online: The Court <http://thecourt.ca>.

20 Peter W Hogg, *Constitutional Law of Canada*, 5 ed (Scarborough: Thomson, 2007) cited in *Fraser*, *supra* note 10 at para 227.

21 *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*].

22 *Fraser, supra* note 10 at para 5.

23 *Ibid.*

24 *Ibid.*

pursued through activities that "cannot be performed by individuals acting alone."[25] Section 2(d) must include such "collective" rights, said the *Dunmore* Court. This is necessary, wrote, Justice Bastarache, because

> [T]he press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members.[26]

This assessment means not only that "a language community cannot be nurtured if the law protects only the individual's right to speak,"[27] but also that there must be a freedom to organize in labour relations. That is, section 2(d) would no longer protect just the right to do collectively what individuals could also do separately. Rather, it would now vest rights in groups as such, including labour associations:

> [T]he law must recognize that certain union activities — making collective representations to an employer, adopting a majority political platform, federating with other unions — may be central to freedom of association even though they are inconceivable on the individual level.[28]

This did not mean that there was now a constitutional right to collective bargaining or a right to strike. The *Dunmore* Court was not prepared to reject so completely the precedent set in the *Reference Re Public Service* and affirmed in several subsequent cases. Thus, Justice Bastarache approvingly underlined the fact that "this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(*d*)."[29] Nevertheless, the fact that not "all [labour] activities are protected by s. 2(*d*), nor that all collectivities are worthy of constitutional protection," could not, in the Court's view, mean that farm workers can be excluded from all *LRA* protections.[30] What was required was a legislative scheme allowing farm workers to exercise their section 2(d) rights in a "meaningful" way.[31]

In response to *Dunmore*, the Ontario legislature enacted the *Agricultural Employees Protection Act* in 2002.[32] The *AEPA* established a labour relations

25 *Supra* note 21 at para 16.
26 *Ibid* at para 17.
27 *Ibid.*
28 *Ibid.*
29 *Ibid*.
30 *Ibid*.
31 *Ibid* at para 67.
32 *Agricultural Employees Protection Act, 2002*, SO 2002, c 16 [*AEPA*].

regime for farm workers, albeit one still separate from the *LRA*.[33] The *AEPA* protected farm workers who desired to organize and make representations to their employer; it prevented interference from exercising these rights; and it established a tribunal for disputes. As we shall see, however, it did not explicitly establish the full range of protections common to the Wagner model.

If *Dunmore* represented the first crack in the *Reference Re Public Service* approach to s. 2(d), then *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia* represents its "last rites."[34] In an effort to reduce escalating healthcare costs in the province of British Columbia, the provincial legislature passed Bill 29, which would override many existing collective agreements and loosen restrictions on contracting out work. The controversial law was quickly challenged and eventually came before the Supreme Court of Canada in *Health Services*.

In "the most explicit reversal of an earlier Supreme Court *Charter* ruling to date,"[35] the majority *Health Services* opinion (co-authored by Chief Justice McLachlin and Justice LeBel) struck down Bill 29 on the grounds that s. 2(d) protected a constitutional right to collective bargaining.[36] Gone was the view of "the collective bargaining process as a creature of modern legislation, distinct from, and not protected by, the fundamental freedoms envisioned by the *Charter*."[37] The Court explained that *Dunmore*, by recognizing the collective dimensions of s. 2(d), "opened the door to reconsideration of that view," and that the two-decade long exclusion of collective bargaining from the *Charter*'s ambit could "not withstand principled scrutiny and should be rejected."[38]

The Court paired this bold reversal with a note of caution. The new right to collective bargaining, it maintained, is limited "to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method."[39] Peter Hogg was not convinced:

> The majority [in *Health Services*] claimed that it was not constitutionalizing "a particular model of labour relations." But that is exactly what it was doing…Presumably,

33 *Labour Relations Act, 1995*, SO 1995, c 1 ss 3(b), 3(c) [*LRA*].

34 *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*Health Services*]; Jamie Cameron, "The Labour Trilogy's Last Rites: B.C. Health and a Constitutional Right to Strike" (2009) 15 CLELJ 297.

35 Peter Russell et al, *The Court and the Constitution: Leading Cases* (Toronto: Edmund Montgomery Publications Ltd., 2008) at 395.

36 *Health Services, supra*, note 34 at para 2.

37 Hunter, *supra* note 19.

38 *Health Services*, *supra* note 29 at para 22.

