Public Reason and Canadian Constitutional Law

by

Bryan Thomas

A thesis submitted in conformity with the requirements
for the degree of Doctor of Juridical Science

Faculty of Law

University of Toronto

©Copyright by Bryan Thomas (2008)
Public Reason and Canadian Constitutional Law

Doctor of Juridical Science, 2008

Bryan Thomas

Faculty of Law

University of Toronto

Abstract

Liberals claim that the exercise of state power must be justified on terms that all citizens can reasonably accept. They also support democracy. The challenge is to bring these two desideratum in line— to ensure that democratic deliberations are somehow predicated on claims that all citizens can reasonably accept. Put differently, the challenge is to set the terms of public reason.

Liberal philosophers advance grand theories of political justice towards this end. They claim that a reasonable argument in the political sphere is one that conforms to theory x. The difficulty is that there will be those who reasonably reject theory x, preferring theory y or z, or eschewing theory altogether. Pessimism at the prospect of agreement on higher-order theories of justice leads some to advocate simple majority rule.

The thesis argues that convergence on higher order theory is not essential to public reason. The Supreme Court of Canada’s method of adjudication under the Canadian Charter of Rights and Freedoms is used as a model. Where basic rights are engaged, or are alleged to be engaged, the Court examines the reasonableness of law and policy using a series of open-ended tests. These tests discipline their deliberations by focusing attention on generally accepted facts and values (notably, the values expressed by the Charter). The thesis contends that the Court’s open-ended, contextual approach can serve as a model for broader public reasoning.
The thesis then explores the role of religious arguments within this model. In a polity committed above all to Charter values, what is the place of religion in the justification of law? It is argued that religion is understood to be private and inscrutable under the Charter. This is what justifies the Court’s generous reading of the right to religious freedom. It also justifies our forbidding state coercion in the name of religion.

With the preceding ideas in mind, the thesis examines Canadian law and public discourse on the issues of therapeutic cloning (ch.4) and same sex marriage (ch.5).
Acknowledgements

I would like to express thanks to Sophia R. Moreau, for her patient, thoughtful, and encouraging supervision. My thanks also to David Dyzenhaus and Lorne Sossin, for their valued advice and support.

My friend Jeff King encouraged me to pursue this degree, and has provided advice and encouragement along the way. Troy McLelan read drafts of two chapters and provided excellent editorial advice.

Above all I would like to acknowledge the large debt I have incurred to my family. They have sacrificed to enable me to pursue this path, and for that I extend my deepest thanks.
CHAPTER 1: DEMOCRACY AND IDEALIZED DELIBERATION ................................................. 1
  1. Deliberative Democracy ......................................................................................... 8
     1.1 The Place of Rights within Deliberative Democratic Accounts .................. 12
     1.2 A Preliminary Objection to the Deliberative Democratic Approach ....... 15
  2. The Exclusionary Approach .................................................................................... 21
     2.1 Does Religion Contribute to Deliberations? ............................................... 24
     2.2 Does Religion Motivate Concern for Justice? ........................................... 26
     2.3 Ideal Citizens versus Ideal Representatives ............................................. 29
     2.4 Is the Exclusion of Religion from Deliberations Arbitrary? ...................... 30
  3. Rawls’s Grand Theory Approach .......................................................................... 32
     3.1 Theoretical Ascent and Reasonable Argumentation ......................................... 33
     3.2 Theorization as a Procedural Requirement in Democratic Deliberations ....... 37
  4. A Different Approach .............................................................................................. 40

CHAPTER 2: PUBLIC REASON WITHIN THE CHARTER......................................................... 43
  1. The ‘Large and Liberal’ Scope of Public Reason under the Charter ............ 49
  2. The Rejection of Hierarchy ................................................................................... 55
  3. Public Reason and the Limitation of Rights ....................................................... 59
     3.1 Pressing and Substantial Objectives within Public Reason ...................... 61
     3.2 Rational Connection and Minimal Impairment ........................................... 72
     3.3 Balancing Ends Overall .............................................................................. 76
  4. Broader Lessons for Public Reason ................................................................. 78

CHAPTER 3: RELIGION’S PLACE IN PUBLIC REASON ......................................................... 81
  1. Multiculturalism and Religion in the Public Square .......................................... 85
     1.1 Does Multiculturalism Conflict with Public Reason? ............................... 88
     1.2 Multicultural Liberalism and the Preservation of Religious Culture ........ 93
     1.3 Multiculturalism and the Recognition of Religious Voices ....................... 99
     1.4 Cultural Preservation and Liberal Individualism ......................................... 107
  2. Freedom of Religion and Fundamental Autonomy ........................................... 114
     2.1 Comparing Religious and Secular Liberty Protections under the Charter .... 115
     2.2 Freedom of religion and freedom from religion ......................................... 122
     2.3 The asymmetry of freedom of religion and freedom of secular conscience ..... 125
  3. Religion, public reason, and the right to equality .................................................. 135
     3.1 Equality rights and the element of choice in religious identity ................. 139
     3.2 Does public reason disadvantage religious believers? ............................ 144
     3.3 Dignity and the discounting of religious argument ..................................... 146
  4. Conclusion ............................................................................................................. 149

CHAPTER 4: THE CASE OF THERAPEUTIC CLONING ....................................................... 155
  1. The Appeal of Stem Cell Therapies and Therapeutic Cloning ......... 162
     1.1 Why Embryonic Stem Cells? .......................................................................... 162
     1.2 Why Therapeutic Cloning? ............................................................................ 164
  2. Stem Cell Research, Therapeutic Cloning, and Charter Principles ................ 166
     2.1 Arguments for Delay .................................................................................... 169
     2.2 Research into Therapeutic Cloning and the Right to Free Expression ....... 173
     2.3 Section 7 and the Criminalization of Therapeutic Cloning ...................... 181
  3. Rationales for the Prohibition of Therapeutic Cloning .................................... 191
     3.1 Public Consensus ............................................................................................ 191
     3.3 Equality Concerns and Potential Harms to Women ..................................... 200
     3.4 Human Safety ................................................................................................ 206
  4. Conclusion ............................................................................................................. 207

CHAPTER 5: THE CASE OF SAME SEX MARRIAGE ........................................................... 209
1. The Framework of Debate over Same Sex Marriage .................................................. 209
2. Equality and the Right to Marry ............................................................................. 216
   2.1 The Triviality Objection ...................................................................................... 216
   2.2 The Definitional Argument ................................................................................ 220
   2.3 The Argument from Social Engineering ............................................................ 224
   2.4 Public Reason and Societal Tastes .................................................................... 228
3. Same-sex marriage and the rights of religious believers ........................................... 231
   3.1 Religious alienation in reaction to same-sex marriage ......................................... 232
   3.2 A Pandora’s Box of Threats to Religious Freedom? ............................................ 234
   3.3 Religious Freedom and the Right to Refuse Solemnization .................................. 238
   3.4 Registered Domestic Partnerships: A Reasonable Compromise? ......................... 243
4. Justifications for infringing the equality rights of same-sex couples ....................... 245
   4.1 A Slippery Slope to Polygamy? ........................................................................ 246
   4.2 The Moral/Jurisprudential Slippery Slope ........................................................ 248
   4.3 The Political Momentum Slippery Slope ............................................................ 251
   4.4 What about the children? .................................................................................. 253
   4.5 The “New” Natural Law View .......................................................................... 259
5. Conclusion .................................................................................................................. 263
CHAPTER 6: CONCLUSION ......................................................................................... 266
BIBLIOGRAPHY ............................................................................................................. 275
CHAPTER 1: DEMOCRACY AND IDEALIZED DELIBERATION

The fundamental tenet of modern liberalism is that the use of state power must be justified to all citizens.\(^1\) Of course, all normative political theories aspire to model a justifiable social order. What sets liberalism apart is that it aspires to justify itself while respecting the citizenry’s plurality of worldviews. Thus the assent sought by liberalism can not be achieved by force, deception, or thought control. Nor even can it be achieved by falsifying dissentient views, in the way that positions are justified within the scientific community, on some accounts. A liberal society aspires to achieve stability and voluntary cooperation among its citizens by respecting, as much as possible, their diverse views on religion, philosophy, morality, and the good. In this chapter, and indeed in this dissertation as a whole, I will assume that this is a worthy aspiration.

A complete liberal account must build upon this fundamental tenet, explaining how this justificatory aspiration is to be achieved.\(^2\) We might understand the central question of the liberal program to be this: what reasons are acceptable to all citizens? Conceptualizing the issue in this way, we might then search for some self-evident first

---

1 Cf. John Rawls, Political Liberalism (New York: Columbia University Press, 1993) at 217: [O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.

To avoid implying that liberalism has a bias towards a minimal state, it is worthwhile clarifying that the failure to exercise state power may also require justification (e.g., the state’s decision to allow abortion on demand, or to preside over great inequalities of wealth). Also, Rawls’s statement of the liberal principle of legitimacy is couched in terms of ‘constitutional essentials,’ which reflects particularities of his own account. A more generic statement is offered by Jeremy Waldron, “Theoretical Foundations of Liberalism” (1987) 37 The Philosophical Quarterly 127 at 149: “Liberals demand that the social order should in principle be capable of explaining itself at the tribunal of each person’s understanding.”

2 Throughout this chapter, I will understand ‘liberalism’ very widely, to encompass all positions predicated on the view that the exercise of state power must be justified to all citizens, in a manner that is respectful of diverse worldviews. The hope is that those who do not self-identify as liberals might nevertheless accept this foundational premise. Take, for example, Canada’s so-called ‘Charter critics’, who object to judicial review under the Charter of Rights and Freedoms on grounds that it is undemocratic. Though these critics range from left to the right on the political spectrum, they share a common view on public reason: they are deliberative or aggregative democrats, in the taxonomy of this chapter.
premise—some *universal* reason-- to serve as a starting point in justifying the exercise of state power. Hobbes, for example, pointed to societal peace as something that has *instrumental* value for everyone; peace is something we require no matter what our values and aims happen to be. Utilitarians point to happiness, which they claim has *intrinsic* value for everyone.³

A difficulty with Hobbes’ criterion is that it is not discerning enough to ensure legitimacy: we can imagine peaceful yet unjust social orders; the authoritarian regime Hobbes ultimately defends in *Leviathan* is an example. A difficulty with the utilitarian criterion, by contrast, is that it is *too* discerning: a reasonable person can accept that happiness has intrinsic value while denying that it is the highest or only good. Most of us suppose that considerations of *fairness* should limit our collective pursuit of happiness, or that some pursuits are intrinsically good or bad, irrespective of happiness.

We could take a second pass at this general line of approach, and search for some more plausible instrumental good than peace, or some more plausible intrinsic good than happiness. Revising the Hobbesian approach, we might make additions to the list of things that have instrumental value for all: to peace, we might add freedom, education, wealth, community, and perhaps other all-purpose goods. The difficulty is that we then need some criterion for ordering these multiple values. The person who values wealth more than community and education will object to being taxed for parks and schools.⁴ Revising the utilitarian strategy instead, we might propose some even less controversial intrinsic good than happiness. The good of *autonomy* is a regular candidate. Here too, though, there may be objections. Some parents wish to raise their children in a

---


⁴ The introduction of *any* rivalrous good will create problems on its own: we may both agree that wealth is all that matters, but we will disagree over its distribution. The problem does not arise with non-rivalrous goods such as peace.
particular religious faith, cloistered from competing worldviews.\(^5\) The liberal ideal of the autonomous, examined life is rejected by some, perhaps not unreasonably.\(^6\)

At this point, we may begin to rethink the formulation of our original question. Perhaps we should give up the search for self-evident foundational values, and instead devise a fair decision-procedure. Majority rule springs to mind, and I will discuss it at length below. The familiar worry with majority rule, for liberals, is the risk of majority tyranny: that a decision was supported by 51% of voters is not a compelling justification to the other 49%—at least, not if the decision is one that overlooks their interests and concerns. Some liberals suggest hypothetical decision procedures designed to correct for such risks. John Rawls’s device of the original position—where we imagine what basic principles we would agree to if blinded to our parochial concerns—is the best known example. Yet, the problem we saw with utilitarianism resurfaces here. The religious parents who reject the good of autonomy may also reject the device of the original position, and for much the same reason. They will say that their religion is an essential part of their identity, and that for the social order to be justified to them, it must address them as they are essentially constituted.\(^7\)

In light of this seemingly insuperable disagreement, it may seem that simple, no-holds-barred majority rule is the most reasonable decision-process. In this chapter and the next, I want ultimately to challenge the underlying supposition here, that disagreement over theories of justice forces deliberations, by default, to unbridled

\(^5\) In Mozert v. Hawkins County Board of Education (1987), 827 F.2d 1058, fundamentalist Christian parents sought to prevent their children from being trained in critical reasoning while attending public school. Their claim under the U.S. Constitutions’ First Amendment’s guarantee of religious freedom failed, as the court found that merely being exposed to other viewpoints did not constitute coercion.


\(^7\) See Michael Sandel, Liberalism and the Limits of Justice (Cambridge: Cambridge University Press, 1982). For Rawls’s reply to this objection, see “Justice as Fairness: Political not Metaphysical” 14 Phil.& Pub.Aff. 223-251.
majority rule. The intermediate option, I will argue, is a kind of refined majority rule, where deliberators are required to attend, in their deliberations, to values and principles accepted by all. The Canadian Supreme Court is a deliberative body which exemplifies this: its members deliberate by reference to a common framework of values and principles, but rely on majority rule to settle disagreements that persist within that framework.

First things first though. In this chapter I will explore three accounts of public reason, very broadly construed: the deliberative democratic approach, the exclusionary approach, and the grand theory approach. Let me offer with a preliminary sketch of each.

The deliberative democratic approach is the most proceduralist of the three. The deliberative democrat supposes that the optimal way to achieve liberalism’s justificatory ambitions is to ensure that law and policy are chosen by processes of open and ongoing deliberation, culminating in a fair vote. The proceduralism of this approach lies in what it lacks: beyond insisting that all voices are heard and all votes counted equally, the deliberative democrat does not specify, prioritize, or exclude any substantive values a priori. The deliberative democrat does not stipulate, for example, that religious arguments, or ‘comprehensive doctrines’ generally, are to be excluded from public deliberations. Nor does the deliberative democrat stipulate any substantive content for public deliberations (e.g., that some grand theory of justice must serve as a framework for deliberations).8

---

8 Throughout this dissertation, I will use the capitalized form (‘Court’) to denote the Canadian Supreme Court. When referring to lower courts, or courts generically, I will use the lower case.  
9 I say ‘optimal’ rather than ‘ideal’ because in practice, all accounts of public reason will fall short of perfection. The most one can say in defending an account is that it achieves liberalism’s justificatory aims better than the alternatives.  
10 In large societies, both the deliberation and the voting may be done by representative proxies.  
The exclusionary approach is a middling position, which nevertheless draws adherents in the literature on public reason. I discuss this approach mainly as a stepping stone between the deliberative democratic and grand theory approaches. Proponents of the exclusionary approach may adopt much the same view as the deliberative democrat, but with the stipulation that a certain category of claims should be ‘bracketed’ from political deliberations. Religious claims are often singled out for exclusion. The exclusionary approach is often propounded by American philosophers and constitutional scholars, who are no doubt partly inspired by that country’s constitutional doctrine of the separation of church and state. Though Canadian constitutional law does not, strictly speaking, bar the establishment of religion by the state, it is not uncommon to hear voices in Canadian politics calling for religion to be bracketed from political deliberations;\textsuperscript{12} chapter 3 of this dissertation is devoted to this debate.

Finally, grand theory approaches specify even more in terms of the content of legitimate public deliberations. The best known example here—and the one I will focus on below—is the account of public reason advanced by John Rawls. As I will explain below, Rawls’s position on public reason is often misrepresented in the secondary literature. It does not, strictly speaking, turn on an acceptance of his substantive theory, justice as fairness. What Rawls’s account of public reason does require, though, is that deliberators advance some ‘grand theory’ to support their claims on matters of basic justice, and that the grand theory they offer account for all generally accepted political values (i.e., freedom of conscience, the equal moral worth of all, and so on.). Justice as fairness is one theory that achieves this, but Rawls allows that other theories may as well.

\textsuperscript{12} The First Amendment of the U.S. Constitution states in part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” The Charter of Rights and Freedoms protects “freedom of conscience and religion,” but does not follow the U.S. First Amendment in forbidding the establishment of religion by the state. Some claim that an establishment clause has been read into the Charter. See Jeremy Patrick “Church, State and Charter: Canada’s Hidden Establishment Clause” 14 Tulsa J. Comp. & Int’l L. 25.
It is helpful to see these three approaches as arrayed along a spectrum, with bare democratic proceduralism at one extreme, and increasingly substantive requirements of justice towards the other extreme. That liberal accounts can be arrayed along this spectrum reflects the fact that all liberals are concerned both with respecting democracy and with achieving a just society. A complicating factor in liberal theory is that these two desiderata are themselves inter-definable. So for example those proposing a grand theory of justice will try to lend an air of democratic legitimacy to their position, by claiming that citizens have, in some abstract or hypothetical sense, committed to the grand theory on offer; or that the grand theory is merely a distillation of an existing popular consensus; or that protection of the rights and liberties set out in the grand theory is a precondition of legitimate democracy. At the other end of the spectrum, those arguing for the primacy of majority rule will contend that their approach reflects a theory of justice—albeit a parsimonious one—captured in the simple but over-riding principle that equal participation in collective decision-making is the right of rights.

Debates over the procedures and substantive moral rules of public deliberation feed directly into debates over the legitimacy of judicial review. The deliberative democratic approach is naturally allied with an institutional model of legislative supremacy; the grand theory approach is naturally allied with judicial review under a Charter of rights. The exclusionary approach is ambivalent on this front, as one would expect of a middling position. There is, however, a danger of overstating the connection between accounts of public reason and views on institutional design. The pairings just mentioned are not set in stone. One might favour judicial review while embracing a deliberative democratic criterion of legitimacy. There are those, for example, who hold

---

13 Cf. Joshua Cohen, “Deliberation and Democratic Legitimacy” supra note 11 at 85: “The appropriate ordering of deliberative institutions depends on issues of political psychology and political behavior; it is not an immediate consequence of the deliberative ideal.”
that judicial review is legitimate only insofar as it enhances democratic deliberations.\textsuperscript{14} Conversely, one might be ambivalent towards judicial review while advocating a ‘grand theory’ approach to public reason. This I believe is the position Rawls takes in his later writings. In *Political Liberalism*, Rawls speaks of the Supreme Court as an ‘exemplar’ of public reason, and from this, many read that work as a kind of circuitous defense of judicial review. This is a mistake or at least an overstatement. *Political Liberalism* is above all a plea to citizens: that they bracket their sectarian commitments and reason together by reference to freestanding political principles. A society where citizens deliberated in this way could achieve Rawls’s ideal without judicial review. It is a contingent matter whether a given society is up to the challenge.\textsuperscript{15}

All of this to say that we can, to some extent, separate claims about the proper content and logic of public deliberations from questions of institutional design. Moreover, since our answer to one of these questions will not strictly dictate our answer to the other, neither has clear logical priority. So let me stipulate my priorities. The question that interests me foremost—here and in subsequent chapters—is the first of the two just mentioned: that of the proper content and logic of public reason. The following are the related and subsidiary questions that interest me mainly. What are the essential properties of decision processes that satisfy liberalism’s justificatory ambitions? What is the place of religious and other sectarian claims within an ideal model of deliberation? Is a framework of rights essential to a defensible model of public reason? Are grand political theories an essential part of ideal deliberations?