39 *Ibid* at para 91.

> only compulsory collective bargaining on the Wagner model will now pass muster in Canada.[40]

Ontario's farm workers were not convinced either. Although the *AEPA*, enacted in response to *Dunmore*, had improved their situation considerably, it had not enacted all of the components of the Wagner model.[41] For example, it did not contain a provision explicitly requiring that employers bargain in "good faith." If *Health Services* had, despite protestations to the contrary, constitutionalized the Wagner model (as Hogg claimed), then the farm workers could challenge remaining deficiencies of the *AEPA*. This is what they did in *Fraser*.

All but one dissenting Supreme Court justice rejected the farm workers' claim and upheld the *AEPA*. Two opinions are key for our purposes: a five-judge opinion authored by Justices McLachlin and Lebel (joined by justices Binnie, Fish, and Cromwell) and a two-judge opinion authored by Justice Rothstein (joined by Justice Charron). Both rulings found the *AEPA* to be constitutional, but they arrived at that conclusion by very different routes, disagreeing most profoundly on whether upholding the *AEPA* required reversing *Health Services*.

For Rothstein, *Health Services* had wrongly constitutionalized the right to collective bargaining, contrary to long-established precedent (including *Dunmore*), and had thus made *Fraser* possible. The way to resolve *Fraser* was thus to overrule *Health Services* and return labour relations to full legislative control. In support of this conclusion, Rothstein drew on Hogg's view that *Health Services* had constitutionalized the Wagner formula "without any clear prescription in the *Charter*," and that "there is much to be said for leaving the regulation of labour relations to elected legislative bodies (and the sanction of the ballot box)."[42]

Not surprisingly, Justices McLachlin and LeBel, the very judges who co-authored the majority opinion in *Health Services*, were unwilling to abandon their earlier ruling so quickly. They insisted, contrary to the farm workers' claims, that the *AEPA* (properly understood) was compatible with *Health Services*, reminding readers that while the 2007 ruling did establish a right to collective bargaining, it did not guarantee a "particular model of

40 *Supra* note 20.
41 *Supra* note 32.
42 *Supra* note 20.

bargaining."[43] For observers such as Hunter, McLachlin and LeBel's reaffirmation of "the validity of *Health Services*" was based on "a far less progressive ratio" than had been generally assumed.[44]

The debate in *Fraser* is more complex and subtle than this brief summary can capture. It will suffice to contextualize the point of debate that constitutes our focus: the role of *Charter* values in constitutional interpretation. For Rothstein, the right to collective bargaining established by *Health Services* is "a stand-alone right created by the Court, not by the *Charter*."[45] To repeat Hogg's formulation — which, of course, Rothstein quotes — the right to collective bargaining is "without any clear prescription in the *Charter*."[46] Instead, the right was derived, wrongly in Rothstein's view, from underlying *Charter* values.

According to *Health Services*, collective bargaining must receive constitutional protection because it complements and promotes the "*Charter* values" of "human dignity, equality, liberty, respect for the autonomy of the person, and the enhancement of democracy."[47] Rothstein has serious doubts about the rigor of this approach. "Either the *Charter* requires something," he writes, "or it does not."[48] He believes interpreting the *Charter* must "begin with the words of the *Charter* itself and must be bound by the normal constraints of legal reasoning and analysis."[49] The point of constitutional interpretation, Rothstein insists, "is not to simply promote, as much as possible, values that some subjectively think underpin the *Charter* in a general sense."[50] These comments clearly echo Justice McIntyre's earlier warnings in the *Reference Re Public Service* that "the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time."[51] Rothstein was willing to concede that there are circumstances where the "*Charter* values" approach could be necessary to deal with "genuine ambiguity" in a statute.[52]

43 *Supra*, note 10 at para 42.
44 Christopher Hunter, "Defining the 'Meaningful' — Collective Bargaining and Freedom of Association (Ontario (Attorney General) v. Fraser) Part II", *The Court* (27 September 2011), online The Court <http://thecourt.ca>.
45 *Supra* note 10 at para 200.
46 *Supra* note 20.
47 *Supra* note 10 at para 251.
48 *Ibid* at para 252.
49 *Ibid*.
50 *Ibid*.
51 *Reference Re Public Service*, *supra* note 17 para 149.
52 *Bell ExpressVu, supra* note 4 at para 62.