\textsuperscript{15} Rawls, *Political Liberalism*, supra note 1 at 213.
1. Deliberative Democracy

I have said that liberalism’s fundamental tenet is that the exercise of state power must be justified to all citizens. The reader may be puzzled: shouldn’t there be some reference to liberty in liberalism’s fundamental tenet? The puzzle is resolved by noting that, in many instances, the surest way to arrive at an outcome that is justified to someone is to put the decision in their hands. There is, in other words, a tight conceptual link between liberalism’s commitment to justification and its concern for liberty. So long as no third parties are harmed, choices freely made are (often) taken to be self-justifying. I can hardly demand that my fellow citizens justify my self-regarding decisions to me.

Political philosophers will often distinguish between the liberty of the ancients, by which they mean the right to participate in democratic decision-making, and the liberty of the moderns, by which the mean the right to be free from state interference.

---

16 The term ‘deliberative democracy’ is used so varyingly in the literature that one can only stipulate a meaning. I will use the term very generically, to denote the view that a political decision is legitimate if: (a) the decision was preceded by deliberations where opposing viewpoints were voiced and challenged and (b) either a consensus was reached or a majority voted for the decision. Some self-described deliberative democrats (e.g., Cohen “Democracy and Liberty” supra note 14) build substantive theories of individual rights into the concept of ‘democracy,’ and might reject simple majoritarianism as a criterion of legitimacy. I say ‘might’ because Cohen and other deliberative democrats are non-committal about the real-world implications of their views. Other deliberative democrats (e.g., Habermas, infra note 22) emphasize solely the process of open and ongoing deliberations.

17 Right-wing libertarians apply this reasoning to its limits, concluding that the government is best which governs least. The libertarian implausibly supposes that these ideas of personal responsibility can be applied across all domains of life: just as I am the author of my lifestyle choices, so I am the author of my economic opportunities. But of course other people’s economic choices will shape the choices available to me, in a rather determinative way that their lifestyle choices may not. We cannot sweepingly justify a political order with talk of personal responsibility, because in some important areas of life, our options are not sufficiently within our control. It is of course a complicated matter, sorting out which activities legitimately fall within the rubric of personal responsibility. See generally Arthur Ripstein, Equality, Responsibility, and the Law (Cambridge: Cambridge University Press, 1999). For an illuminating discussion of public reason and the minimal state, see Joseph Raz, “Disagreement in Politics” (1999) 43 The American Journal of Jurisprudence 25 at 28-30. For the libertarian perspective on the justifiability of state coercion, see Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974) chs. 7 and 8.

One can see how these two concepts of liberty both achieve liberalism’s justificatory aim: democracy appears to lend intrinsic justification to collective decisions in much the same way that personal liberty lends intrinsic justification to decisions taken by individuals. On a moment’s reflection, though, this notion that the intrinsic legitimacy of personal choices can be aggregated to legitimate collective choices runs into difficulties. With collective decision-making, those in the minority find their choices frustrated in a way that requires justification from the majority.

For obvious reasons, these justificatory shortcomings are especially acute with purely aggregative democratic decision-making processes, where no process is in place to ensure meaningful deliberations prior to the vote. If those in the minority are denied the opportunity to plead their case and publicly challenge the position taken by the majority, it is unclear why they should accept the outcome.

Accordingly, those who prioritize democratic legitimation have taken to adding the qualifier that democracy must be deliberative: that all sides must have an opportunity to state their case, and to challenge competing views.\(^9\) Where opposing sides are given a full opportunity to present their respective positions, and challenge

---

\(^9\) Jürgen Habermas offers a more formal and fine-grained account of ideal deliberation, in *Moral Consciousness and Communicative Action* (Cambridge, MA: MIT Press, 1991) at 87-89:

1. No speaker may contradict himself.
2. Every speaker who applies predicate F to object A must be prepared to apply F to all other objects resembling A in all relevant respects.
3. Different speakers may not use the same expression with different meanings.
4. Every speaker only asserts what he believes.
5. A person who disputes a proposition or norm not under discussion must provide a reason for wanting to do so.
6. Every subject with the competence to speak and act is allowed to take part in a discourse.
7. (a) Everyone is allowed to question any assertion whatsoever.
   (b) Everyone is allowed to introduce any assertion whatever into the discourse.
   (c) Everyone is allowed to express his attitudes, desires, and needs.
8. No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in 6 and 7.

(I have changed the numbering slightly.)
rival positions, this may ideally lead to a consensus. But even in the more realistic scenario where consensus is elusive and the matter must be put to a vote, the majority can point to the fact that open and exhaustive deliberations were held as justification for enforcing the outcome. They may say to the minority:

You were given a full and fair opportunity to state your case, or to propose compromise solutions, but in the end you failed to bring a majority onboard. This process of collective decision-making—open and exhaustive deliberations, followed by a vote—could not be more respectful of your viewpoint, short of being disrespectful to the viewpoints of others. Conversation is the only method we have of reaching a collective decision. If you will not voluntarily respect the outcome of a decision-making process so consummately reasonable, you leave us no choice but to ensure your compliance by coercive force. Notice that for you to have things your way would require an ever greater shortfall of the justificatory ideal on which your current objection rests.

A parallel logic applies in justifying criminal trials. So long as the trial procedure is fair, we think it justifiable to convict someone over their persisting disagreement.

For liberals, there should be an appealing straightforwardness to the deliberative democratic approach. Liberalism’s fundamental tenet, mentioned above, expresses the conviction that brute coercion is never justified, and that conviction rests (one assumes) on a belief that citizens have the capacity to reason together: the capacity to offer a reasoned defense of their position, a willingness to adjust or abandon that position when it is effectively challenged, and a desire to arrive at fair compromises. Anyone who implicitly holds that view of citizens as their core political conviction has no business being overly cynical about the workability of deliberative democracy. A citizenry too self-serving or obstinate to arrive at a reasoned resolution of their disagreements would, for

---

20 Some self-identifying deliberative democrats hold up consensus as a criterion of legitimacy. In large pluralistic societies, though, this is an impossible ideal. The goal of consensus may nevertheless play a role in theory, as a ‘point at infinity’ we aim towards. Be that as it may, ought implies can, and some realistic criterion of legitimacy must stand in for consensus, in the real world. As I will use the term, a deliberative democrat is one who endorses majoritarianism as a second-best criterion. See Jeremy Waldron, Law and Disagreement (Oxford: Oxford University Press, 1999) at 91-93; Gerald Gaus, “Reason, Justification, and Consensus: Why Democracy Can’t Have it All” in James Bohman and William Rehg, Deliberative Democracy: Essays in Reason and Politics (Cambridge, M.A.: MIT Press 1997) 205.
that reason, prove itself unworthy of the confidence tacitly expressed by liberalism’s founding premise.\(^{21}\)

The case for deliberative democracy flows rather naturally and straightforwardly from the liberalism’s basic tenet, and as a result some suppose it should enjoy the status of fallback position. By contrast, proponents of the grand theory approach face an uphill battle by sheer dint of the fact that their approach requires more in the way of contestable theoretical claims.\(^{22}\) There is disagreement over which grand theory should be adopted, and deliberative democrats can point to that disagreement as a reason for falling back to their sparer, proceduralist account. Majority rule is billed as the realizable alternative to grand theory.\(^{23}\)

One might ask, in passing, whether deliberative democrats are altogether entitled to claim the default position in this way. After all, there is a great deal of disagreement over the theory and practice of democracy. On the level of underlying theory, there is disagreement between those who value democracy on epistemic grounds (i.e., those who hold that majority voting is the decision procedure most likely to select the ‘right’ answers\(^{24}\)), versus those who value it on deontological grounds (i.e., those who hold that

\(^{21}\) See generally Rawls Political Liberalism, supra note 1 at 47-88. Cf. Jeremy Waldron, Law and Disagreement, ibid. at 221-22.

\(^{22}\) Cf. Jürgen Habermas (“Reconciliation through the Public use of Reason: Remarks on John Rawls’s Political Liberalism” 92 The Journal of Philosophy 109 at 131):

Philosophy shoulders different theoretical burdens when, as on Rawls’s conception, it claims to elaborate the idea of a just society, while the citizens then use this idea as a platform from which to judge existing arrangements and policies. By contrast, I propose that philosophy limit itself to the clarification of the moral point of view and the procedure of democratic legitimation, to the analysis of the conditions of rational discourses and negotiations. In this more modest role, philosophy need not proceed in a constructive, but only in a reconstructive fashion. It leaves substantial questions that must be answered in the here and now to the more or less enlightened engagement of participants, which does not mean that philosophers may not also participate in the public debate, though in the role of intellectuals, not of experts.


democracy is required out of respect for the equal dignity of all\textsuperscript{25}). There are also disagreements over how to achieve the democratic ideal in institutional terms. Some argue for the wisdom of existing legislative models, others would prefer issue-specific referenda, or propose deliberation by citizen focus groups. It is misleading, then, to tout deliberative democracy as a point of retreat from the disagreement that plagues other camps.\textsuperscript{26}

1.1 The Place of Rights within Deliberative Democratic Accounts

Deliberative democrats do not advocate the wholesale abandonment of rights discourse. Jeremy Waldron, for example—a leading proponent of legislative majoritarianism—nevertheless reserves a place for rights discourse within democratic deliberations. Waldron explains that the model of legislative supremacy he expounds, assume[s] that there is a strong commitment on the part of most members of the society...to the idea of individual and minority rights. Although they believe in the pursuit of the general good under some broad utilitarian conception, and although they believe in majority rule as a rough general principle for politics, they accept that individuals have certain interests and are entitled to certain liberties that should not be denied simply because it would be more convenient for most people to deny them. They believe that minorities are entitled to a degree of support, recognition, and insulation that is not necessarily guaranteed by their numbers or by their political weight.\textsuperscript{27}

Waldron’s point, contra grand theorists, is that citizens agree about rights only in this shallow sense. They disagree about the application of rights to particular issues (e.g., they will agree there is a right to individual liberty, but disagree on how that right applies to the issue of abortion). They disagree about the scope of particular rights (e.g., whether the right to free expression encompasses commercial advertising). They disagree about the relative weight of rights (e.g., whether liberty rights trump equality rights). And they disagree over which ultimate criterion (if any) should guide them in

\begin{itemize}
\item \textsuperscript{25} See Waldron \textit{infra} note 27.
\item \textsuperscript{26} Thomas Christiano, “Waldron on Law and Disagreement” (2000) 19 Law & Phil. 513; Aileen Kavanagh, “Participation and Judicial Review’ (2003) 22 Law & Phil. 451 at 468.
\item \textsuperscript{27} Jeremy Waldron, “The Core of the Case Against Judicial Review” (2006) 115 Yale L.J. 1346 at 1364.
\end{itemize}
sorting out all of these questions. “[I]t is disagreement all the way down,” according to Waldron.\footnote{Jeremy Waldron, \textit{Law and Disagreement}, \textit{supra} note 20 at 102.} Given that the general commitment to rights has no settled, substantive content, few arguments or claims can be ruled out of deliberations in advance, as falling outside the boundaries of some imagined consensus. Thus, Waldron goes on to say, judicial review can not be defended by claiming that judges are expert at teasing out the true meaning of rights; there is no true meaning to be found.

The point I want to press for the moment is that prioritizing democratic deliberations does not require that we abandon the logic and rhetoric of rights. Under the deliberative democratic approach, though, citizens (or their elected representatives) are charged with defining the meaning and weight of rights on an ongoing basis. Thus Habermas—a proponent of deliberative democracy-- objects that under Rawls’s theory-laden approach,

...[citizens] find themselves subject to principles and norms that have been anticipated in theory and have already become institutionalized beyond their control. In this way, the theory deprives citizens of too many of the insights that they would have to assimilate anew in each generation...It is not possible for the citizens to experience this process as open and incomplete, as the shifting historical circumstances nonetheless demand...Because the citizens cannot conceive of the constitution as a \textit{project}, the public use of reason does not actually have the significance of a present exercise of political autonomy...\footnote{Habermas, “Reconciliation through the Public use of Reason” \textit{supra} note 22 at 128. Cf. Manin, “On Legitimation and Political Deliberation” \textit{supra} note 23 at 351-2.}

As I will explain in greater detail in section 3 of this chapter, Rawls holds that reasonable deliberation must proceed as a contest between ‘political conceptions of justice’, and that those political conceptions must themselves account for generally-accepted political values. He labels this approach ‘constructivism,’ denoting the sense in which widely-accepted political principles (e.g., the right to freedom of conscience, to equality treatment before the law, and so on) serve as building blocks for the
construction of a shared political conception of justice.\(^{30}\) The appeal of the approach is that it may satisfy liberalism’s justificatory ambitions, without direct reliance upon any claims drawn from particular moral or religious viewpoints. So understood, constructivism can be differentiated from more radical, foundationalist approaches. Utilitarian thinkers, for example, are sometimes tempted to dismiss generally accepted views about political rights as ‘nonsense upon stilts’. They propose that we abandon received opinion and substitute a new foundation for political theory, namely, the principle of utility. My point in mentioning this is to highlight the force of the objection under consideration: deliberative democrats can argue, with some plausibility, that their proposed decision-process tracks the attitudes and beliefs of the citizenry better than any grand theory, if only because—as Habermas indicates—deliberative democracy does so in real time.

A brief detour is necessary at this point. Habermas’s concern—that in setting down robust theories of justice once and for all, we deprive citizens of the opportunity to apply their own insights and intellect to questions of basic justice—may seem an apt diagnosis of a live problem in U.S. political discourse. When questions engaging constitutional essentials arise in that country, much time and energy is devoted to speculating about what the Founding Fathers intended by the pertinent provisions of the Constitution; those intentions are treated by so-called *originalists* as determinative. There is sad irony in how the opinions of Enlightenment thinkers like Thomas Jefferson—who urged citizens to rely upon their shared capacity to reason, rather than

\(^{30}\) In Rawls’s own words (*Political Liberalism* supra note 1 at 124):

> We may accept provisionally, though with confidence, certain considered judgments as fixed points, as what we take as basic facts, such as slavery is unjust. But we have a fully philosophical political conception only when such facts are coherently connected together by concepts and principles acceptable to us on due reflection. These facts do not lie around here and there like so many isolated bits. For there is this: tyranny is unjust, exploitation is unjust, religious persecution is unjust, and on and on. We try to organize these indefinitely many facts into a conception of justice by the principles that issue from a reasonable procedure of construction.
defer to Holy Books—are treated with a kind of holy reverence in some (high-up) circles today. Revulsion at this practice is, in part, what draws some to the deliberative democratic approach. Originalism is very difficult to defend as a minimally plausible account of justification. As I will explain below, Rawls certainly does not mean to defend anything of the sort. As Rawls uses the term, ‘public reason’ is a verb denoting an ongoing activity undertaken by citizens and their representatives, and not as a noun denoting the contents of the Federalist Papers (or even A Theory of Justice). It should be noted, moreover, that originalism is foreign to the Canadian constitutional tradition, where the interpretation of rights is expected to grow as a ‘living tree’ along with changing circumstances and evolving understanding. I mention originalism here only to set it aside.

1.2 A Preliminary Objection to the Deliberative Democratic Approach

As explained, deliberative democrats are drawn to bare proceduralism, yet the commitment is hedged by the assumption that a (fluid) appreciation of individual rights will figure prominently in deliberations. This assumption that deliberators will be

---

31 Jefferson encapsulated his Enlightenment worldview in a 1787 letter to his nephew: Fix reason firmly in her seat, and call on her tribunal for every fact, every opinion. Question with boldness even the existence of a God; because, if there be one, he must more approve of the homage of reason than that of blindfolded fear. Quoted in Richard Dawkins, The God Delusion (London: Bantam Press, 2006) at 42-3.
33 Waldron, Law and Disagreement, supra note 20 at 220.
34 Justice Antonin Scalia of the United States Supreme Court defends originalism “by asking whether the framers and ratifiers of the Constitution...would conceivably have approved a provision that read somewhat as follows: In addition to the restrictions upon governmental power imposed by the Bill of Rights, the States and the federal government shall be subject to such additional restrictions as are deemed appropriate, from time to time, by a majority of the Judges of the Supreme Court.” See Scalia, A. ”Romancing the Constitution: Interpretation as Invention” (2004) 23 Sup. Ct. L. Rev.337. Yet the logic at work here—of asking whether the framers would have favoured originalism—is plainly circular as an argument for originalism. Surely the issue has to be approached from a transhistorical perspective.
35 Edwards v. Canada (Attorney General) [1930] A.C. 124. Of course the framers’ original intent plays some role even in the context of Canadian constitutional law; the point is that it is not determinative. See Binnie, Ian, “Constitutional Interpretation and Original Intent” (2004) 23 Sup. Ct. L. Rev.345.
concerned about rights serves as an essential selling point of the deliberative democratic approach, and yet it is a controversial assumption.

First let me clarify why this assumption should be regarded as controversial, even within liberal circles. I have explained how liberalism’s fundamental tenet entails a belief in citizens’ capacity to treat one another respectfully and resolve their disagreements through reasonable conversation. It would be a mistake, though, to suppose that in adopting liberalism’s fundamental tenet, one assumes that deliberators will in fact be concerned about rights. Liberalism rests on a view about citizens’ potential to deliberate reasonably—not on the more far-fetched claim that citizens will invariably realize this potential. The question up for debate is how best to actualize this potential; simply to assume it will be actualized under the bare conditions of majority rule is controversial. There is a concern that in making this assumption, deliberative democrats are trying to have their cake and eat it: unbridled democracy with the attendant risk of majority tyranny assumed away.

One wonders, therefore, whether the commitment to rights should be left outside the deliberative democrats’ model, as an informal assumption, and not elevated to the status of an additional procedural requirement bearing on deliberators. That is to say, if the assumption of concern for individual and minority rights is essential to the plausibility of the deliberative democratic approach, why not insist that majoritarian decisions are legitimate only if rights are attended to in deliberations?

It will be objected, of course, that to add this stipulation will make the law’s legitimacy again turn on contested views about the interpretation of rights—the very difficulty one seeks avoid by asserting that legitimacy requires only open deliberation and majority support. To insist (as a condition of legitimacy) that deliberators attend to rights is to abandon proceduralism, the argument would go.
Yet this response is too quick. Consider how decisions are made by multi-judge tribunals, such as the Canadian Supreme Court. True, members of the Court often disagree in their interpretation of the *Charter of Rights and Freedoms*, and when this happens, a collective verdict is reached by majority rule. Waldron makes much of this fact, implying that judicial and legislative bodies rely ultimately upon the same decision-making procedure; he then goes on to argue that legislative majoritarianism has the tie-breaking advantage of better representing citizens as equals.36 Surely it is an oversimplification, though, to suppose that because judicial and legislative decision processes both culminate in a majority vote, the two are procedurally equivalent. For all their disagreements, the judges agree on one thing: that their contributions to deliberations, and ultimately their votes, must respond to the claims put before them, with arguments grounded in a reasoned interpretation of the *Charter* principles at issue. Not only this, the Court has, over time, established a multi-staged framework for *Charter* adjudication. I will explore this in greater detail in Chapter 2, but the basics can be quickly stated here. Judges begin by asking whether a rights infringement has occurred—a question answered by reference to the *purpose* of the right at issue. If an infringement is found, they then proceed through a sequence of further questions (known collectively as the *Oakes test*37): (1) Has government infringed the right in pursuit of a pressing and substantial objective? (2) Is the infringement of the right rationally connected with that objective? (3) Has the government ensured that rights are infringed minimally as it pursues its objective? (4) On balance, do the benefits of pursuing the objective outweigh the cost to rights?

---

36 See Waldron, *Law and Disagreement*, supra note 20 at 15: “The citizens may well feel that if disagreements on these matters are to be settled by counting heads, then it is their heads or those of their accountable representatives that should be counted.” See also Waldron *supra* note 27 at 1386-1395.
While it is true that conclusions arrived at by this process are ultimately voted upon, this hardly shows that it is on a par with all other majoritarian decision-processes. Strictly as a decision-process, the Court’s approach may be viewed as an improvement, inasmuch as deliberations carefully attend to principles that citizens generally accept (i.e., the principles set out in the Charter). Notice, as well, that this is a proceduralist framework, in the sense that it does not specify substantive outcomes, or assign absolute priority to any particular values. It is simply a more refined decision-procedure, in the same way that deliberative democracy is a more refined decision-procedure relative to aggregative democracy.

My aim here is not to defend judicial review, but to question whether, in devising an account of public reason, we face a binary choice between relying upon majority rule or upon ‘right answers’ (as determined by some putatively ‘correct’ theory of justice). This disjunction serves as the first premise in the deliberative democrats’ syllogism. They then point to widespread disagreement over theories of justice to rule out the right answers option, leaving majority rule the only option standing. The starting disjunction is a false one, I have claimed, as there are intermediary decision-procedures between these two options. The Canadian Supreme Court’s approach to Charter adjudication is one example.

Perhaps the deliberative democrat can reply as follows. They might agree that refined majoritarianism provides a way to formalize rights commitments without positing ‘right answers’ to questions of political justice, and yet object that refined majoritarianism is itself bound to result, in the real world, in an élitist decision-process. The argument would run along these lines. The core justification for majority rule is that all citizens have the right to an equal say in collective decisions. Refined majoritarianism argues for treating some opinions (i.e., those that attend carefully and demonstrably to rights) as having greater legitimacy than others. It does not much
matter whether we justify discounting certain views by labeling them ‘wrong’ (as we impliedly do under ‘right answer’ approaches) or ‘unrefined’. Refined majoritarianism is simply a back road to élitism: real, rough and tumble democracy can not be structured in this way; despite its majoritarian pretenses, in practice, the account leads us inexorably towards judicial review.

A full discussion of this concern will have to await section 3 of this chapter, where Rawls’s account of public reason is presented. As we will see, Rawls argues that citizens themselves can and should abide by strictures of public reason: that they should display the refinement we expect of Supreme Court deliberations. He acknowledges the idealism of his approach:

As an ideal conception of citizenship for a constitutional democratic regime, [public reason] presents how things might be, taking people as a just and well-ordered society would encourage them to be. It describes what is possible and can be, yet may never be...38

One might, in other words, insist upon a particular idea of public reason without insisting that it be enforced by judicial review. Public reason can be an ideal of citizenship and nothing more. I will explore the idealism of Rawls’s approach in section 3 of this chapter, but here I want to explore the idealism of the deliberative democrats’ own conception of citizenship.

It may seem that advancing idealized conceptions of citizenship should be forbidden in this debate, as amounting to a kind of goalpost shifting. When deliberative democrats object that adherence to grand theories is incompatible with democracy, the grand theorist responds with a reformist ideal of citizenship; that ideal conveniently has citizens devoted to the grand theory on offer. (This slightly misrepresents Rawls, as I explain below, but put that aside.) To this the deliberative democrat may again object

38 Rawls, Political Liberalism, supra note 1 at 213.
that reformist accounts of citizenship deny an elementary truth of democracy: the *agora* is "a 'wild' complex that resists organization as a whole."^{39}

A case can be made, though, that all political models advance their own special-tailored ethos of citizenship. Take *aggregative* democracy—the most bare bones, proceduralist approach under consideration. The ideal citizen, on that account, is in essence *homo economicus*, transported from the marketplace to the voting booth. All that is expected of citizens, on that view, is that they turn up at the polls and vote their preferences—the assumption being that legitimate political outcomes can be arrived at by aggregating brute preferences.^{40} In societies where the aggregative conception of democracy prevails, an ideal of citizenship emerges which disproportionately emphasizes the act of voting, *simpliciter*. Despite the shift in democratic theory in recent years, to a deliberative conception, this ethos which equates good citizenship with voting remains operative today. We should not be lulled, by its familiarity, into supposing that aggregative democracy reflects a natural conception of citizenship; it certainly would not seem natural to ‘the ancients’ who first devised systems of democratic governance. And it apparently seems unnatural to many citizens living in our own time: in North America, the voting rituals of aggregative democracy now ring so hollow that around half of the population routinely declines to participate. From the perspective of underlying theory, this should signal a crisis of legitimacy for aggregative democrats.

Deliberative democracy is predicated on a distinct ethos of citizenship, where merely voting one’s reflexive preferences must be regarded as a failing of sorts.^{41} The deliberative democratic ideal will direct citizens to have in mind considered reasons for the positions they support; to consider and respond to the positions advanced by others;


^{41} Dryzeck, *supra* note 39.
to consider reasonable objections raised against their own position, and to change
positions when faced with an insuperable objection; and lastly, one assumes, to abstain
from voting if they are unwilling to take these responsibilities seriously.

Citizenship is a malleable concept, and every political conception has its ideal.
The exclusionary and grand theory approaches are more demanding, as we will see,
because the content of deliberation is to some extent specified in advance, on those
accounts. But in terms of the demands placed upon citizens, the step from deliberative
democracy to these approaches is a small one, when considered next to the step from
aggregative democracy to deliberative democracy. As explained below, deliberative
democrats often address the great demands of their model by supposing that
deliberations can be undertaken by a far smaller number of elected or randomly chosen
representatives. Yet a similar assumption might be made by grand theorists to address
the concern that their model is unworkable for large scale deliberations.

In the remainder of this Chapter, I want to build up from the bare, Habermasian
conception of public reason to a more restrictive view. Before considering Rawls's highly
restrictive view of public reason, I want to consider an intermediate stance: the view that
religion should be bracketed from democratic deliberations.

2. The Exclusionary Approach

Philosophical accounts of deliberative democracy often rely upon the idealizing
assumption that deliberations will go on forever, so that no viewpoints will be cut short
or passed over for lack of time. Over-reliance on this assumption leads some deliberative
democrats to invoke consensus as a criterion of legitimacy. But the assumption of
infinite deliberation can form part of a less utopian vision. Habermas’ vision seems to be
roughly this: that the free, fair, and ongoing exchange of viewpoints will constantly adapt

\[supra\] note 20.
new, provisional principles of political justice, so that the discourse as a whole is forever evolving along with changing historical circumstances.\textsuperscript{43} No substantive conclusions—such as that individual liberty is to be prioritized over equality—are settled upon in advance. Notwithstanding the refusal to prioritize liberty, one can imagine how this approach might, on some level, appeal to liberals convinced by Mill’s arguments in \textit{On Liberty}—positing, as it does, that principles of political justice should themselves be shopped in the marketplace of ideas.

Real world deliberations will of course fall far short of this imagined ideal. For one thing, the sheer numbers make it impossible for all citizens to have their viewpoints addressed in deliberations, in the way that is assumed (e.g.) by Habermas’s model. Deliberative democrats disagree over how to address this problem of deliberative scarcity, at least in the details.\textsuperscript{44} Generally, their preferred solution is to economize deliberations by having a much smaller group stand in as deliberative representatives for the population as a whole. Existing legislative bodies offer one such model, though other models have been suggested, involving (e.g.) citizen juries. The Canadian government will often hold lengthy public consultations before legislating in controversial areas, inviting testimony from representatives of diverse groups. Inasmuch as these hearings inform subsequent lawmaking, the process may be seen as an attempt to approximate the deliberative democratic ideal.

Against this general strategy it may be objected that merely reducing the number of deliberators, by designating group representatives, will not adequately address the problem. The contention would be that certain claims (or categories of claims) really have no feasible role to play in political deliberations. They pointlessly consume scarce

\textsuperscript{43} Rawls writes (\textit{Political Liberalism supra} note 1 at 385) that Habermas’s ideal “is a point at infinity we can never reach, though we may get closer to it in the sense that through discussion, our ideals, principles, and judgments seem more reasonable and we regard them as better founded than they were before.”

\textsuperscript{44} For a survey of competing views, see Dryzeck \textit{supra} note 39.
deliberative energies. Religious claims are the obvious example here, and will be the focus of this section. The reason why religious claims are often singled out for exclusion is obvious enough: we expect that people will cling to their religious beliefs even when presented with disconfirming evidence— that recalcitrance is defining of ‘faith’. For their part, non-believers are generally unmoved by religious claims. The mix of religion and politics is therefore a recipe for interminable deliberative stalemate.\textsuperscript{45} It is on this basis, in part, that some argue for the exclusion of religion from politics. A way of expressing the point, from a Habermasian perspective, is to say that for all our ignorance of ‘right answers,’ one thing is certain: no amount of deliberations will generate agreement on religious claims.\textsuperscript{46} So, the argument would go, we can bracket religion from the political agenda without fear that this will jeopardize some viable avenue of deliberation.

The concern is not merely that religion throws sand in the gears of deliberation. In a political culture committed to resolving its disagreements through conversation, it may be considered an act of bad faith to bring religious claims to the table, when it is clear that such claims have no persuasive force for non-believers. Respectful discourse requires that we advance arguments that we reasonably expect others might accept.\textsuperscript{47} To advocate the exercise of state power on the basis of claims one knows others will reasonably reject is not to engage in deliberation with them; it verges on a plain demand for submission.


\textsuperscript{46} Jürgen Habermas, “Religion in the Public Sphere” (2006) 14 European Journal of Philosophy 1 at 5.

\textsuperscript{47} A further concern, evidenced by the religious wars of the sixteenth and seventeenth centuries, is that the mixture of religion and politics may lead to societal instability. Though religion remains a major source of instability in the world, the risk of religious instability causing problems for Canada seems remote. What threats there are to Canada’s stability as a nation have more to do with regional and linguistic differences. That said, some have contended that the rise of the Canadian Alliance Party signals a foundational shift in the dynamics of Canadian politics. The country’s right wing is now allied along moral/religious lines. Michael Lusztig and J. Michael Wilson, “Moral Issues and Partisan Change in Canada” (2005) 86 Social Science Quarterly 126.
To be clear, no one contends on the basis of these arguments that religious believers or organizations should be forcibly blocked from advancing religious arguments in the public square. In the same way that deliberative democrats call upon citizens to engage voluntarily in meaningful deliberations, the proponent of the exclusionary approach calls for citizens to voluntarily bracket religion when acting _qua_ citizen. That said, there are non-coercive means by which the exclusionary approach might be reflected in our institutions. I mentioned that it is common for the Canadian government to hold public consultations with stakeholders before drafting legislation on controversial matters, and to invite testimony from representatives of the major faiths. If the exclusionary approach is sound, this practice of seeking input from religious leaders on matters of political controversy should come to an end. Religious leaders of course have the same entitlement to be heard as any other citizen, but they should not be sought out as having special expertise germane to political deliberations; quite the opposite, on the exclusionary view.

2.1 _Does Religion Contribute to Deliberations?_

Against these arguments, it is sometimes objected that religious claims do in fact contribute in important ways to the advancement of public deliberations. In the American historical context, the abolitionist movement, the civil rights movement, the peace movement, and the anti-poverty movement are pointed to as cases where religion and politics have mixed with welcome results.49

---

48 Indeed, liberals may encourage the expression of religious viewpoints outside the political sphere, on a variety of grounds. First, it is desirable, on Millian grounds, that religious viewpoints be exposed to the light of public scrutiny. Though as I will explain in chapter 3, it is not a good thing for the state itself to critically scrutinize religious beliefs. Second, there is something intrinsically valuable in expressing one’s deeply held convictions. On this, see Kaveny, Cathleen, “Religious Claims and the Dynamics of Argument” (2001) 36 Wake Forest L. Rev. 423.

One reply here is to say that the exclusionist has no objection to claims inspired by religion, where those claims are vetted by generally accepted standards of reasonableness—so that claims are not ultimately ‘justified’ by to pointing their scriptural origins. One would expect that all of the above cited stances—abolitionism, opposition to racism, and so on—could have found their way into public deliberations, under the exclusionary approach so understood. Take the case of abolitionists, for example. This was not a case where religious believers relied upon straightforward command deontology to justify their political aims. We know this because the Bible contains no express condemnation of slavery on which they might have relied; when the practice is mentioned in the Bible, it is more often impliedly (or explicitly) condoned. Abolitionists therefore had to begin with some prior understanding of the wrongfulness of slavery, which in turn guided them through the Bible’s conflicting messages on the topic. The exclusionary approach merely requires that abolitionists articulate that prior understanding, submitting it for deliberation, rather than citing Bible passages cherry-picked on the basis of that understanding. Abolitionism, anti-racism, and so on, are cases where this requirement can clearly be met. Perhaps it will not be so with other issues. In the stem cell research debate, for example, some have doubted whether deep concern over the destruction of 4-day old embryos can be grounded in anything but religious grounds.

---

50 Instead of the exclusion of religious justifications, one could speak of the need to include secular justifications. This is the approach taken by Robert Audi, in his seminal essay, “The Separation of Church and State” 18 Phil.& Pub.Aff. 259. Though much is made of the distinction between accounts of public reason calling for the exclusion of religion and those calling for the inclusion of secular argument, the distinction strikes me as somewhat superficial. Audi’s inclusionist account, were it embraced as an ethos of public reason, would surely have the effect of diminishing the religiosity of political debates. It is more straightforward, to my mind, to speak in terms of the exclusion of religious justifications.

2.2 Does Religion Motivate Concern for Justice?

This line of reply—if it succeeds—demonstrates only that religion is not an essential source of information in political deliberations. Perhaps the more salient question, though, is whether religion provides essential motivation for citizens. Let me quickly dispense with a bad argument of this sort, before moving on to a more compelling version. It is sometimes supposed that without religion, there can be no morality. This is belied by a raft of evidence: non-human primates exhibit moral concerns; the theory of natural selection can explain the emergence of altruism; many pre-Biblical societies were more humane than (e.g.) the societies of Medieval Christendom; in the present day, the world’s most atheistic countries—Sweden, Denmark, and Norway, for example—are also the world’s most compassionate, across a number metrics; the list could go on.

Whether strictly necessary for morality or not, though, religion is the focal point of many citizens’ moral lives, and this should give us pause when calling for religion to be ‘bracketed’ from politics. A common criticism of liberalism is that it fosters individualism, by emphasizing rights of non-interference, while overlooking the positive obligations that citizens have to one another. When directed at modern liberal theory, the criticism is quite off the mark. Rawls’s justice as fairness—perhaps the leading liberal theory of the 20th Century—is not substantively individualistic in the sense of requiring a minimal state. Rawls does prioritize basic liberties (of thought and expression and so on), but beyond that, his view on distributive justice is that society must direct itself, myopically, to bettering the circumstances of its least advantaged.

Theory aside, the reality is that liberal societies often do seem to fixate on negative liberties. In Canada, for example, the twenty-five years since the enactment of the Charter of Rights and Freedoms has seen a steady increase in the gap between rich

---

and poor.\textsuperscript{53} I am not suggesting a direct causal relation between the two, but anyone convinced by Rawls’s account should find this worrisome. There appears to be no public ethos holding (e.g.) that the Canadian government’s studied inaction on child poverty is an elementary political injustice, on the order of state censorship or unlawful detention. One can only speculate, but perhaps Canadians have on some level been lulled into believing that the \textit{Charter} alone is a sufficient guarantor of a just society.\textsuperscript{54}

The claim might then be that until a stronger public ethos of mutual concern takes root, religion should be welcomed in the political domain for its capacity to motivate concern for the least advantaged.\textsuperscript{55} To those who accept the arguments I have offered thus far for the exclusion of religious arguments, this last claim may be seen as a variant of Plato’s ‘noble lie’: true, religious claims may have no justificatory force within public deliberations,\textsuperscript{56} but such claims must be allowed because, on balance, they motivate people to pursue ends that are justified.\textsuperscript{57}

Notice how this general line of argument represents a departure from the deliberative democratic view of legitimacy. The driving concern is not that all citizens

\textsuperscript{53} René Morissette and Xuelin Zhang "Revisiting wealth inequality" (2006) 7 Perspectives on Labour and Income 5.

\textsuperscript{54} In the literature on public reason, the endless drive for economic growth, and the associated mania of consumerism, is seldom identified as (part of) a comprehensive doctrine. Arguably, though, that drive dominates the political sphere more than any religious doctrine, carrying with it a controversial understanding of human fulfillment and well-being. Cf., Curtis White, “Hot Air Gods” (2007) 315 \textit{Harper’s Magazine} 13; Charles Taylor, \textit{A Secular Age} (Cambridge, MA: Belknap Press, 2007) at c. 13.

\textsuperscript{55} Wiethman “The Separation of Church and State: Some Questions for Professor Audi” supra note 49 at 56.

\textsuperscript{56} Strictly speaking, of course, religious claims are not ‘lies’ within public reason; they may be true or false, according to the exclusionist deliberative democrat. What matters is that citizens will forever disagree about their truth status.