However, the "Court cannot employ a *Charter* values argument to interpret the *Charter* itself."[53]

Rothstein's concerns were rejected out of hand by his colleagues in the *Fraser* majority. "We can only respond," wrote Justices McLachlin and LeBel, "that a value-oriented approach to the broadly worded guarantees of the *Charter* has been repeatedly endorsed by *Charter* jurisprudence over the last quarter century."[54] McLachlin and LeBel are quite right about the prevalence of the *Charter* values approach, yet their dismissal of Rothstein's views was too quick and easy. The issues Rothstein raises are of enduring jurisprudential significance and interest. The questions he poses crop up regularly and in a variety of contexts. Three comparative examples will help illuminate what is at stake: *Griswold*,[55] the *Provincial Judges Reference*,[56] and the *Secession Reference*.[57]

Griswold v. Connecticut (1965)

At issue in *Griswold* was a Connecticut law prohibiting the sale of contraceptives. The law was no longer generally enforced in the 1960s, but opponents eventually manufactured the standing necessary to challenge it. A majority of the Supreme Court found that the law infringed the right to privacy, especially marital privacy. But where in the US Constitution was this right to be found? The answer was in the "penumbras formed by emanations from" a set of explicit constitutional rights that protect particular aspects of privacy.[58] The First Amendment's protection of freedom of religion and speech, for example, arguably has privacy dimensions. So do the Third Amendment's constraint on soldiers being quartered in private homes and the Fourth Amendment's protection against unreasonable search and seizure. Similarly, the Fifth Amendment's guarantee against self-incrimination can be seen as a kind of privacy right. Finally, the Ninth Amendment's acknowledgement of rights "retained by the people" could include privacy rights. According to Justice Douglas's majority opinion in *Griswold*, the penumbras of these explicit rights create a "zone" of constitutionally protected privacy.[59] Or, to restate it, underlying the various explicit privacy rights is the more general principle or value of privacy. This unwritten underlying principle gives meaning and coherence

53 *Supra* note 10 at para 253.
54 *Ibid* at para 96.
55 *Supra* note 7.
56 *Supra* note 13.
57 *Supra* note 6.
58 *Supra* note 7 at 484.
59 *Ibid*.

to the explicit rights, which should be seen examples of a broader zone of constitutional protection. Other examples of the underlying principle can and should be made explicit, and brought to the surface, over time. These include the kinds of privacy needed to judicially invalidate laws against contraception and later (and even more controversially) against abortion.

Critics of this jurisprudential approach have always resisted its elastic potential to constitutionalize (and hence judicialize) almost everything. In the critics' view, *Griswold* goes far beyond using the underlying principle (or value) of privacy to give interpretive meaning and stronger protection to explicit privacy protections, such as the prohibition of unreasonable search and seizure; instead, it justifies the creation of entirely new constitutional rights. As Justice Stewart wrote in dissent in *Griswold*, the facts of the case did not involve:

> …any abridgment of 'the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' No soldier has been quartered in any house. There has been no search, and no seizure. Nobody has been compelled to be a witness against himself.[60]

Not that Justice Stewart favoured the anti-contraception law at stake in *Griswold*. He considered it an "uncommonly silly law," and asserted his own view that "contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs."[61] Like Justice Douglas, in other words, Stewart clearly considered the law to be a regrettable infringement of privacy. But the Court had not been asked whether the law "is unwise, or even asinine"; it had been asked only whether it "violates the United States Constitution," and in Justice Stewart's view it did not.[62] In other words, not all "silly," "unwise," or even "asinine" laws were unconstitutional. Privacy was good thing, but the Constitution protected only some aspects of it, leaving the rest to democratically elected legislatures, which were free to enact silly laws. The remedy provided by the Constitution for such laws was legislative and electoral, not judicial:

> If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.[63]

60 *Ibid* at 529.
61 *Ibid* at 528.
62 *Ibid*.
63 *Ibid* at 531.

This is not unlike Hogg's view concerning collective bargaining — i.e., that "without any clear prescription in the *Charter*, there is much to be said for leaving the regulation of labour relations to elected legislative bodies (and the sanction of the ballot box)." For both Hogg and Justice Stewart, there cannot be a *constitutional* democracy unless democratic legislatures are subject to constitutional constraints, but neither can there be a constitutional *democracy* unless some important matters lie beyond the reach of the judicially enforceable Constitution.