\textsuperscript{57} Rawls takes this motivational concern seriously, when contemplating the case of slavery. That case may be a special one. The pro-slavery side relied upon theological arguments themselves. Indeed their side is well supported by scripture: Leviticus, 25:44-46, for example, authorizes slaveholding in no uncertain terms. In situations where one’s interlocutors are offering religious arguments, perhaps a kind of \textit{fight-fire-with-fire} argument may justify suspending the strictures of public reason. For an illuminating discussion, see David Estlund, “Democracy and the Real Speech Situation” in Samantha Besson and José Luis Mari eds., \textit{Deliberative Democracy and its Discontents} (Burlington, VT: Ashgate, 2006) at 75-91.
have an equal say in deliberations, or that decisions actually be justified by reasons that all citizens might reasonably accept. Rather, the driving concern is that a predetermined end be achieved: namely, that the interests of the least advantaged be promoted. Religious arguments are welcomed, not for their justificatory force, but for their overall tendency to drive deliberation towards ‘correct’ ends. This is not a line of argument open to deliberative democrats who deny that there is any such thing as a ‘correct end,’ independent of what is chosen by reasonable deliberations.

Even for grand theorists such as Rawls, who do posit ‘correct’ ends, this instrumentalist approach to devising rules of deliberation is problematic. As I have explained, the reason we favour democratic deliberations is that we want the legitimacy of laws to somehow flow from their having been chosen by citizens’ deliberations. The instrumentalist approach described a moment ago decidedly does not achieve this. It seems, on the one hand, to pay lip service to the value of wide open deliberations, inviting religious claims into discourse on that basis. Yet underlying this call for open deliberations are specific ideas about what goals may be legitimately pursued using state power. The problem is one of transparency, really. Whatever one believes to be the correct parameters of reasonable deliberations, the expectation should be that those parameters are recognized by citizens themselves. It should not be that the real test of legitimacy lies somehow behind the scenes. That seems a perversely disjointed way to reconcile the objective of democratic legitimacy with the objective of achieving substantively just outcomes.58

58 Rawls thinks it acceptable to pursue justice as fairness with arguments that fail the requirements of public reason, in societies that are not yet ‘well-ordered’. See Political Liberalism supra note 1 at 66. The argument seems to be this. Until justice as fairness (or some comparably reasonable political conception of justice) is publicly recognized, we should accept religious arguments in public discourse as a means towards establishing justice as fairness (or some comparably reasonable political conception of justice). Perhaps the apt comparison is to Wittgenstein’s ladder metaphor, rather than Plato’s noble lie. Religion is used to reach a shared political conception of justice, and then pushed out of public deliberations, in the way that a ladder might be used to climb to a window, and then pushed away. A potential difficulty here is
None of this to say that citizens can not, or should not, draw upon their faith as a motivation for caring about the least advantaged. But there is no reason why this needs to be the thin end of the wedge, leading us to welcome religion into public deliberations. The criterion set out above remains sensible: that in the public square, religious claims should, as a matter of civility, be vetted by shared standards of reason. It may seem finicky to insist upon this point, but there is a point of principle here. Either we believe that deliberations on fundamental questions of justice must proceed on the basis of reasons that all citizens can reasonably be expected to accept, or we do not. If we commit to an ideal of public reason where citizens address one another on common ground, we must resist the temptation to keep looking back over our shoulders on particular issues, wondering what might have been.

2.3 Ideal Citizens versus Ideal Representatives

In discussing the separation of church and state, two seemingly contradictory claims are often advanced. It is claimed (1) that citizens are fully entitled to press their religious beliefs in the political domain and (2) that law and policy should not be justified by religious argument. Claim (1) seems to rest on an acceptance of no-holds-barred deliberative democracy, while (2) sets fixed limits on what majorities may legitimately do. As I explain in chapter 3, my sense is that, in the Canadian context, the embrace of this contradiction may stem from the mistaken supposition that multiculturalism entails claim (1).

Some may suppose, though, that the apparent contradiction between (1) and (2) can be resolved by drawing a distinction between arguments that are appropriate for

---

that we may never reach a stage where the difference principle is formally recognized. Rawls opposes constitutional entrenchment of the welfare rights of the least advantaged, on grounds that we will never agree as to when that principle is satisfied. If this is so, we may forever be in a state of uncertainty as to whether religious arguments are allowed into deliberations; for we may forever fear that to exclude religious arguments would diminish political motivation to care for the least advantaged. On the entrenchment of difference principle, see Lawrence G. Sager, "The Why of Constitutional Essentials" 72 Fordham L. Rev. 1421.
citizens to offer, versus arguments that are appropriate for their representatives to offer.

Habermas explains this view:

...the institutional thresholds between the ‘wild life’ of the political public sphere and the formal proceedings within political bodies are also a filter that from the Babel of voices in the informal flows of public communication allows only secular contributions to pass through.59

This argument is implausible in much the same way as the argument explored above, that religious claims should be welcomed in the political domain as a ploy to motivate concern for the disadvantaged. The reason that a citizen’s opinions should be heard is so that they may participate as an equal in the deliberative decision-process. There is nothing respectful in feigning openness to religious arguments, if the accepted reality is that such claims are ultimately filtered out of deliberations. On the contrary, this approach is plainly patronizing to religious believers. If we are not willing to have our laws justified by religious arguments, then that rule of deliberations should be clearly justified and articulated to all.

2.4 Is the Exclusion of Religion from Deliberations Arbitrary?

Earlier on, I explained how the use of religious arguments to justify the exercise of state power may be criticized as falling unacceptably short of a genuine attempt at justification. Religious claims have no persuasive power for non-believers, and so to exercise state power in the name of religion is effectively to demand submission of non-believers. One may be tempted, though, to suppose that all disagreements can be characterized in this way; that is, that whenever a collective decision is taken in the face of ongoing disagreement, the losing side is effectively forced into submission. This objection is often joined with the claim that secular reason, and Enlightenment liberalism, are themselves quasi-religious viewpoints.60 To single out religious claims for

59 Jürgen Habermas, “Religion in the Public Sphere” supra note 46 at 7.
exclusion, and prioritize secular arguments, is just to demand the submission of religious believers. This is perhaps the most common objection to the exclusionary approach.

The first thing to notice is that this objection rests upon an implicit acceptance of liberalism’s fundamental tenet—i.e., that the exercise of state power must be justified to all. For the objection here is that the exclusion of religious arguments is arbitrary, and therefore may reasonably be rejected by religious believers. Those advancing this objection can not rely upon liberalism’s basic tenet in this way, and avoid engaging with the dilemma it raises: i.e., how to achieve these justificatory ambitions in a pluralistic society.

Often, those who object to the exclusion of religion from the politics seem drawn to *no-holds-barred* deliberative democracy. They claim that religious beliefs are constitutive of the self, so that to demand to exclusion of the beliefs is to demand the exclusion of the person. (I mentioned this argument earlier.) Empirically, they point to the positive contributions religion has made to political progress over time, fostering understanding of universal human dignity. All of this leads them to prefer a decision-process where religious claims are treated on par with secular claims, and not limited in any way. As I explain at length in chapter 3, those who advocate this approach seldom reckon with its flipside. Religious believers have enjoyed generous protections under the *Charter of Rights and Freedoms*; their beliefs and practices are cushioned from the effects of majority rule in a way that secular beliefs and practices are not. If political deliberations are to proceed on the supposition that religious and secular beliefs are on a par, and majority rule is to become the sole test of legitimacy, these special protections will come to an end.

---

Religious believers might instead propose an amended version of the exclusionary approach, asking, as a matter of fairness, that secularists bracket their deeper philosophical doctrines. The claim made a moment ago— that whenever decisions are enforced in the face of disagreement, the minority is forced into submission-- may be rejected as too strong. Perhaps it is better to draw a distinction between reasonable and unreasonable deliberations. Here we on the terrain that Rawls takes as his starting point: the mark of reasonable discourse is that deliberators do not cite the truth of their controversial religious or philosophical doctrines as a premise in their arguments. Just as the teachings of Jesus Christ can not be self-evidently true, nor can the utilitarianism of Jeremy Bentham, and so on. Reasonable arguments must instead be predicated on claims that all sides can reasonably accept.

3. Rawls’s Grand Theory Approach

I have just finished explaining that there are reasonable and unreasonable ways to proceed in the face of disagreement. The unreasonable way is to continue pressing claims founded on premises that one knows will be rejected by others. The reasonable way is to desist in pressing such claims, and build instead on shared values and beliefs. Reasonableness so understood is no guarantee of eventual consensus. Even reasonable deliberators will be forced to resort, ultimately, to majority voting or impartial arbitration. But anticipation of that fact is no cause for abandoning the commitment to reasonable deliberations. A majoritarian decision grounded in a reasoned interpretation of generally accepted beliefs and values is preferable to a majoritarian decision grounded

---

62 Richard Rorty, once a proponent of the exclusionary approach (see supra note 45), later recanted, on grounds that any rule requiring the bracketing of religious scripture in the political sphere should, as a matter of fairness, also require that one refrain from quoting J.S. Mill—a tradeoff too costly for Rorty to bear. See Rorty, “Religion in the Public Square: A Reconsideration” (2003) 31 Journal of Religious Ethics 141.
directly in a sectarian religious doctrine or contested philosophical views.\(^6^3\) (Recall, I earlier referred to this as *refined majoritarianism*).

The first question is where to look in search of generally accepted beliefs and values. Rawls’s contention is that liberal democracies are built upon an ‘overlapping consensus’ of widely-shared political values-- values which citizens generally embrace notwithstanding their deeper religious and philosophical differences. Basic among these are the right to freedom of thought and expression, the right to the basic liberty needed to pursue one’s own plan of life, the right to participate as an equal in the political process, and the right to equality before the law. This list is not exhaustive, and indeed, new principles and values may gain consensus over time.\(^6^4\) Deliberators have to use their judgment in determining what values are widely accepted, and (one assumes) take greater pains to justify reliance on novel public reasons.

3.1 *Theoretical Ascent and Reasonable Argumentation*

Rawls’s model of deliberation requires more than merely referencing widely-accepted political values, and this is where grand theory comes in. Where parties agree upon certain facts and values, but disagree over how to apply those scattered consensus points in resolving emerging disagreements, a natural way to proceed is by constructing theories: theories that abstract from consensus points, and that, owing their orderliness, provide a more determinative framework for deliberations. Thus Rawls has in mind that we deliberate on the basis of a *complete* political conception of justice: one which expresses “principles, standards and ideals” by which widely shared political values “can be suitably ordered or otherwise united so that those values alone give a reasonable

---

\(^6^3\) This point is developed at some length in Micah Schwartzman, “The Completeness of Public Reason” (2004) 3 Politics, Philosophy, and Economics 191. Following Gerald Gaus, Schwartzman refers to disagreements over the interpretation of generally accepted principles as ‘nested indeterminacy’—i.e., the disagreement is ‘nested’ within a set of agreed-upon values. See Gaus, *Justificatory Liberalism* (Oxford: Oxford University Press, 1996) at 156.

answer to all, or nearly all, questions of constitutional essentials and matters of basic justice.” If a political conception of justice lacks completeness—if it only provides answers to a limited set of constitutional questions, or cherry-picks principles from the overlapping consensus—then it may reasonably be rejected as an expression of shared public reason. We want to avoid a situation where the political values invoked in public deliberations are, or are perceived to be, in Rawls' words, “puppets manipulated from behind the scenes by comprehensive doctrines.” The supposition is that by reasoning at a higher level of abstraction, we discipline public discourse against the direct influence of comprehensive views. Good, complete theories that account for widely shared political values are hard to come by, and so as deliberators strive to stake out their positions from within grand theories, disagreement will winnow down to a ‘family of reasonable conceptions.’ Rawls explains this as follows:

[E]ach of us must have, and be ready to explain, a criterion of what principles and guidelines we think other citizens (who are also free and equal) may reasonably be expected to endorse along with us. We must have some test we are ready to state as to when this condition is met...Of course, we may find that actually others fail to endorse the principles and guidelines our criterion selects. That is to be expected. The idea is that we must have such a criterion and this alone already imposes very considerable discipline on public discussion. Not any value is reasonably said to meet this test, or to be a political value; and not any balance of political values is reasonable.

Citizens may persistently disagree over which conception of political justice is most reasonable, but the hope is that this process will generate a ‘family of reasonable political conceptions’; a set of political conceptions, all of which citizens regard as reasonable “if barely so.”

Rawls’s favoured political conception, of course, is justice as fairness. Very briefly stated, that is the view that just political principles are those that would be chosen in the original position, a hypothetical situation where we are blinded to our race,
gender, religion, socio-economic class, talents and skills, and all other attributes allocated by the lotteries of birth and circumstance. So situated, Rawls claims, we would choose first to entrench protections for basic liberties; with basic liberties secured, we would demand that inequalities in the basic necessities of a good life—wealth, education, health care, and so on—be arranged so as to optimize the situation of those worst off. The details of justice as fairness are unimportant for present purposes; I sketch them only as an example. The idea is that justice as fairness is one theory that accounts for our widely-shared political values. We may not think that justice as fairness is the optimal theory, but that is different from declaring it unreasonable. At any rate, if we think a better theory is available, we are welcome to it under Rawls’s account. The important point is that reasonable deliberations involve a contest between complete theories.\(^{69}\)

Stepping away from the realm of constitutional law for a moment, consider as an analogy debates over diverse economic matters: the setting of interest rates, tariffs, rates of taxation, business subsidies, and so on. Public discourse on these matters can, and to varying degrees always will, take the form of an utterly unprincipled affair where private interests jockey for the state’s favour. But these debates can be organized so as to be reasonably principled, by insisting that participants frame their arguments within reasonable economic conceptions, as Rawls would have us do in the constitutional sphere. The family of reasonable conceptions in the domain of economics would include a variety of market-based conceptions—laissez-faire conceptions and Keynesian conceptions currently dominate the discourse—and, on the margins, some non-market conceptions. These are complete conceptions for the economic sphere, insofar as they

---

\(^{69}\) Rawls welcomes this, and is open to the possibility that the rivalry between political conceptions may never culminate in agreement. He writes (Political Liberalism at 227): “It is inevitable and often desirable that citizens have different views as to the most appropriate political conception; for the public political culture is bound to contain different fundamental ideas that can be developed in different ways. An orderly contest between them over time is a reliable way to find which one, if any, is most reasonable.”
generate answers for all, or nearly all, questions arising therein. Their reasonableness stems from their ability to account for an overlapping consensus on the values of efficiency, stability, growth, and views about property rights and distributive justice. Some economic conceptions may be ruled out as unreasonable due to their failure to account for some or all of these consensus points. Indeed the market-based conceptions which now dominate economics discourse may strike future generations as unreasonable, as new values gain consensus (e.g., concern for the environment), or as new and better grand theories are devised. Of course theories of justice can not be modeled with mathematical proofs, and so the analogy with economic theory goes only so far. My point is simply that discourse in the economic sphere has a structural resemblance to the Rawlsian ideal of political discourse. This may be a good or bad thing for Rawls’s account, depending on one’s view of the current state of public deliberations over economic policy.\textsuperscript{70} I offer the example to illustrate the logic at work here: the turn to grand theory in the economic domain disciplines against rent-seeking (and the perception of rent seeking) in that sphere, just as the turn to grand theory disciplines against the influence of comprehensive doctrines in the political sphere. Theoretical ascent forces a reasonable balancing of everyone’s interests.

Rawls often points to the U.S. Supreme Court as an exemplar of his ideal of public reason. In their deliberations, members of the Court do not draw directly upon their personal religious or philosophical views. In the ideal, anyway, their deliberations are to be guided by values and beliefs that are generally accepted among the population.

\textsuperscript{70} One concern suggested by this analogy is that economic policy is now a very specialized domain of government. It is reasonable to ask whether Rawls’s model of public reason may lead to élitism. Rights-based views generally are targeted by this complaint. Bruce Ackerman writes that, “[w]hatever the philosophical merit of the resulting speculation into the nature of our Rights, the...discourse is invariably esoteric-- involving encounters with authors and doctrines that most college-educated people successfully avoided during their most academic moments. This élitist talk of Kant and Locke only emphasizes the illegitimacy involved in removing fundamental questions from the democratic process.” Bruce Ackerman, “Constitutional Politics/Constitutional Law” 99 Yale L. J. 453 at 465.
Interpreting and ordering those values charitably requires that they be brought together in a coherent fashion, necessitating theoretical abstraction. We may have doubts as to whether judges do, or ought to, adjudicate in this way, but contemplating the example is helpful in imagining the mindset required to actualize public reason.

The ideal scenario for Rawls, of course, is a situation where citizens converge upon a single political conception of justice. To achieve this would be to achieve the most harmonious society possible, consistent with pluralism: one where disagreements are settled by reference to a single theory that everyone agrees reflects the optimal understanding and ordering of shared political values. That ideal may be a point at infinity that we get closer to by conscientiously deliberating in the prescribed manner.

3.2 Theorization as a Procedural Requirement in Democratic Deliberations

In interpreting and restating Rawls’s account, I have emphasized its open-endedness, casting public reason as an ongoing process and downplaying the centrality of justice as fairness as a fixed point in deliberations. Following on the heels of our earlier discussion of deliberative democratic approaches, it may seem that my objective in emphasizing the proceduralism of Rawls’s account is to defend it against criticisms lodged by Waldron and Habermas. Really, though, my point is more to show how these accounts complement one another. Waldron favours a majoritarian decision procedure, restrained by concern for the rights of individuals. Rawls can be seen as setting out the basic terms of deliberation necessary to achieving that objective: fleshing out Waldron’s assumption that deliberations will attend to rights, Rawls suggests as a criterion of legitimacy that deliberations must take the form of a contest between reasonable political conceptions of justice. The Rawlsian ideal may culminate in majority voting,

72 Cf. supra note 43. Below I explain that Rawls’s account is complementary to Habermas’s.
73 For a different reading of Political Liberalism, see Waldron, Law and Disagreement, supra note 20 at c. 7.
but to say this is not to deny any disciplinary power to the idea of public reason.\textsuperscript{74} Habermas wishes to see principles of justice constantly renegotiated in the public sphere. Rawls models for us how political conceptions of justice can bootstrap on existing (and emerging) consensus points, maintaining a basic standard of reasonableness through the ongoing evolution of a political community.

There may be, then, reconcilable if not complementary views at work here over ideals of deliberation, but disagreement over how best to approximate those ideals under real world conditions. Perhaps the disagreement comes down to this. Rawls believes that the “family of reasonable political conceptions” vying (or latent) in politics is a small family, and that within that family, the resemblances are strong. There appears to be widespread disagreement in our society, but that is because citizens have not fully reckoned with the need to deliberate on the basis of a complete political conception of justice. If they would only commit to the Rawlsian ideal of citizenship, their divergent views would rapidly coalesce into a handful of theories, all very similar. Someone holding all of this might suppose that judicial review presents a viable ‘second-best’ institutional option. The idea being that it is better to have a small number of disinterested people, committed as part of their institutional role to reasoning at the requisite level of abstraction, than to have a large group voting without attending to grand theory.