Provincial Judges Reference (1997)

In the Canadian context, the essence of the *Griswold* debate was replicated — though with respect to a very different issue — in the *Provincial Judges Reference*.[64] This case arose because judges, along with the public sector more generally, had been subject to across-the-board salary reductions as part of governmental deficit- and debt-reduction strategies. The question was whether governments could cut judicial salaries in this way without violating "judicial independence." The Supreme Court decided that the Constitution required judicial salaries to be set on the recommendation of independent judicial compensation commissions. A government's decision to pay less than such a commission advised, moreover, would be subject to review and potential reversal by judges.[65]

Where did this hitherto unknown constitutional requirement of judicial compensation commissions come from? Not from any explicit constitutional provision but from the principle of judicial independence underlying several constitutional provisions. Section 11(d) of the *Charter* guarantees the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[66] Section 99 of the *Constitution Act, 1867* states that "Judges of the Superior Courts shall hold office during good behaviour," and "shall be removable" only "by the Governor General on Address of the Senate and House of Commons." Section 100 of the *1867 Act* specifies that the salaries of federally appointed judges "shall be fixed and provided by the Parliament of Canada." Finally, the statement in the *1867 Act* preamble — that the Constitution was "similar in Principle to that

64 *Supra* note 13.
65 *Ibid* at para180.
66 *Supra* note 2.

of the United Kingdom" — has been understood to include the principle of judicial independence.[67]

In Chief Justice Lamer's majority opinion in the *Provincial Judges Reference*, the "express" or "substantive" provisions of the Constitution "merely elaborate"[68] "the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*."[69] As "the very source of the substantive provisions" of the Constitution, the underlying, principles are "not only…key to construing the express provisions," but may also be used to "fill out gaps in the express terms of the constitutional scheme."[70] As does Douglas in *Griswold*, Lamer holds that provisions expressly protecting parts of a basic principle are "merely" components of a broader constitutional zone of protection for that principle, all of which is open to judicial enforcement. Accordingly judges may bring new components to the surface from time to time — e.g., the right to marital privacy in *Griswold*, and the right to judicial compensation commissions in the *Provincial Judges Reference*.

As in *Griswold*, this elastic view of the Constitution attracted opposition in the *Provincial Judges Reference*. Justice La Forest's dissent in the latter case closely resembles Justice Stewart's in the former. For La Forest, "the express provisions of the Constitution are not, as the Chief Justice contends, 'elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*'. On the contrary, they *are* the Constitution."[71] Like Stewart, La Forest resists the idea of a constitution that extends to everything that might in principle be desirable. Underlying principles can, to use Lamer's formulation, be helpful in "construing the express provisions," but for La Forest using them to "fill out gaps … in the constitutional scheme" amounts to rewriting that scheme rather than interpreting it.[72] "Construing" express provisions is a democratically justifiable judicial function, in this view, but to add entirely new, previously unthought-of, rights is "to subvert the democratic foundation of judicial review."[73]

For Justice La Forest, in other words, what justifies judicial enforcement of constitutional provisions in a democratic era — in a constitutional *democracy* — is the fact that the written Constitution was itself democratically

67 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*1867 Act*].
68 *Supra* note 13 at para 95.
69 *Ibid* at para 107.
70 *Ibid* at para 95.
71 *Ibid* at para 319 [emphasis added].
72 *Ibid* at para 95.
73 *Ibid* at para 319.

mandated, that it is a form of democratic pre-commitment.[74] But can the democracy plausibly be said to have pre-committed itself on every policy question that was (or might become) important? Justice La Forest did not think so. In his view, for judges to act as though there had been such an extensive pre-commitment, was not to respect "the democratic foundation for judicial review" but to "subvert" it.

Peter Russell, among others, agreed with La Forest's dissent in the *Judges Reference*. Not only did Russell find the "reading of our Constitution" on which the Court based the new requirement for judicial compensation commissions "very far-fetched," but he noted that "[t]he six Supreme Court justices who went along with this decision seemed not a bit disturbed by the conflict of interest inherent in their ruling," namely, that it gives "judges the final word in deciding how much they should be paid."[75] Russell was disturbed — so disturbed, in fact, that he considered the *Judges Reference* his "top candidate" for reversal through the *Charter*'s section 33 notwithstanding clause.[76]

Secession Reference (1998)