\textsuperscript{74} Cf. John Rawls, \textit{Political Liberalism}, supra note 1 at 241: “Close agreement is rarely achieved and abandoning public reason whenever disagreement occurs in balancing values is in effect to abandon it altogether. Moreover...public reason does not ask us to accept the very same principles of justice, but rather to conduct our fundamental discussions in terms of what we regard as a political conception. We should sincerely think out view of the matter is based on political values everyone can reasonably be expected to endorse. For an electorate thus to conduct itself is a high ideal the following of which realizes fundamental democratic values not to be abandoned simple because full agreement does not obtain. A vote can be held on a fundamental question as on any other; and if the question is debated by appeal to political values and citizens vote their sincere opinion, the ideal is sustained.” See also Rawls’s discussion of how the legality of abortion might legitimately be decided by majority vote, \textit{ibid.} at lv-lvi.
Deliberative democrats, for their part, may agree in principle to the value of theoretical ascent, but have strong doubts about this resulting in greater agreement. The “family of reasonable political conceptions” is, for them, a large and disparate set. So to pluck out nine “black robed celebrities” and have them meditate on questions will not—by the winnowing effect of theoretical assent—produce a representative sample of the diverse viewpoints that would arise if all thirty million Canadians gave the matter careful consideration. There may be hundreds of proposals that are reasonable in the Rawlsian sense described above.

Either view involves conjecture. As evidence that “people disagree—and disagree radically—about justice,” Waldron points out that “there is barely a handful of academic political philosophers who accept the original position idea as Rawls expounds it or his view of the principles and guidelines that would be accepted therein.” But of course the community of academic political philosophers is hardly a fair sampling, as they are in the business of picking apart one another’s theories; academic philosophers define themselves by their disagreements with one another. Rawls’s supposition that theoretical assent will coalesce public opinion into a small family of reasonable political conceptions involves conjecture too—conjecture about the number and variance of possible grand theories. It is unclear what sort of evidence, if any, could settle this disagreement. It is a disagreement over counterfactuals that are likely to remain counterfactuals, so long as grand theory remains an esoteric pursuit. We may never know with any greater certainty what theory of justice (or diversity of theories) citizens would settle upon if they turned their minds en masse to the question.

75 Law and Disagreement, supra note 20 at 153-54.
76 Indeed, Waldron starts out Law and Disagreement bemoaning the 1:1 ratio of theories to theorists in contemporary political philosophy. Ibid. at 1-4.
4. A Different Approach

I have argued, *inter alia*, that disagreement over grand theories of justice does not force a retreat to majority rule. I have explained how Rawls’s account of public reason is not predicated on agreement over grand theory. Rawls can be understood as proposing a reasoning-process to be employed in deliberations over questions of basic justice. The model can accommodate disagreement, and is compatible with majority rule. A society where citizens conscientiously deliberated by reference to reasonable political conceptions of justice, and relied upon majority rule to resolve disagreements, would achieve the Rawlsian ideal.

Rawls, as we have seen, also points to the U.S. Supreme Court as an exemplar of his ideal of public reason. I have also pointed, briefly, to the Supreme Court of Canada as exemplifying a form of refined majoritarianism. In chapter 2, I explore the extent to which the Canadian Supreme Court conforms to Rawls’s model, in its handling of *Charter* cases. My contention is that the Court does not reason in the way that Rawls proposes. Indeed, the Court has in fact quite explicitly rejected the Rawlsian approach—consciously declining to invoke grand theory in adjudicating *Charter* claims.

Rawls’s approach reflects, I believe, the constitutional tradition of the United States. That tradition places a strong emphasis on defining the scope of rights in the abstract, and then defending rights, so defined, as absolutes (trumps). In cases where free expression is at issue, for example, debate will focus on whether the communicative act at issue constitutes ‘speech’. The supposition is that the Bill of Rights should frame the debate with exacting precision, reducing it to a single question, for which there is a ‘yes’ or ‘no’ answer.77 One has to assume that this paradigm is driven (in part) by the need to justify the United States’ institution of strong judicial review. The hope is that clear-cut questions with rationally discernable answers can be put before the Court; as

77 *Cf.* Habermas *supra* note 22 at 114-15.
things move away this ideal, it becomes less clear why the courts, rather than citizens, should have final say.

A very robust theory has to lie behind the simple wording of the Bill of Rights, if it is to play this powerfully determinative role in deliberation. And so American political philosophers enamoured with the Bill of Rights set out to develop robust theories, to fulfill this role. For their part, those who favour majoritarian decision-procedures tacitly accept this paradigm as well, but only to argue that the necessary theoretical convergence is unachievable.

My claim in the next chapter is that this paradigm is, and ought to remain, somewhat foreign to the Canadian constitutional tradition. The difference in approach lies in the open-ended structure of the Charter itself, which allows rights to be limited where doing so is “demonstrably justified in a free and democratic society.” Thus, in the Court’s method of adjudication, the question of whether a right has been infringed is formally separated from the question of whether the infringement is justified, with attention focused mainly on the latter question. The former question, of whether a right has been infringed is less of a focal point. The shift in focus to assessing the justifiability of infringements greatly lessens the reliance on grand theory. No longer are deliberations so heavily preoccupied with abstract questions about the scope of rights. No longer is there much call for imagining ourselves in some idealized choice situation like the original position, asking what rights we would opt for, and how we would order those rights, in that imaginary situation. We instead seek answers to comparatively down-to-earth questions. The vast majority of Charter decisions turn, in the final analysis, on this question: is there a way for government to achieve its objective while further minimizing rights infringements? That, obviously, is a quasi-empirical question
that will not be answered using abstract devices like the original position.\textsuperscript{78} The terminology of *Charter* jurisprudence reflects all of this, with its regular talk of \textit{contextual balancing}, and \textit{proportionality}. In short, the *Charter* is, by its very nature, an open-ended political conception, with no aspiration (or even potential) to have its internal logic mechanized through the installation of a grand theory.

With the move away from grand theory there is, or can be, a move away from viewing the Court as an oracle of philosophical truth. This too is reflected in Canadian constitutional culture. When the Canadian Supreme Court hands down a controversial decision—as it did for example with the recent \textit{Chaoulli}\textsuperscript{79} decision, which struck down Quebec’s ban on private health insurance—the response from critics is often not to claim that the Court had erred in delineating the scope of rights. The response is rather that the Court has erred by showing insufficient deference to judgments made by elected bodies. A great deal of Canadian constitutional theory is devoted to thinking about where and why the Courts should defer to majoritarian judgments.\textsuperscript{80}

The account of public reason I argue for in Chapter 2 departs from Rawls’ account in this respect: it places much less emphasis on overarching theories of justice. Emphasis is instead put on balancing interests on a contextual basis; overarching theory enters into public reason, if at all, as a matter of last resort.

\textsuperscript{78}The Court explains the empiricism of their approach clearly in \textit{RJR-MacDonald} [1995] 3 S.C.R. 199 at para. 133:

\begin{quote}
In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.
\end{quote}

\textsuperscript{79} \textit{Chaoulli v. Quebec} (Attorney General) [2005] 1 S.C.R. 791

CHAPTER 2: PUBLIC REASON WITHIN THE CHARTER

The reality is this: we as a society agree that rights matter, but we disagree over how they matter. The objective in devising an account of public reason, then, is to explain how free and equal citizens might structure their deliberations, in light of this reality. As we have seen, Rawls contends that by systematizing and extrapolating from the rights we all take to be self-evident, we can develop a complete ‘political conception of justice’, or a family of such conceptions, which may in turn be applied to resolve newly emerging disagreements. If we despair at the workability of this program, we may be tempted throw up our hands, and conclude that there is nothing more to be said by way of an account of public reason: we agree that rights matter, but we disagree over how they matter, and that is the end of it. In institutional terms, pessimism at the prospect of theoretical convergence argues, perhaps, for a majority rule decision-process. The risk of majority tyranny is attenuated, at least, by a fact that all sides concede: we as a society agree that rights matter.

Canadians contemplating the idea of public reason may naturally envision the Charter of Rights and Freedoms standing in for justice as fairness, as a framework for deliberations over matters of basic justice. As we will see in chapters 4 and 5, the Charter very often does serve as a framework for Canadian political discourse over controversial matters--outside the courtroom as well as inside. Perhaps a sort of inchoate notion, akin to Rawls’s idea of public reason, was in the minds of Canadians, for example, as the issue of same sex marriage was referred to the Supreme Court.¹ The naïve view among Canadians—those who supported handing the matter over to the Court-- may have been that there was a ‘right answer’ to the question of whether same

sex marriage was required by the *Charter*, and that the Court was best equipped to find that answer. If this imputes an uncharitable degree of naivety to Canadians, perhaps it is better to say that many Canadians imagine the Supreme Court to be a forum of higher principle. Along with Rawls, they expect that the Court will offer *some* principled justification for its decision, reflecting the overall spirit of the *Charter*, and that this is preferable to the unprincipled alternative, majority rule.

In this chapter, I want to explore how *Charter* adjudication differs from Rawls’s idealized account of public reason. As political conceptions of justice go, there is a considerable distance between *justice as fairness* and the *Charter*. *Justice as fairness* is a more orderly and complete political conception of justice, in the sense that it proceeds from a single overarching criterion (the original position), which yields two second-order principles, stated as absolutes (1. maximize basic liberty commensurate with equal liberty for all; 2. differences in wealth and other primary goods must be to the benefit of the worst-off). Those two principles are in turn ordered hierarchically (i.e., we are forbidden to sacrifice liberty, even to advance the interests of the least advantaged).² The all-purpose heuristic of the original position, along with the absolutism and lexical ordering of the two principles, are what makes *justice as fairness* a complete political conception of justice. The breadth and absolutism of these principles enable *justice as fairness* to yield answers to all questions of basic justice arising in the political sphere.

This is not to deny that considerable discretion is involved in applying *justice as fairness* to real world politics. Consider the question of how to satisfy the first principle. One presumes that this will not be a matter of securing negative liberty alone. It may be that liberty is best promoted when the state shoulders some positive obligations—say, an obligation to finance elections or public broadcasting networks—so that citizens are able

---

to exercise their liberty meaningfully.\textsuperscript{3} Perhaps even some limitations on negative freedom—such as Canada’s hate speech and obscenity laws—contribute to greater liberty overall, by combating attitudes that undermine the autonomy of oppressed groups.\textsuperscript{4} All of this to say that there will be delicate tradeoffs and deliberations involved in deciding how best to satisfy the first principle of \textit{justice as fairness}. Notice as well that the second principle, the difference principle, requires even greater discretion for its application. Indeed, Rawls argues against formal entrenchment of the difference principle as a constitutional right, precisely because there is bound to be constant disagreement as to when that principle has been satisfied.\textsuperscript{5} In addressing real world problems, then, \textit{justice as fairness} can provide a framework for discussion, but it will not yield determinate answers.\textsuperscript{6}

Despite leaving all this room for discretion and disagreement, \textit{justice as fairness} does close off a wide array of claims. In arguing within \textit{justice as fairness}, the device of the original position bars one from advancing contentious claims about the good,

\textsuperscript{5} The supposition here is that the question of how to optimize the situation of the worst off is of a different nature than questions about (e.g.) what constitutes an infringement of free expression. A reasonable convergence of opinion is expected with the latter, which is unlikely in the former. See Lawrence G. Sager, “The Why of Constitutional Essentials” 72 Fordham L. Rev. 1421. The Court has shown great reluctance to recognize positive economic rights of the sort countenanced by the difference principle, for reasons roughly analogous to those offered by Rawls: they fear that the redistributive issues are too complex a matter to be solved by the courts, by reference to the \textit{Charter}. See Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429.
\textsuperscript{6} This is a point that Rawls openly concedes. See John Rawls, \textit{Political Liberalism} (New York: Columbia University Press, 1993) at 368, explaining that \textit{justice as fairness}, ...
...is not to be regarded as a method of answering the jurist’s questions, but as a guiding framework, which if jurists find it convincing, may orient their reflections, complement their knowledge, and assist their judgment. We must not ask too much of a philosophical view. A conception of justice fulfills its social role provided that persons equally conscientious and sharing roughly the same beliefs find that, by affirming the framework of deliberation set up by it, they are normally led to a sufficient convergence of judgment necessary to achieve effective and fair social cooperation.
grounded in any particular comprehensive doctrine. If Rawls is correct about the priorities we would adopt in the original position, then only claims advanced under the heading of equal liberty, along with redistributive claims advanced from the perspective of the least advantaged, will have currency in this deliberative framework. Religious claims, for example, will only enter in a limited way, as when one argues, for example, that basic liberty must encompass this or that activity central to religion.

Turn now to Charter. As I will explain throughout this chapter, the Charter is a comparatively open-ended political conception of justice. The rights issued under the Charter are not absolutes, as the Charter explicitly allows that rights can be limited when doing so is “demonstrably justified in a free and democratic society”; Charter principles are not arranged hierarchically, and in developing doctrine, the Court has consciously resisted imposing any hierarchy upon it; the s.33 ‘notwithstanding clause’ allows that Charter rights may be overridden, in deference to the will of the majority, provided certain procedural requirements are met; lastly, on a more theoretical level, the Charter reflects both liberal and communitarian philosophies—making it difficult to

---

7 One assumes, of course, that a whole range of state interest might be grounded indirectly in these foundational commitments: concerns about public health, public education, the preservation of cultural diversity, the advancement of the arts and sciences, the protection of the environment, public safety and national security, and so on.

complete the Charter by reference to any one philosophical tradition. These ideas will be explored at greater length in the discussion that follows.

The Charter’s open-endedness leads the Court to a unique approach to rights discourse, where instead of absolutist reasoning, emphasis is put on notions of proportionality, and on the ‘contextual balancing’ of individual rights against state interests. On its face, all of this may seem to render the Charter a hopelessly subjective conception of justice—of little use in disciplining public discourse in the way that Rawls’ account of public reason prescribes. Indeed, critics routinely point to the Charter’s open-endedness in arguing that judicial review under the Charter is fundamentally illegitimate. A standard story told in defense of judicial review is that the population democratically ratifies its constitution—‘pre-committing’ to its strictures—and empowers the judiciary, as an independent and impartial body, to interpret and enforce that higher law. Yet, the objection goes, if the Charter is “largely indeterminate with regard to the questions put before it,” it is a mystery what citizens have pre-committed to.

In what follows, I want to consider the Canadian Supreme Court as an exemplar of public reason, asking: What general framework has the Court adopted for applying the Charter to real world controversies? In what ways does the Court’s method of

---

9 Thus, for example, ss. 16–23 of the Charter provide French and English language guarantees; s.29 of the Charter allows government to fund only Catholic and Protestant denominational schools, notwithstanding the s.15 equality guarantee; and s.25 specifies that aboriginal rights are not to be abrogated through the enforcement of the Charter. These provisions, arguably, reflect the concerns of the communitarian philosophical tradition, though some have tried to explain them in the language of liberalism. I do not mean to suggest that these attempts fail, or to presume that the Charter is incapable of being subsumed within the philosophical traditions of liberalism or communitarianism. My point is only that there is reasonable disagreement over this. The U.S. Constitution’s roots in enlightenment liberalism are much clearer by comparison. See Robin M. Elliot, “The Supreme Court of Canada and Section 1—The Erosion of the Common Front” (1987) Queen’s L.J. 277 at 281.

10 Samuel Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review” (1990) 9 Law & Phil. 327. In the early years of the Charter, the Court offered a similar argument as it assumed broad powers of judicial review. See (e.g.) Reference re Section 94(2) of Motor Vehicle Act [1985] 2 Sup. Ct. L. Rev. 486 at 497.

deliberation depart from the liberal ideal, as expressed in Rawls’s idea of public reason? In what ways—if any—does the Court’s method of deliberation discipline its reasoning against the influence of comprehensive doctrines? Assuming that citizens and elected officials wanted to deliberate by reference to the Charter, what guidance might they take from the Court’s example?

The members of the Court do not agree on any grand theory of justice, or any overarching criterion for the resolution of Charter disputes. As I will explain, they positively deny that there is any need to state such an overarching criterion. Still, they agree upon a decision-process—a chain of reasoning—that must be followed in adjudicating rights claims. My aim in this chapter is to explain that decision-process. Chapters 4 and 5 will demonstrate how that decision-process might serve as a framework of public reason outside of the courtroom.

Democratic deliberations outside the courtroom need not, and indeed should not, perfectly mirror the Court’s established framework. This is so, primarily, because the Court’s approach is tailored to its institutional role. The role of the Court, in principle, is not to second-guess complex policy decisions, but to ensure that decisions made by government comply with the law, including the foundational law of the constitution. These concerns with deference runs through the Court’s thinking on Charter matters, as I will explain, but of course legislators and citizens, in their reasoning, are not obliged to mirror that deference back to the Court— for they are sovereign in this dialectic. Still, there framework of reasoning employed by the Court may provide inform broader public deliberations.
1. The ‘Large and Liberal’ Scope of Public Reason under the Charter

A key feature of the Charter—mirroring European rights discourse—is that it openly allows for the limitation of rights, under s.1. In North American popular discourse, we are accustomed to thinking of rights as trumps, so that the notion of a justified rights infringement strikes us as a contradiction in terms. In Charter jurisprudence, by contrast, the question of whether a rights-infringement has occurred is separated from the question of whether that infringement is justifiable. The infringement question is asked first, and the burden is on the claimant to show that an infringement has occurred. If the claimant succeeds at that task, government then bears the onus of showing that the infringement is justifiable. Thus it is common for the Court to find that a claimant’s Charter rights have been infringed, and yet offer no remedy, on grounds that the infringement is justifiable in a free and democratic society. Section 2.3, below, will examine the logic employed in justifying the infringement of a right, but here I want to focus on how, at this first stage of this process, allegations of a prima facie infringement are assessed by the Court.