In Canada, the use of underlying principles to "fill gaps" in the constitutional scheme was taken to its greatest heights in the *Secession Reference*.[77] In this case, the constitutional "gap" to be filled was arguably what Michael Foley has called a constitutional "abeyance" — i.e., a purposeful constitutional silence that places the object of that silence beyond the reach of the Constitution.[78] In Canada, the question of how a province might secede from Confederation is plausibly understood as such an abeyance. The potential secession of the province of Quebec was a key factor in launching the constitutional reform process that led to the *Constitution Act, 1982*, with its *Charter of Rights and Freedoms* and its newly domesticated (i.e., "patriated") amending formulae.[79] Given the top-of-mind status of secession during this constitution-making process, the

74 For discussion and critique of the pre-commitment idea see Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Rainer Knopff, "How Democratic is the *Charter*? And Does it Matter?" (2003) 19 Supreme Court Law Review 199.

75 Peter Russell, "The Notwithstanding Clause: The *Charter*'s Homage to Parliamentary Democracy" (2007) Policy Options 65 at 68.

76 *Ibid* at 67.

77 *Supra* note 6.

78 Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (London: Routledge, 1989).

79 Roy J Romanow, John Whyte & Howard Leeson, *Canada — Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at xix; Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto, University of Toronto Press: 2004) at 99.

absolute silence of the new constitutional documents on how to secede speaks loudly in support of the claim that this was indeed a purposeful silence, an "abeyance." On this basis, one might consider the issue of secession to be a gap in the constitutional order that should not be filled by judges.

However, the Supreme Court refused in the *Secession Reference* to declare the Constitution irrelevant to the question of secession. Determining that an issue as important as secession could not lie beyond the reach of the Constitution — i.e., that we enjoyed a "gapless Constitution" with respect to secession — the Court declared a constitutional duty to negotiate in good faith upon an affirmative answer by a clear majority to a clear referendum question on secession.[80] Significantly, the Court based this duty not on any explicitly relevant constitutional provisions, but on underlying constitutional "values" or "principles" (to repeat, the two terms are used extensively and interchangeably throughout the judgment).[81] The four main values or principles were federalism, democracy, the rule of law, and minority rights. Some of these are particular to the *Constitution Act, 1867* (federalism); others infuse the entire Constitution (democracy, rule of law, and minority rights) and are, in part, "*Charter* values."[82]

As with respect to *Griswold* and the *Provincial Judges Reference*, the underlying principles and values highlighted in the *Secession Reference* were all embodied in "express" or "substantive" provisions of the written Constitution, and could helpfully illuminate the interpretation of those provisions. Yet the express provisions of the Constitution played little role in the judgment.[83] Indeed, according to Woehrling, "[t]he most remarkable part of the decision was how the court answered all the questions without ever referring to the actual specific provisions of the constitution."[84] The reason was that the Court clearly needed to go beyond normal constitutional interpretation and fill a "gap" with a new constitutional rule or right. If *Griswold* arguably created a new right to marital privacy, and the *Provincial Judges Reference* created a new constitutional requirement for judicial compensation commissions, then the *Secession Reference* "essentially amended the amending formula of the consti-

80 Robert Howse & Alissa Malkin, "Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession" (1997) 76 Canadian Bar Review 186.

81 *Supra* note 6.

82 *Ibid* at para 34.

83 For a detailed examination of this aspect of the *Secession Reference*, see Sylvia LeRoy, *Supreme Disabeyance: Law, Politics and the "Secession Reference"* MA Thesis, University of Calgary, 2004) [unpublished].

84 José Woehrling, "Unexpected Consequences of Constitutional First Principles" (1999) Canada Watch 7.

tution by clarifying the legal procedures that would be required for a province to leave the federation."[85]

Unlike *Griswold* and the *Provincial Judges Reference*, the *Secession Reference* generated no dissent. The judgment came in the form of a unanimous, unsigned opinion of "the Court." This is not surprising given the highly controversial public issues at stake. Faced with issues of such sensitivity, the Court strives for the increased institutional legitimacy conferred by *per curiam* unanimity. Justice La Forest was no longer on the Court to advance the kinds of concerns he underlined in the *Provincial Judges Reference*, but even if he had been there, political prudence might well have persuaded him to join the unanimous opinion. As Peter Russell said of the 1981 *Patriation Reference*, "questionable jurisprudence" is sometimes necessary to achieve "bold statescraft."[86]