Typically, the Court is generous in allowing that an infringement has occurred: the mantra here is that rights should be given a ‘large and liberal’ interpretation at the infringement stage. The rationale for this, partly, is that the onus on Charter claimants should be eased, to compensate for government’s vastly superior legal resources. Owing to this ‘large and liberal’ approach, it suffices (e.g.) in freedom of expression cases for the claimant to establish that some content-bearing expressive activity—no matter how

---

12 Section 1 of the Charter states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.”

trivial or ignoble—has been interfered with by government.\textsuperscript{14} Thus, for example, cigarette advertising,\textsuperscript{15} and solicitation for prostitution,\textsuperscript{16} are deemed to fall within the scope of the right to free expression. As we will see in the next chapter, the right to religious freedom has been interpreted in a similarly generous manner, such that any activity sincerely believed to be required by one’s faith will fall under the protection of that right.\textsuperscript{17}

Nevertheless, some Charter provisions—notably the s.15 guarantee of equality, and the s.7 guarantee of ‘life, liberty, and security of the person’-- have been more narrowly defined at the infringement stage. In the ordinary business of governing, the state must, in myriad ways, treat citizens unequally, and interfere with their freedom to do as they please.\textsuperscript{18} Some initial limits therefore must be set on the Court’s ‘large and liberal’ interpretation of the equality guarantee, to separate trivial or obviously justifiable forms of unequal treatment from genuinely problematic ones. Likewise, the scope of the s.7 right to “life, liberty, and security of the person” requires restrictions at the infringement stage.\textsuperscript{19}

\textsuperscript{15}RJR-MacDonald, [1995] 3 S.C.R. 199
\textsuperscript{16}Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), 1990 1 S.C.R. 1123.
\textsuperscript{17}Syndicat Northcrest v. Amselem, [2004] SCC 47.
\textsuperscript{18}See generally Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143. The decision to limit the scope of s.15 claims to ‘enumerated and analogous’ grounds has drawn criticism from some quarters. Some argue that the right should have been left open-ended, so that any inequality of treatment under the law could be challenged, irrespective of whether race, gender, or some other analogous ground was operative in the discrimination. See David M. Beatty “The Canadian Conception of Equality” (1996) 46 (3) U.T.L.J. 349.
\textsuperscript{19}It is sometimes said that s.7 contains an \textit{internal limitations clause}, as it stipulates that state interferences with liberty are allowed only when they accord with ‘principles of fundamental justice.’ Section 7 claimants are charged, at the infringement stage, with establishing a widely accepted principle of fundamental justice, which has been violated by the alleged interference with their life, liberty, and security of the person. The Court must determine what constitutes a ‘principle of fundamental justice,’ and here they have clearly departed from a ‘large and liberal’ approach. Those convinced of Mill’s harm principle might consider the criminalization of any harmless behaviour to be an injustice. The Supreme Court of Canada has held otherwise: in upholding Canada’s criminal prohibition on recreational marijuana use, the Court has denied that Mill’s harm principle is a principle of fundamental justice for the purposes of s.7. (See R. v. Malmo-Levine; R. v. Caine, 2003 SCC 74). In Malmo-Levine, the Court found that recreational
The effect of this large and liberal approach at the infringement stage is that many claims reach a s.1 analysis. There, as explored in detail below, the Court inquires as to whether the right has been infringed in pursuance of a pressing and substantial government objective, and if so, whether the infringement is proportionate to that objective. If government can convince the Court that those questions are rightly answered in the affirmative, the infringement is allowed. Thus the Court’s ‘large and liberal’ approach at the infringement stage does not, of itself, bespeak any generosity to rights claimants—except insofar as it eases their burden of proof—for rights are often whittled down at the subsequent s.1 stage.20

Now, consider the large and liberal approach, not as a fixture of judicial reasoning, but as a principle of broader public reasoning. Supposing that Canadian citizens and public officials wanted to employ the Charter as a framework for democratic deliberations, should they too ‘pre-commit’ to a ‘large and liberal’ interpretation of Charter rights? Put differently, is it somehow publicly unreasonable to advocate a small and conservative reading of the Charter’s principles? At issue here is the scope of public

marijuana use was not a matter of ‘fundamental personal importance’ and was therefore too trivial an interest to engage s.7, and necessitate a justification from government under s.1.

There is presently some ambiguity as to the status of the harm principle under Canadian law. In a recent decision (R. v. Labaye, [2005] 3 S.C.R. 728) discussed later in this chapter, the Court considered a challenge to criminal indecency laws. At issue was whether government could criminalize private ‘swingers clubs’ in Montreal, where patrons engaged in group sex, out of public view. The case was not framed as a s.7 claim—in other words, this was not a case where swingers asserted a s.7 liberty interest in anonymous group sex. Instead, the issue was framed as a question about the limits of criminal law powers. Surprisingly, in light of the decision in Malmo-Levine (supra), the Court in Labaye developed a ‘theory of harm,’ ruling that criminal law provisions had to be directed towards a demonstrable harm. It is unfortunate, from the perspective of the general coherence of the law, that the swingers’ claim in Labaye was not treated directly as a claim under the s.7 right to liberty. One assumes that the reason criminal law powers are restricted to harm prevention, in Labaye, is to protect peoples’ liberty to engage in harmless activities. Yet if it was a liberty interest that won out in Labaye, why did the Court not first inquire—as it did straight away in the marijuana cases—whether partaking in a swinger’s club was an ‘inherently private decision,’ of ‘fundamental personal importance’? Perhaps good justification can be offered for criminalizing marijuana possession, while no good justification can be found for criminalizing swinger’s clubs. The point is only that the two activities should be held up to the same standard when asking whether their criminalization infringes liberty interests.

reason. As will be explained throughout this chapter, to say that Charter rights are engaged by an issue is to say-- at the very least-- that more rigorous standards of justification are appropriate to deliberations over that issue.21 (Those who profess a concern for rights while denying this minimal claim do not to have an eccentric understanding of rights; they misunderstand the meaning of rights.) The wider the scope we accord to Charter rights, the more our political deliberations will be bound by that more rigorous standard of justification.

Certainly the Court’s reason for adopting a large and liberal interpretation of Charter rights—i.e., to shift the evidentiary burden away from rights claimants and onto government—carries less weight in deliberations outside of the courtroom. As we engage in public reason in our deliberations as citizens, we draw upon a whole range of information sources; we do not draw strictly upon courtroom pleadings. There is no obvious need to frame public reason so as to correct for the kind of David and Goliath power imbalances that may arise in courtroom battles between private citizens and government.

It is worthwhile to consider the downside of pressing the ‘large and liberal’ approach to its limits in democratic deliberations. Political theorists of a liberal bent will at times argue that the strictures of public reason should encompass all of politics.22 Where Rawls wishes to limit the scope public reason to ‘constitutional essentials’—i.e., basic interests such as the right to free expression23—others insist that all of legislative politics, including ordinary spending decisions, must be made on the basis of widely accepted reasons, without reliance on perfectionist ideas of the good.24 Translated into

---

21 Of course some will claim that the concept of a right entails more than this—that rights are trumps, say—and I do not mean to deny that. As explained, though, that conception of rights does not fit well with Charter discourse.
24 Quong, supra note 22 at 240.
the language of Charter rights, the proponent of broad public reason might argue (e.g.) that a large and liberal interpretation of freedom of conscience effectively forbids any state support for religion.

There is something conceptually misguided, I believe, in this broad view of public reason. The purpose in articulating an account of public reason, one assumes, is to specify rules of deliberation that ensure a basic threshold of political legitimacy. There is nothing to be gained by insisting that public reason—and, by implication, political legitimacy—is at stake in each and every decision made by government. Indeed, there is much to be lost by overprinting the currency of liberal rights in this way. If everything engages basic rights, then nothing engages basic rights.

Perhaps, though, one can argue for the large and liberal interpretation of rights, as *prima facie* rule. Consider the advantages of the large and liberal approach from the perspective of discourse ethics. The Court’s objective, in writing decisions, is to convince the parties—particularly the losing party—of the reasonableness of its verdict. A benefit of the large and liberal approach is that, by granting that an infringement has occurred and proceeding to a s.1 analysis, the Court is able to offer more robust argumentation to both sides. The Court is given room to explore in detail whether the government’s objective in committing the infringement is pressing, whether it would be difficult or impossible to further minimize the infringement, and so on. When instead a claim is denied at the infringement stage, the evidence considered, and the reasoning offered, will be comparatively truncated.

Moreover, denying claims at the infringement stage seems, quite simply, to necessitate more theorizing about rights. In areas where the Court has been forced to carefully specify the scope of rights, so as to turn away claimants at the infringement stage—notably with the generic equality and liberty guarantees, as explained above—the resulting doctrine stands out for its complexity. From the perspective of doctrinal
complexity, it is less demanding simply grant--where possible--that an infringement has occurred, and move on to a s.1 analysis. As I will explain below, s.1 analysis is often comparatively straightforward, in theoretical terms; it often amounts to a form of Pareto testing. Clearly and consistently delineating the boundaries of rights over time is a difficult, and ultimately somewhat artificial way of resolving disagreements.

One can see how s.1 reduces the need for doctrinal complexity. When rights are instead conceived as ‘trumps’, there is a need to carefully delineate the scope of rights in the abstract. By analogy, consider how a deontological moral system will require careful qualifications to its rules, if it is to offer plausible guidance in the face of real world dilemmas. A deontological rule such as ‘never tell a lie’ will have to be qualified to accommodate cases where lying is plainly appropriate: cases where a murderer is demanding directions to the location of his victim, say. Adding a single utilitarian caveat may dispense of the need for those qualifications—though of course it will also compromise the integrity of the deontological moral system. The formalistic reasoning that results without a limitations clause—First Amendment doctrine fixating on whether this or that form of expression qualifies as ‘speech’, for example—has nothing to recommend it as a model of deliberation.25 Among other things, this approach has an air of artifice to it. One can’t help but think that a balancing of interests, akin to what goes on openly in s.1 jurisprudence, is at work behind the scenes.

Let me propose a rule for delineating the scope of public reason that addresses these concerns. If the Canadian Supreme Court is to be an exemplar here, the lesson perhaps is that deliberators should err on the side of generosity in granting the prima facie legitimacy of rights claims. The rule I have in mind might be stated as follows: in denying that a right is engaged by a particular issue, deliberators are obliged to justify that denial with a reasoned account of the right at issue. They must offer a reasoned

account of the *purpose* of the right, and explain why the claim fails in light of that account.\textsuperscript{26} The account proffered should accord with our settled views regarding the application of the right at issue.

An example drawn from chapter 4 illustrates the point. When it is alleged that Canada’s ban on research into therapeuting cloning infringes scientists’ right to free expression, it will not suffice, in response, to dismiss this allegation out of hand. If one wants to dismiss this claim *without* engaging in a balancing analysis—that is, without specifying some competing, weighty, and generally acceptable state interest that justifies the ban—then one is obliged to offer a reasoned account of the right to free expression, specifying why cloning falls outside the scope of that right. It is forbidden, in other words, to justify a particular law or policy by reference to one’s comprehensive doctrine *without first* clearing the ground by demonstrating that rights are not engaged.

2. The Rejection of Hierarchy

Before turning to the framework of reasoning employed in justifying the infringement of rights, it is worth discussing cases where the rights of two or more individuals come into conflict. In cases where one person’s exercise of religious freedom conflicts with another’s security of the person, for example, it is tempting to say that any talk of ‘balancing’ the two rights is wholly inappropriate. The more obvious solution, some have supposed, is to ‘reconcile’ the two rights at the infringement stage, concluding (in the example just mentioned) that religious freedom, properly conceived, does not encompass a right to endanger others’ security. Despite the intuitive appeal of this approach, the Court has been reluctant to adopt this ‘reconciling rights’ approach in all but the most glaring cases, as I will now explain. This reluctance to order rights in the

abstract further militates against the Charter’s completeness, and so it deserves exploration.

The Charter would be a more determinate decision-making tool were there an agreed-to ordering of its principles. The same-sex marriage debate, for example, might have been open and shut: that issue was framed as a conflict between the equality rights of same sex couples, and the religious freedom of those committed to the traditional, opposite-sex definition of marriage. If it had been accepted from the outset (say) that equality claims always trump religious freedom claims, the only debate would have been whether the equality claim raised by same sex couples had merit. From there one might have deduced a priori that the equality claim defeated concerns over religious freedom, and put the matter to rest.

Cases come before the Court from time to time which cry out for this sort of approach—cases where rights ostensibly conflict, but where the s.1 balancing approach appears perverse, because it seems simpler and more principled simply to assert that one right trumps the other. Consider, for example, (B.) R. v. Children’s Aid Society of Metropolitan Toronto (hereinafter, Children’s Aid Society).27 There, Jehovah’s Witness parents argued that their s.7 right to liberty, as well as their right to religious freedom, was infringed when the Children’s Aid Society was granted wardship over their child, and authorized a blood transfusion, contrary to the parents’ religious beliefs. The majority took the standard approach, granting at the outset that there had been an infringement of the parents’ Charter rights, but ultimately found the infringement to be justified, as the state had a pressing interest in protecting the child’s best interests.

In their concurring opinion, though, Justices Iacobucci and Major reasoned that it was analytically misguided to speak in terms of balancing the parent’s religious

freedom against a competing state interest (i.e., the state’s interest in promoting the best interests of children). They claimed that no balancing was needed here, because,

...the right to liberty embedded in s. 7 does not include a parents’ right to deny a child medical treatment that has been adjudged necessary by a medical professional. Although the scope of "liberty" as understood by s. 7 is expansive, it is certainly not all-encompassing. 28

They went on to say that “the child’s right to life must not be so completely subsumed to the parental liberty to make decisions regarding that child,” and that, “the best way to ensure this outcome is to view an exercise of parental liberty which seriously endangers the survival of the child as falling outside s. 7.” 29 In short, the minority preferred to delineate the boundaries of the parent’s right to liberty and the child’s right to life, limiting the former to make room for the latter, in the abstract.

The majority strenuously resisted imposing any such hierarchy upon the Charter. 30 The Court’s reasoning here is perfectly understandable: if it is settled in the abstract, for example, that security of the person takes precedence over religious freedom, this may foreclose the possibility of arriving at more subtle judgments and justifications, in particular cases, wherein security and religious freedom are both given consideration. Cases do arise, after all, where a person’s exercise of religious freedom poses a threat to others’ safety, but where it is less clear that security of the person should trump. In Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 31 for example, the Court considered whether the claimant, a Sikh schoolboy, had a right to don a ceremonial dagger in the classroom, notwithstanding concerns about the dangers this might pose to his classmates. There, religious freedom won out, as the danger was found by the Court to be sufficiently remote.

28 Ibid. at 319.
29 Ibid. at 431-32.
31 1 S.C.R. 256
The concern, then, is that one should not generalize in the abstract about the interests at stake in Charter conflicts. Though our general outlook may be (say) that liberty takes precedence over equality, there will be cases where—thanks to the large and liberal approach at the infringement stage—comparatively trivial liberty interests conflict with weighty equality concerns. As I explain in greater detail below, the contextual approach employed by the Court in its s.1 analyses is preferred because, “[n]o single principle is absolute and capable of trumping the others; they must all be defined in light of competing claims.”\(^\text{32}\) Obviously, this ‘contextual balancing’ approach is made possible by the fact that the Charter allows the limitation of rights under section 1.\(^\text{33}\)

It should be noted, as well, that imposing a hierarchical order on Charter rights would be of only limited use in making the Charter a more determinative or ‘complete’ political conception of justice, because only a limited subset of political disagreements involve conflicts between rights. It is sometimes supposed that the limitation of a right can only be justified, under the s.1, by pointing to some competing right, and were this so, an abstract ordering of rights would go a long way towards making the Charter a more determinative conception.\(^\text{34}\) Section 1 analysis would then be a matter of determining which rights are at stake, and deciding a victor by reference to the pre-established hierarchy, as one does in a rock, paper, scissors contest. But of course, when it is said that government may infringe rights only for the protection of other rights, this is meant very loosely. Thus, one might reasonably hold that there is a legitimate state interest in


\(^{33}\) There are rare cases where the Court will ‘reconcile’ the conflict by clarifying the limits of the rights without advancing to the s.1 stage. These are cases where one side in a would-be ‘conflict of rights’ advances a claim that strains even the limits of the ‘large and liberal’ approach. So, for example, if I claimed to express myself by assaulting others, the Court would ‘reconcile’ the conflict between my expressive freedom and others’ security of the person by clarifying that violence is excluded from the s.2(b) guarantee. The Court would not, in other words, go through the motions of a s.1 analysis, balancing my interests against the interests of others. See Frank Iacobucci, ‘Reconciling Rights: The Supreme Court of Canada’s Approach to Competing Charter Rights’ (2003) 20 Sup. Ct. L.Rev. 137.

\(^{34}\) This view that rights can only be infringed for the sake of other rights may be due to Rawls: recall, the first principle of justice as fairness is often expressed by saying that liberty can only sacrificed for the sake of greater equal liberty.
censoring tobacco advertisement, to protect the personal security of those who might otherwise be induced to take up smoking. But that is a slightly misleading way of speaking, as no one seriously believes that citizens have a ‘right’ to be shielded from tobacco ads. (The parameters surrounding allowable justifications for the infringement of rights are discussed further below, in section 3)

The reader may be at pains to see how this relates to broader public discourse—surely there is not a risk, outside the courtroom, of citizens and legislators advancing arguments based upon a hierarchical ordering of Charter values. On the contrary, though, in public discourse one commonly finds arguments advanced that tacitly assume a particular ordering of Charter principles. As explained in chapter 5, the debate over same sex marriage was widely framed as a conflict between equality rights and religious freedom, and there, participants often tacitly assumed an ordering of those two rights. Those opposed to same sex marriage, for example, would speak as if just demonstrating that religious freedom was at stake would suffice to win their argument—so weighty are concerns over religious freedom relative to equality claims of same sex couples. It is therefore instructive to note that the Court has roundly rejected this approach, and moreover to note the Court’s reasons for doing so. If the Court is to be our exemplar in public reason, we must demand, in cases of alleged conflicts of rights, to know the specifics of the alleged threats on either side. A reasonable argument will not rest solely on some abstract claim— or worse, some unstated presupposition—about the importance of one right relative to another.35

3. Public Reason and the Limitation of Rights

Section 1 of the Charter states that:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The purpose in including this provision was to disavow absolutist thinking about rights of the sort that, for example, hampered the introduction of New Deal legislation in the United States, in the early 20th Century. During the so-called *Lochner era*, the U.S. Supreme Court imposed a free-market ideology upon lawmakers, ruling that legislative interferences with the labour market violated the Fifth Amendment of the Bill of Rights, which prohibits government from seizing citizens’ property without just compensation. The *Charter’s* limitations clause is meant to avert situations where the judiciary blocks legislation plainly needed for the public good, by allowing government to justify rights infringements to the Court.\(^\text{36}\) From the perspective of public reason, one virtue of the limitations clause is that it formally requires government to clearly specify their reasons for infringing rights, and expose those reasons to careful scrutiny. The challenge, though, in allowing the weight of rights to vary by context in this way, is to specify the sense in which rights are granted *any priority at all*, over general considerations of public welfare.