The *Patriation Reference* itself had, of course, generated multiple opinions, which helped to highlight the overall "questionable jurisprudence." In the *Secession Reference*, jurisprudential qualms were raised by commentators outside the Court. For example, Constitutional scholar John Whyte wrote that "[t]he court pulled the duty to negotiate out of rarefied air,"[87] and Patrick Monahan saw the Court engaging in a "purely legislative exercise, in which it designs the constitutional obligation based on its own conception of what would be appropriate."[88] Like the dissents in *Griswold* and the *Provincial Judges Reference*, these formulations see underlying principles or values being used not to construe existing constitutional provisions but to create new ones, on the grounds that the Constitution protects not just those dimensions of the underlying principles that it explicitly enumerates, but the principles as such, thus enabling judges to find new, implied rules and requirements over time. For those who take this view, such politically fraught cases as the *Secession Reference* pose a serious dilemma: the questionable jurisprudence that "statescraft" seems to require in those instances is legitimated and strengthened for use more generally.

85 Herman Bakvis, Gerald Baier & Douglas Brown, *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Don Mills: Oxford University Press, 2009) at 89.

86 *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753; Peter Russell, "Bold Statecraft, Questionable Jurisprudence" in Keith Banting & Richard Simeon, eds, And No One Cheered: Federalism, Democracy and the Constitution Act (Toronto: Methuen, 1983) [Russell].

87 John D Whyte, "The Secession Reference and Constitutional Paradox" in David Schneiderman, ed, The Quebec Decision: Perspectives on the Supreme Court on Secession (Toronto: Lorimer: 1999) at 133.

88 Patrick Monahan, "The Public Policy of the Supreme Court of Canada in the *Secession Reference*" (2000) 11 NJCL 65 at 91.

Conclusion

Against the backdrop of such cases as *Griswold*, the *Provincial Judges Reference*, and the *Secession Reference*, the controversy about *Charter* values in *Fraser* continues a longstanding and persistent debate about the appropriate jurisprudential use of underlying principles or values. That such principles and values exist, indeed that they can be appropriately understood as the "source" of "substantive" or "express" constitutional provisions (to invoke Justice Lamer's formulation), seems beyond question. How else can one understand a constitutional guarantee against "unreasonable search and seizure" than as a protection of "privacy"? How else can one understand the guarantee of judicial tenure during good behavior than as promoting "judicial independence"? How else can one understand the constitutional provision of elected legislatures than as implementing representative "democracy"? The controversy concerns how much of an underlying principle is given constitutional protection. Does the Constitution protect (in a judicially enforceable way) only those features of a principle that it expressly articulates, or are the express provisions "merely" examples of a broader "zone" of constitutional protection justified by the principle?

Justice Rothstein's insistence in *Fraser* that the objective of constitutional interpretation "is not to simply promote, as much as possible, values that some subjectively think underpin the *Charter* in a general sense"[89] clearly takes the more restrictive view of the Constitution's reach — i.e., that it does not substantively protect everything that might plausibly be entailed in or implied by its underlying principles or values. On this he stands with Justice La Forest's view in the *Provincial Judges Reference* that "the express provisions of the Constitution are not …'elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*'. On the contrary, they *are* the Constitution."[90] And Justices La Forest and Rothstein both echo the view of Justice Stewart in *Griswold* that a new, hitherto undiscovered privacy right could not legitimately be added to the explicitly protected privacy rights. Fitting the same pattern is Justice McIntyre's 1987 caution that "the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time."[91] Also fitting the pattern is the perspective of commentators who, however much they might

89 *Supra* note 10 at para 252.
90 *Supra* note 13 at para 319.
91 *Reference Re Public Service*, *supra* note 17 at para 149.

admire the "bold statescraft"[92] of the *Secession Reference*, think there is something questionable about jurisprudence that uses underlying principles to amend the Constitution's explicit amending provisions in order to overcome a constitutional abeyance.

Despite the formal similarities between the debate as it occurs in *Fraser* and in the other three cases, it is important to acknowledge a relevant difference. In all four cases, the opponents of expansive constitutionalism resist what Justice Rothstein in *Fraser* calls "stand-alone" rights added to the Constitution by judges. Rothstein thinks *Health Services* created such a stand-alone right to collective bargaining and wants to undo it. The fact that as eminent an authority as Peter Hogg comes to the same conclusion about *Health Services* shows that this argument is not without some force. Nevertheless, a right to collective bargaining might be considered less dramatically "stand-alone" in relation to freedom of *association* than marital privacy is to the right against self-incrimination. It can similarly be seen as less "stand alone" in relation to constitutionally protected association than the duty to negotiate in good faith after a successful secession referendum is to any of Canada's explicit amending formulae. By the same token, collective bargaining (insofar as it is plausibly part of freedom of *association*) is more difficult to describe as an addition to the Constitution than, say, the requirement of judicial compensation commissions.