*R. v. Oakes*\(^\text{37}\) is perhaps the most important of all *Charter* decisions,\(^\text{38}\) as it outlines a framework for the application of s.1, and thereby specifies the decision-procedure to be followed in balancing all rights against competing state interests. The *Oakes* test specifies that the infringement of a *Charter* right will be justified provided: 1. the government’s objective in infringing the right is *pressing and substantial*; 2. the

---

\(^{\text{36}}\) The *Lochner* era is normally pointed to as an example—*the* example, really—of the pitfalls of judicial activism. Arguably, though, the problem with that era of jurisprudence had as much to do with the Court’s assumption that property rights are near-absolute. Had *legislators* assigned absolute priority to free market property rights, this *too* would have been a problem from the perspective of public reason, though not a problem of judicial activism. The overemphasis on the issue of judicial activism has, some argue, allowed these ideological shortcomings of *Lochner* to persist. See Cass Sunstein, “*Lochner’s Legacy*” 87 Columbia Law Review 873 (1987). *Cf.*, Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Boston: Harvard Univ. Press, 1996) at 82.


\(^{\text{38}}\) In a recent poll of Canadian constitutional scholars, *R. v. Oakes* was found to be the most important *Charter* decision of all. See “Ten Court Rulings that Cemented Rights and Freedoms” *The Globe and Mail* (12 April 2004).
infringement is *rationally connected* with that pressing and substantial objective; 3. the right is *minimally impaired*; 4. the value of the objective, and the actual costs and benefits associated with pursuing that objective, are *proportionate* to the costs of the infringement. In what follows, I want to explore how the *Oakes* test manages to discipline argumentation within the *Charter*, assigning some priority to rights claims while allowing sensitivity to context.

### 3.1 Pressing and Substantial Objectives within Public Reason

It is *very* rare for government to fail in justifying a rights infringement at the ‘pressing and substantial objective’ stage of the *Oakes* test. Tellingly, though, one of those rare occasions was *R. v. Big M Drug Mart*, where the Court found that the *Lord’s Day Act* had a religious purpose, and ruled that enforcing the observance of Judeo-Christian Sabbath was not a justifiable objective. Insofar as the *Charter* compels

---

39 The inquiry into the salutary and deleterious effects of the government action was a later addition to the *Oakes* test. See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 887.

40 Regrettably, the numbering and terminology used in referring to the different stages of the *Oakes* test tends to vary; numbering the stages 1 through 4 seems the most straightforward approach, and I will use it here. The *Oakes* test is often described as a ‘two branch’ test, where the assessment of the government’s objective is understood as the first branch, and the final three stages (i.e., rational connection, minimal impairment, and proportional effects) are grouped together as a second ‘proportionality’ branch. Indeed, this is the terminology used in *Oakes* (ibid. at 105-6). In my view, this way of speaking about the *Oakes* test invites needless confusion. For one thing, it is unclear how the rational connection test—which falls within the proportionality branch—has anything to do with proportionality. If I say that opening umbrellas indoors has no rational connection with future misfortunes, I am not making a claim about the proportionality of some tradeoff between umbrellas and bad luck. Rather, I mean to deny that there is any tradeoff between them. Furthermore, the *minimal impairment* stage is meant to focus solely on the efficacy of the chosen means in achieving the government’s objective; the proportionality of the government objectives relative to the deleterious effects upon the right holder is not relevant at this stage. (See *Thompson Newspapers v. Canada* [1998] 1 S.C.R. 877 at para. 125). It is only at the *fourth* stage that the deleterious effects upon rights-holders enter the picture, to be weighed against the salutary effects of the government action. As others have noted, the Court has often been sloppy in compartmentalizing these different stages, showing a tendency to crowd the proportionality analysis into the minimal impairment stage. (See Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007) 57 U.T.L.J.384 at 393-5.) Below, I speculate that the Court may prefer to emphasize the *minimal impairment stage* out of a desire to avoid controversy; decisions reached at the *minimal impairment stage* have some of the rhetorical appeal of Pareto efficiency arguments, I argue.

41 [1985] 1 S.C.R. 295 at 344. Of course *Big M Drug Mart* was decided prior to *Oakes*, but in its language, *Big M* is unequivocal that religiously-motivated state coercion fails at the first hurdle of s.1.
government to bracket religious and sectarian aims when justifying infringements of basic rights and freedoms, it is by virtue of the ‘pressing and substantial objective’ stage of the Oakes test.

Though Charter decisions seldom turn on it, the question of what constitutes a valid government objective ‘in a free and democratic society’ is the very question that motivates the idea of public reason. For comparison’s sake, notice how justice as fairness furnishes a general, but nonetheless determinate answer to this question. Under justice as fairness, the only objective deemed sufficiently pressing and substantial to justify interference with basic liberties is the defense of others’ equal liberty. The Charter does not offer any analogous, general principle. Given this indeterminacy, citizens may find it difficult to discern which objectives are allowable and which are not. Religious citizens, for example, may find it arbitrary or overreaching that, in the precedent set by Big M Drug Mart, religious objectives are summarily ruled out by the Court. They may wonder: by what criteria are government objectives judged pressing and substantial?42

The Court has generally refrained from theorizing at length about what constitutes a ‘pressing and substantial’ aim. The Oakes decision itself offers as robust an explanation as one is likely to find, as Chief Justice Dickson explains:

The Court 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 the 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.43

43 R. v. Oakes supra note 37 at para. 64.
There was once, apparently, some hope that a rich body of doctrine might emerge, specifying the workings of s.1 with greater precision and theoretical depth.\textsuperscript{44} As I will explain, though, there are indications that the Court has steered towards a kind of utilitarian pragmatism on this front.\textsuperscript{45} For example, in the recent Chaoulli\textsuperscript{46} decision—where Quebec’s ban on private health insurance was overturned, arguably jeopardizing single-tier healthcare—the Court was far less florid about the values that may enter into s.1 analyses, offering instead this terse, utilitarian view:

...the measure must be consistent with democratic values and it must be necessary in order to maintain public order and the general well-being of citizens. The variety of circumstances that may be presented to a court is not conducive to the rigidity of an exhaustive list.\textsuperscript{47}

Reflecting this stripped-down, utilitarian view, the s.1 analysis in Chaoulli focused strictly upon the whether single-tier health care was Pareto efficient, relative to a two-tiered system. The majority asked strictly whether for-profit health care could be allowed without detracting from the quality of service in the universal, not-for-profit system. The majority did not explore whether—considerations of welfare aside—there might be something intrinsically offensive to Canadians’ shared understanding of equality, or human dignity, in allowing those possessed of the financial means to gain quicker access to life-saving treatment. In Chaoulli, the Court took on a cherished Canadian institution—an institution which, for many, is paradigmatic of Canadians’ shared political conception justice. It is striking, then, that the analysis took place

\textsuperscript{44} See (e.g.) Hon. B. McLachlin, “The Charter of Rights and Freedoms: A Judicial Perspective” (1989) 23 U.B.C. L. Rev. 579 at 588.
\textsuperscript{46} Chaoulli v. Quebec (Attorney General) [2005] 1 S.C.R. 791.
\textsuperscript{47} Ibid., at 93. While the court has moved towards a utilitarian understanding of the pressing and substantial objectives test, it also appears to have grown increasingly open to mundane objectives—requiring that they be merely ‘valid’. See R. v. Whyte, [1988] S.C.J. No. 63. See Sujit Choudhry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter’s Section 1” (2006) 34 Sup. Ct. L. Rev.501 at 510. Whether there is any reason to lament this is unclear: the German Constitutional Court, which employs a proportionality test similar to Oakes, tests only for ‘legitimacy’. See Dieter Grimm, supra note 40.
entirely within a paradigm of Pareto efficiency. In the subsection that follows, I will explain that the Court is often drawn to this style of reasoning, and try to explain why.

A common complaint from conservative quarters, and religious conservatives particularly, is that liberal comprehensive doctrines exert a subtle control over Canadian constitutional discourse, just by requiring that arguments be constructed in liberalism’s favoured lexicon of individual rights, harm prevention, preference satisfaction, and so on. To the conservative’s chagrin, this rules out the possibility that government objectives might be pursued at the expense of individual rights, just out of respect for tradition or customary norms—out of a sense, that is, that societal mores, which may not be clearly explicable under the harm principle, are woven into our mode of life. Even those who do not self-identify as conservative may have worries about this. My point in mentioning Chaoulli, a moment ago, was to indicate how symbolic or deontological reasons may underlie Canadians’ commitment to single-tier health care. On the face of it, it seems altogether reasonable that the infringement of rights might, in some case, be justified by symbolic or deontological (i.e., non-welfarist) state objectives. The concern is that s.1 has come to rest upon a welfarist paradigm, wholly discounting non-welfarist arguments, and that this is objectionable from the perspective of public reason because welfarism is controversial doctrine.

The Court has given fairly explicit indications that symbolic objectives are not sufficiently pressing and substantial to justify the limitation of rights. In Sauvé v.

---

48 “Welfarism is the view that policies (or, strictly speaking, the states of affairs that policies produce) should be assessed solely by a social welfare function that considers only information about individual preferences.” Lawrence B. Solum, “Public Legal Reason” (2006) 92 Virginia Law Review 1449 at 1452. In recent years, a debate has raged among legal theorists over whether only welfarist considerations should be given weight in policy deliberations; the implication is that considerations of (e.g.) fairness would be given no weight. Whatever the philosophical merits of this argument, this proposal is controversial within public reason, as many citizens will reasonably reject the idea the welfare is all that matters. For a defense of the pure-welfarist position, see Louis Kaplow & Steven Shavell, Fairness versus Welfare, (Harvard University Press 2002); for a critique of it, see Arthur Ripstein, “Too Much Invested to Quit” (2004) 20 Economics and Philosophy 185.

49 Lawrence B. Solum, “Public Legal Reason”, ibid. at 1452.
Canada,\textsuperscript{50} for example, the Court considered whether government was justified in denying long-term prisoners the right to vote in federal elections. In a 5-4 decision, the majority came close to finding that the government’s objective was not pressing and substantial.\textsuperscript{51} The majority in Sauvé explains that symbolic objectives will not suffice to justify the infringement of a basic right, demanding concrete evidence of harm instead:\textsuperscript{52}

...[P]recisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. Their terms carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms...At the end of the day, people should not be left guessing about why their Charter rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process.\textsuperscript{53}

For their part, some constitutional theorists have also construed s.1 as a purely ‘welfarist’ test. David Beatty, for example, has suggested that the best way to conceptualize the \textit{Oakes} test, in the language of moral theory, is to collapse the pressing objective test (stage 1) and the proportionality test (stage 4) into “a very conventional ‘utilitarian’ standard.”\textsuperscript{54} These two stages, in combination, are meant simply to verify that the benefits of the infringement outweigh its costs. The other two stages—the rational connection and minimal impairment tests—can similarly be collapsed into welfarist terms, “encompassed in a single criterion or test of ‘Pareitan’ well-being.”\textsuperscript{55}

Thus, on Beatty’s restatement, the \textit{Oakes} test allows the infringement of rights provided two tests are met: 1. there is no alternative which achieves the same net utility but which is Pareto superior from the point of view of upholding rights; 2. the utility of pursuing

\textsuperscript{50}[2002] 3 S.C.R. 519 [hereafter \textit{Sauvé}].
\textsuperscript{51}“[P]rudence suggests that we proceed to the proportionality analysis, rather than dismissing the government’s objectives outright.” \textit{Ibid.} at para.26.
\textsuperscript{52}It should be noted that the right to vote is perhaps the most fundamental of fundamental rights. As the Court notes in \textit{Sauvé}, \textit{ibid.}, the right to vote is \textit{not} subject to the s.33 override, which signals its inviolability.
\textsuperscript{53}Ibid. at paras. 21-23 [emphasis added].
\textsuperscript{54}David Beatty, “The End of Law: At Least as We Have Known It” in Richard Devlin, ed., \textit{Canadian Perspectives on Legal Theory} (Toronto: Emond-Montgomery, 1991) 393.
\textsuperscript{55}Ibid. at 394.
the government’s objective outweighs the utility of upholding the right. Test 1 is
assigned lexical priority over test 2, Beatty claims, meaning that an overbroad

There is a problem, from the perspective of public reason, if Beatty is right about all of this. For this utilitarian reading of s.1 is, in my view, both too narrow and too broad, and therefore objectionable from the perspective of public reason. Rightly understood, some utilitarian considerations must be barred from consideration under s.1, and conversely, some non-utilitarian objectives should be open to consideration.

The first thing to notice, contra Beatty’s account, is that a pure utility calculus will be open to all consequences that impact welfare. This of course is what generates familiar counterexamples to utilitarianism—those imagined scenarios where utility is maximized by executing an innocent man, say, because doing so averts a vigilante riot, or provides lasting delight to a large bloodthirsty audience. The Court has taken seriously this idea that limitations on Charter rights must be reasonably justifiable in a free and democratic society, and though this criterion is vague, it is not completely open-ended. It is conceivable that actively inculcating religious convictions might lead to an increase in total welfare, given the compelling evidence that religious believers are on average happier than non-believers.\footnote{In his study of the social, economic, and political determinants of subjective well-being, John Helliwell finds that religious belief has a strong positive correlation with self-assessments of well-being: “Both aspects of religion—regular church going and belief in the importance of God—are associated with significantly higher subjective well-being....For example, the combined effects of church-going and belief in God are almost as large as those involved in moving from the very bottom to the top of the income distribution.” Helliwell, Globalization and Well-Being (Vancouver: UBC Press 2002) at 49. See also, Witter, R.A., et al., “Religion and Subjective Well-Being in Adulthood: A Quantitative Synthesis,” (1985) 26 Review of Religious Research 332. One might try to explain away Big M Drug Mart, and salvage the welfarist reading of s.1, by arguing that coerced religious belief will not bring about greater welfare.} But for the state to inculcate religious beliefs in this way is inimical to a free and democratic society, and it is plain from Big M Drug Mart that the
Court will refuse, as a matter of principle, to entertain any such utility calculus. In short, government objectives inconsistent with Charter values of autonomy and equality are forbidden as justifications for the infringement of rights, no matter what the utility payoff might be from the pursuit of such objectives.

More importantly—contra Beatty’s analysis, and the Court’s reasoning in Sauvé—it is not clear from other areas of Charter jurisprudence that only the promotion of welfare should qualify as a pressing and substantial objective. There are not reams of case law exploring the allowability of non-welfarist justifications, because the vast preponderance of legislation is directed towards welfarist objectives (or at least, can be readily construed as such by government lawyers pleading before the Court). Questions about the allowability of welfarist versus moralist justifications are nonetheless central to debates over public reason, for obvious reason. When, for example, religious voices weigh in on public debates, their viewpoints are often non-welfarist. As explored in Chapter 3, ‘divine command’ comprehensive doctrines will naturally generate beliefs about the intrinsic goodness and badness of particular acts and ends. Thus, despite its marginality in the case law, this question of moralism versus welfarism is central to public reason. This question is addressed most squarely in obscenity and indecency cases, and so it is worthwhile briefly exploring these cases, with a focus on how non-welfarist morality is treated.

Surveying the Supreme Court’s handling of obscenity and indecency cases from the enactment of the Charter to the present day, one finds a gradual move away from a

---

58 Supra note 41 at para. 142. In Chapter 3, I will say more about the place of religion within the Charter. There I argue that the generous protection extended to religious belief and practice under the Charter bespeaks an underlying understanding that religious justifications are inherently private and therefore inscrutable within public reason. This explains why religious justifications in particular can never count as pressing and substantial.

59 As I explain below, the Court has a preference for welfarist objectives, as such objective are amenable a minimal impairment analysis. No doubt government lawyers defending legislation under s.1 will chose to emphasize welfarist objectives, wherever possible.

60 I do not mean to suggest that all religious believers engage in moral reasoning of this sort; nor, for that matter, do I claim that all atheists are welfarists.
‘community standards test’—where non-welfarist moral judgments are given weight, and pornography is censored for its intrinsic ‘filthiness’—to a harm-based test. In *Towne Cinema*, a 1985 decision, the test established for obscenity was based upon *what the community as a whole would tolerate others viewing*. *Towne Cinema*, it should be noted, might be viewed as a small step in the direction of popular sovereignty, as it required judges to look beyond their *private* moral views, and fix upon the moral views of the community. The shortcoming of this approach, from a liberal perspective, is that it merely substitutes community tastes for the tastes of judges. Many liberals of course would prefer a harm-based test, or at least, some alternative test that doesn’t aspire merely to capture the community’s unvarnished sensibilities. The court grappled with this again in *R. v. Butler*, a 1992 decision, and arrived at a test that sits halfway between the community standards test and a harm-based test. With *Butler*, the test became, “what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure.” Thus only the community’s concerns about harm to others would count, and not, for example, their religious views about the inherent sinfulness of pornography.

Though *Butler* was hailed by some liberals as a move toward a harm-based test, the Court was careful to explain in that decision that “the mere fact that a law is grounded in morality does not automatically render it illegitimate.” That said, not just *any* morality could be pursued in the criminal law, the Court explained: it would have to be a form of morality reflected in the *Charter* itself. This strand of the *Butler* decision is of interest, for present purposes, because it seems to suggest that the state can act in

---

63 Ibid. at 485.
64 Ibid. at 493.
furtherance of what one might label Charter moralism: the coercive advancement of Charter morality where no welfare concerns are directly at stake.\textsuperscript{65}

This strand from Butler was recently picked up and made the centerpiece of indecency law, in \textit{R. v. Labaye}.\textsuperscript{66} There, while appraising a ban on so-called ‘swinger’s clubs,’ the Court finally disavowed all talk of ‘community standards,’ and ruled that the only harms relevant were those which society “formally recognizes as incompatible with its proper functioning”:

The inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has recognized as essential. Views about the harm that the sexual conduct at issue may produce, however widely held, do not suffice to ground a conviction. This is not to say that social values no longer have a role to play. On the contrary, to ground a finding that acts are indecent, the harm must be shown to be related to a fundamental value reflected in our society’s Constitution or similar fundamental laws, like bills of rights, which constitutes society’s formal recognition that harm of the sort envisaged may be incompatible with its proper functioning. Unlike the community standard of tolerance test, the requirement of formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society. Autonomy, liberty, equality and human dignity are among these values.\textsuperscript{67}

It is worth noting, in passing, that the Court’s objective in \textit{Labaye} was, in part, to rule out of consideration religious views regarding the intrinsic evil of swinger’s clubs:

...the guarantee of freedom of religion in this context requires further comment. The claim that particular sexual conduct violates particular religious rules or values does not alone suffice to establish this element of the test. The question is what values Canadian society has formally recognized. Canadian society through its Constitution and similar fundamental laws does not formally recognize particular religious views, but rather the \textit{freedom to hold particular religious views}. This freedom does not endorse any particular religious view, but the right to hold a variety of diverse views.\textsuperscript{68}

\textsuperscript{65} Whether the Court’s intention, in Butler, was to allow non-welfarist justifications is unclear. The court references Dyzenhaus, David. “Obscenity and the Charter: Autonomy and Equality” (1991) 1 Criminal Reports 367. In a series of essays Dyzenhaus has argued that pornography may be harmful to women’s autonomy, and that liberals, given their commitment to autonomy, should be open in principle to censorship. The argument is not moralistic, but instead is a nuanced account of how pornography may cause real harm to autonomy interests. See also Dyzenhaus, “Pornography and Public Reason’, (1994) 7 C.J.L.J. 261.