In other words, *Health Services* perhaps comes closer than the other cases to the line between construing constitutional provisions and adding to them, and observers will be more apt to disagree about which side of that line it inhabits. It would be an interesting question for future research to situate instances of *Charter* values jurisprudence on the continuum between those that most plausibly generate new "stand-alone" rights and those, like *Fraser*, for which this is a more debatable conclusion. For our present purposes, the fact that some Supreme Court judges and several leading authorities saw the right to collective bargaining to be a "stand-alone" addition to the Constitution testifies to the ongoing vitality of the debate.

The kind of resistance to extensive constitutional elasticity evident in all four of the cases we have considered is, to be sure, a minority position nowadays. As David Robertson argues, constitutional review around the world has increasingly become "a mechanism for permeating all regulated aspects of society with a set of values inherent in the constitutional agreement the soci-

92 S*upra* note 76.

ety has accepted."[93] In other words, judges engaged in constitutional review increasingly seek to implement not just the explicit provisions of a society's "constitutional agreement," but the full "set of values inherent in" — or underlying — that agreement. This surely helps explain the underlying-values usage of *Charter* values in the Canadian context.

The growing international prevalence of this expansive view of constitutional reach may also explain the short shrift given by Justices McLachlin and LeBel to the reservations Justice Rothstein expressed in *Fraser*. In 2005, Justice McLachlin went to great lengths, in a well-known speech in New Zealand, to defend the kind of elastic constitutional approach described by Robertson. By the time of *Fraser*, she thought it unnecessary to say more than "that a value-oriented approach to the broadly worded guarantees of the *Charter* has been repeatedly endorsed by *Charter* jurisprudence over the last quarter century."[94] This exhibits the confidence of victors in a debate, who can simply assert their victory without feeling the need to substantively rebut the few remaining losers. "The debate has been settled," McLachlin and LeBel seemed to be saying to Rothstein; "get over it."

We agree that McLachlin's side in this debate is dominant nowadays, not only in Canada but also, as Robertson shows, around the world. We doubt, however, that the controversy will subside entirely. Driving the expansive view of constitutional reach is the idea that the Constitution must have something to say about every question or issue that is deemed to be of significance or importance. With respect to such matters, "silly" or even "asinine" laws cannot be constitutional. But to say that matters deemed sufficiently important must always have a constitutional dimension is to say that important matters can never be left wholly to the non-judicial branches of government. That, we suspect, is a view that will always attract at least some skepticism and opposition. Peter Hogg's claim that, "without any clear [constitutional] prescription," some important questions should be left "to elected legislative bodies (and the sanction of the ballot box)" — essentially the view expressed by Justice Stewart's dissent in *Griswold* — is unlikely to die entirely away. Neither is Justice La Forest's view that going as far beyond "express provisions" as the Court's majority did in the *Provincial Judges Reference* "subvert[ed] the democratic foundation of judicial review." To be sure, the latest version of the debate in *Fraser* seems unlikely to generate the kind of anger seen in Peter

93 Robertson, *supra* note 9 at 7.

94 The text of speech was published and can be found under Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 4 New Zealand Journal of Public and International Law 147; *Supra* note 9 at para 96.

Russell's reaction to the *Provincial Judges Reference*, but that does not diminish the importance of the *Fraser* debate.

We conclude with W.R. Lederman's 1991 characterization of what we consider to be the enduring issue:

> [I]f we characterize too many things as constitutional, we put too much of potential legal change to meet societal needs beyond the reach of the flexible statutory means of change… the problem of limiting what is to be considered "constitutional" in this sense is very real. The limits have to be severe. You cannot constitutionalize the whole legal system.[95]

With respect to the *Charter*, Lederman insisted that we should not "turn every legal issue into a specially entrenched *Charter* issue."[96] On these grounds, we suspect, he would have been skeptical of the underlying-concepts usage of *Charter* values.

95 WR Lederman, "*Charter* Influences on Future Constitutional Reform" in David E Smith, Peter MacKinnon & John C Courtney, eds, *After Meech Lake: Lessons for the Future* (Saskatoon: Fifth House Publishers, 1991) at 119.

96 *Ibid*.