\textsuperscript{66} [2005] 3 S.C.R. 728 [hereafter \textit{Labaye}].

\textsuperscript{67} \textit{Ibid}. at para. 32 [emphasis in original].

\textsuperscript{68} \textit{Ibid}. at para. 34.
Labaye’s twist on the *Charter Moralism* advanced in *Butler* is puzzling, in some respects. ‘Moralism’ is often understood in contradistinction to welfarism: to say that a law has no harm-based justification is just to say that it is moralistic. Thus, in *Butler*, when the Court allows for legal moralism, provided it is rooted in *Charter* values (what I have called Charter Moralism), one assumes that the door has been opened to non-welfarist justifications within s.1. One imagines, for example, that hate speech laws might be justified purely as an expression of the Charter’s commitment to equality, even if those laws are ineffective in preventing harm. In *Labaye*, however, Charter values are used as a limiting device within a strictly welfarist paradigm. *Labaye* calls for a strict adherence to the harm principle—disallowing symbolic objectives and judgments about the intrinsic wrongfulness of certain activities—and uses Charter values as device for selecting which harms are to be considered.\(^{69}\) *Labaye* abandons Charter Moralism in favour of a purely harm-based test. To capture this shift, I will label the framework advanced in *Labaye*, ‘Charter Welfarism.’

One can readily understand why the courts might be drawn to either Charter Moralism or Charter Welfarism, as both approaches ostensibly provide constitutional grounding for moral judgments. For similar reasons, one can understand the appeal of both accounts—and Charter Welfarism, particularly—for liberals. If the infringement of Charter rights can only be justified by reference to other Charter values, then the *Charter* as a whole can be viewed as a closed system: a ‘complete’ political conception of justice, in the sense that it exhaustively specifies the values at play in public reason.

What lessons might be drawn from all of this, for broader public reasoning? Both Charter Moralism and Charter Welfarism employ the same tactic: they both aspire to have the *Charter*, as it were, reflect back on itself at the s. 1 stage, so that the allowable

\(^{69}\) Thus, the Court focuses on harms to equality and autonomy, verifying that women attending the swinger’s club are treated respectfully, that they freely choose to attend, that the general public is not unwittingly exposed to the goings-on inside the club, and so on.
justifications for the infringement of rights are selected by the Charter itself.\textsuperscript{70} **Charter** Welfarism, though, relies upon a contestable view of what the Charter stands for. It supposes that only welfarist justifications can justify rights infringements, thereby implying that the Charter is an exclusively welfarist political conception of justice. But of course some core Charter values are readily amenable to a reasoned, non-welfarist reading. As alluded to above, the value of equality springs to mind here, as it is often held that unequal treatment may offend the value of equality even—contra welfarism—where it does not leave its victim worse off in any absolute sense. My earlier discussion of Chaoulli was meant to suggest, for example, that a non-welfarist conception of fairness and equality may underlie Canadians’ commitment to universal health care. Perhaps two-tiered health care, segregated between rich and poor, is offensive to Canadians’ sense of equality in just the way that a two-tiered school system, segregated between blacks and whites, is offensive. In neither case are concerns entirely assuaged by evidence that the inequality does no tangible injury to the disadvantaged minority.\textsuperscript{71} What offends is the very idea that race should matter to schooling, or that ability to pay should matter to the accessibility of healthcare.

The point is not, of course, to deny that considerations of welfare matter, or even to deny the truth of welfarism as a comprehensive doctrine. The point is only that welfarism— to the exclusion of non-welfarist concerns— is a comprehensive doctrine, and as such it can not be installed as fixed point of public reason. **Charter Moralism** offers a more capacious and therefore more reasonable standard for determining whether a given objective is pressing and substantial. For **Charter Moralism** allows deontological

\textsuperscript{70}To borrow Gerald Gaus’s terminology, the indeterminacy that remains is ‘nested’ in the Charter. See Gaus, *Justificatory Liberalism* (Oxford: Oxford University Press, 1996) at 156.

\textsuperscript{71}In saying this, I do not mean to accept the Court’s finding that two-tiered health care poses no risk to the welfare of the poor. I agree with those who argue that the Court was overreaching in arriving at this conclusion. See Choudry, “Worse than Lochner” in *Access to Care, Access to Justice*, C. Flood, K. Roach, L. Sossin, eds., (Toronto: University of Toronto Press, 2005) 55.
and symbolic objectives, alongside welfarist objectives, insofar as all such objectives can be rooted in a reasoned interpretation of the Charter.

3.2 Rational Connection and Minimal Impairment

To this point, we have seen how the Court is reluctant to specify the scope of rights in an abstract form, preferring a large and liberal (and vague) approach. This refusal to specify the scope of rights in the abstract makes it impossible to impose any fixed hierarchy upon rights. The result is that both the scope and weight of basic rights is left to be decided on a contextual basis. This means that the real work of Charter adjudication is done at the s.1 stage, where the justifications for the infringement of rights are assessed and weighed against the rights-interests themselves. The question then becomes how, if at all, the Charter prioritizes basic rights over considerations of general welfare at the s.1 stage; it must do so, after all, if it is to be political conception of justice and not merely a heuristic for carrying out grand utility calculations. We have just seen one respect in which the Charter prioritizes rights, by disallowing a whole range of potential “justifications” for their infringement. As explained, the Court’s position on this front is somewhat ambiguous: there are some indications that only Charter-compliant welfarist considerations are allowed. I have argued that this is an unreasonably restrictive view, and have argued for a more capacious, yet not altogether open-ended criterion, Charter Moralism. Even with this narrowed range of allowable justifications, there remains a risk that rights will be traded off for the sake of some comparatively trivial majority preference. Plainly, an adequate political conception of justice must say more than this. The remaining stages of the Oakes test are intended to do just that. Recall, the remaining stages are: the rational connection test (stage 2); the minimal impairment test (stage 3); and the proportionality test (stage 4). In this section, I want to consider stages 2 and 3.
The rational connection test has not received a great deal of attention in the jurisprudence—though, ironically, it was the decisive stage in Oakes decision. Some have claimed that that the rational connection test is redundant, on grounds that any government action lacking rational connection to its stated objective will be caught at the subsequent minimal impairment stage.\textsuperscript{72} I will explain in a moment why, in my view, the Court tends to emphasize the minimal impairment stage, but I first want to explain the importance of the rational connection stage to public reason.

While the minimal impairment stage will address cases where legislation is over-inclusive—inafiring rights where doing so is not essential to the government’s objective—the rational connection stage captures cases where legislation is under-inclusive.\textsuperscript{73} That is to say, it catches legislation that pursues objectives in an arbitrary manner, while infringing rights in the process. Arguments rooted in concerns about under-inclusiveness are a valuable resource in public reason. When it is argued that some group or individual’s rights should be infringed in pursuit of some objective, it makes sense to ask what other sacrifices society has been willing to bear in pursuit of those objectives. Suspisions should be raised if it turns out that a minority is being singled out, and made to bear a disproporionate burden in furtherance of the objective in question. An example here may be useful. In chapter 5, I discuss Margaret Somerville’s arguments against same sex marriage. Her objection is rooted in the putative right of children to know, and be raised by, their biological parents. As I argue

\begin{flushright}
\textsuperscript{73}R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713. In Edwards Books, the Court considers whether Sunday closing legislation—the stated objective of which is to provide workers with a common day of rest— is allowable if it targets only the retail sector. The case expands the rational connection stage of the Oakes test to a catch under-inclusive legislation. Sujit Choudhry views this as a watershed development in Charter jurisprudence, claiming that, absent proper deference from the Court, government could never meet the Oakes test on any matter involving empirical uncertainty. The Court has struggled with the questions of deference ever since. Sujit Choudhry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter’s Section 1” (2006) 34 Supreme Court Law Review 501.
\end{flushright}
at greater length in that chapter, there is something distinctly arbitrary in this, because Canadian law generally does not strain to uphold this putative right of children. On the face of it, the argument seems to single out same sex couples, and make them bear costs for an objective that nobody else is made to sacrifice for. (This problem with Somerville’s argument is dwarfed, I argue, by another problem: the sheer remoteness of same sex marriage from issues of biological parenting.)

One can see how the rational connection test will run up against the limits of the Court’s competency. A full enforcement of the rational connection test would have the Court asking about all the possible means by which government might have pursued its stated objective, asking for an explanation of why those means were not pursued. The test raises very important questions for public reason, but the Court is poorly situated to fully probe and enforce its limits. This is not a reason for dismissing the test as redundant, but a reason for citizens and legislators to press these questions themselves.

The minimal impairment stage has been described as the ‘core’ of the Oakes test: when government fails under s.1, it most often fails at this stage; conversely, success at this stage assures success on the whole—just as it is very rare for government to fail the pressing and substantial objective test, it is very rare for government to fail the at the fourth and final, all-things-considered, proportionality stage.

One can easily appreciate why the Court gravitates toward deciding Charter cases at the minimal impairment stage. When the Court overturns legislation at that stage, it avoids having to weigh the government’s ‘pressing and substantial’ objective against the cost of the rights-infringement, in absolute terms. Instead, the Court can simply point to some less-infringing option available to government, and settle the matter at that. The philosophical and rhetorical appeal of such optimization arguments has long been

---

understood by welfare economists: the least controversial tactic in arguing for an economic policy is to demonstrate that it will make some people better off, without making anyone worse off. Within this framework, the ideal state is Pareto optimality-- a state where no individual can be made better off, without worsening the situation of someone else. The key point is that, in arguing for changes beyond this optimum, one is compelled to make interpersonal utility calculations, where one person’s preferences or well-being are traded against another’s. At this point, more substantive normative considerations come into play, and the matter slips out of the economist’s terrain and onto the terrain of moral and political philosophy. The Courts, like economic advisors, are keen to avoid any appearance of legislating ends, and so they naturally prefer to focus on the minimal impairment test—the judicial equivalent to testing for Pareto efficiency.

Returning to an earlier point, this predilection for deciding matters at the minimal impairment stage arguably leads the Court to some cart-before-the-horse reasoning at the ‘pressing and substantial objective’ stage. Recall the passage quoted earlier, from Sauvé, where the Court offered its reasons for denying that symbolic objectives are pressing and substantial-- the complaint that “symbolic objectives make the justification analysis more difficult.”

One wonders why ease of analysis for the

---

76 Welfare economists argue that free markets naturally gravitate towards this optimal state, as actors with full information and no transaction costs engage in mutually beneficial trading.
77 Pareto efficiency’s appearance of normative neutrality is of course deeply misleading, because the fairness of Pareto optimal arrangement will turn, in large part, upon the initial distribution of goods. Pareto efficiencies will not, on their own, correct for an initially unfair distribution. And so it goes with optimizing Charter rights under the minimal impairment test: merely ensuring that government has been efficient in the pursuit of pressing and substantial objectives is no guarantee that its actions are just on the whole. Dieter Grimm provides a helpful illustration. Consider a law that authorizes the use of lethal force, where demonstrably necessary for the protection of personal property. The aim of protecting property rights is surely a pressing and substantial one; permitting the use of lethal force is certainly a rational way of achieving that aim; and given that, ex hypothesi, lethal force is authorized only when necessary, the law is by definition minimally impairing of others’ right to life. None of this instrumental reasoning demonstrates that the law strikes a fair balance between property rights and the right to life. See Dieter Grimm supra note 40 at 396.
78 Sauvé supra note 50.
Court should be a factor in deciding whether a government objective is pressing and substantial. After all, it is not solely symbolic objectives which are problematic within the Court’s preferred method of analysis. *All* non-welfarist objectives will make the justification analysis difficult, if the Court is pre-committed to conducting that analysis on the basis of means-ends reasoning, at the minimal impairment stage, scrupulously avoiding any weighing of *ends themselves*.

In all of this, I mean only to suggest that the Court’s predilection for reasoning at the *minimal impairment* stage, and its resulting preference for welfarist objectives, need not be a model for broader public discourse. Public reason can not require that citizens and legislators follow the Court’s example in being averse to reasoning about ultimate ends. It is the job of citizens and legislators to develop and express views about such things. To say this, though, is not to invite a deliberative free-for-all. Where basic rights and freedoms are engaged, the ends invoked may be deontological, symbolic, or welfarist, but whatever the case, they must have some basis in the widely shared, fundamental values expressed in the *Charter*. This is not to foreswear the minimal impairment test as a device of public reasoning. The bulk of political discourse is premised on welfarist considerations, and the minimal impairment test is very useful in carrying on deliberation where such arguments are at play.

### 3.3 Balancing Ends Overall

The rational connection and minimal impairment stages can be understood as a lead-up to the ultimate question one faces (or may face) in adjudicating claims within the *Charter*: supposing that the objective is pressing and substantial, and the chosen means are rationally connected to that objective, and there is no way to avoid the rights infringement, is it ultimately justifiable to infringe the right for the sake of the objective?

Canada’s preeminent constitutional authority, Peter Hogg, has suggested that this final stage may, like the rational connection stage, be redundant within the
jurisprudence. Frank Iacobucci writes that the final stage adds little more than “a résumé of previous analysis.” Given concerns about deferring to legislative bodies on policy questions, it is again unsurprising that the Court is less inclined to decide cases at this stage. For to do so requires a bold and controversial assertion from the Court: ‘All things considered, this objective is less important than this right.’

In some respects it is unfortunate that this final stage of the analysis has been so underemphasized. Others have noted how, up to this final stage, little attention is devoted to articulating the purpose and value of the right at issue. After preliminary consideration at the infringement stage, the Court’s attention is primarily focused, through the s.1 stage, on ensuring that government has pursued its objective efficiently, avoiding unnecessary rights infringements. This may even steer things arbitrarily in government’s favour: if government’s justification survives earlier stages of the Oakes test, one might expect it to have gained a kind of momentum in the Court’s reasoning. Imagine, by contrast, if the bulk of s.1 analysis were spent articulating the importance of the claimant’s right, asking whether the claimant’s exercise of the right was rationally connected with the purpose of the right, and speculating about how the right might be maximally protected. Though this is simply the converse of the Oakes test, one might expect a rights-centered analysis of this sort this to yield more victories for rights-claimants.

In the ideal, this final stage of analysis should be a forum for reflecting on the ultimate meaning of shared values expressed in the Charter; a forum for advancing richer theories, to account for how one might balance ends with ends, as opposed to the

79 Supra note 72 at 816-17.
81 Peter W. Hogg, ‘Section 1 Revisited’ (1991) 1 N.J.C.L. 1 at 22.
efficiency driven, means-ends logic employed at prior stages. At times, the Court has
offered helpful suggestions on how to proceed at this stage. One would advance a
reasoned account of the purpose of the right at issue, and try to specify how that purpose
is engaged in the instant case. An infringement striking close to the core of a right’s
purpose demands a proportionately compelling justification, approaching a point
ultimately where certain types of infringement—the silencing of political speech,
perhaps—are incapable of justification.83

Ultimately, reasoning at this final stage may require that we turn to grand
questions of the sort that Rawls and other grand theorists focus upon. Where two
interests conflict, and both strike at the core purpose of Charter values, we may be forced
to ask which of the two values matters more, in the abstract. In those circumstances,
deliberators may have to invoke accounts such as justice as fairness. The point is that,
on the account of public reason defended here, we invoke these grand, overarching
criteria only as matter of last resort. The disciplining effect of this account of public
reason comes largely at earlier stages, as we consider whether infringements are
rationally connected to, and strictly necessary for, the achievement of valid state
objectives.

4. Broader Lessons for Public Reason

Rather than continue the search for the theory of justice, the account of public
reason defended here concedes that reasonable people will forever disagree about such
things. At most we can agree that reasonable answers to questions of political justice
must account for certain firm convictions: the priority of basic liberties, human dignity,
equality before the law, fundamental autonomy, and the ‘right of rights,’ democratic
participation. The ordering of these values will forever be the subject of reasonable

disagreement, but nonetheless it is clear that all reasonable positions must account, in some way, for the priority of these considerations. That, hopefully, is a point of near universal agreement. The question then becomes how we might formalize this requirement in our deliberations: how do we insist that some account be made of shared political values, without begging questions by preemptively imposing some specific ordering for those values?

My suggestion has been that we look to the real world practices of those who wrestle with this very question. There we find an entrenched procedure for reasoning within the Charter, and that framework of reasoning should be our guide in modeling broader public reason. The reason for taking cues from the Court here is not that they are oracles who always arrive at correct answers. Quite the opposite: they are not oracles, and at their best, they recognize that fact. Accordingly, their framework of reasoning is designed to correct for biases, and to force the systematic examination of underlying presumptions. The objective, ultimately, is that the framework of reasoning should serve as a kind of centrifuge: drawing away irrational presumptions, irrelevant considerations, and other contestable claims of fact and value, and concentrating discussion more and more upon core shared values. Rather than frame deliberations within an abstract theoretical model such as justice as fairness, my suggestion is that deliberations should attend sequentially to the following questions, drawn from the preceding discussion:

1. Are fundamental rights engaged by the issue at hand? Here, the burden lies with those who deny that rights are engaged to offer a reasoned account of the right, which accounts for that denial. If it is conceded that rights are engaged, the requirements of public reason are triggered.

2. Is the objective in infringing the right pressing and substantial? Specifically, can it be explained by reference to values reflected in the Charter (i.e. within Charter Moralism)?

3. Has our society made a rational (i.e., principled) commitment to the objectives stated at 2? Or are we asking that some citizens be chosen out, for suspect or arbitrary reasons, to bear its costs?
4. Are there ways to further minimize the rights infringement while achieving the objective set out in 2?

5. All things considered, are the costs of the infringement outweighed by the benefits of the objective stated at 2? This stage involves theorizing about the purpose of the right and the value of the government objective. This theorizing must itself be advanced using the shared values and principles that animate the Charter. Put another way, sectarian comprehensive doctrines are not to guide balancing at this stage.

This series of question is open-ended, and so it should be. An account of public reason should be modest, minimalistic, and indeterminate, so as not to predetermine questions that ought properly to be decided on a contextual basis.

Chapters 4 and 5 will apply this model of public reason to the issues of therapeutic cloning and same sex marriage, respectively. First, though, I want to discuss further the place of religious argumentation within this model of public reason.
CHAPTER 3: RELIGION’S PLACE IN PUBLIC REASON

In subsequent chapters, my focus will partly be on citizens’ freedom from religion, as I examine a variety of contemporary law and policy debates from the perspective of public reason. In this chapter, I directly consider how religious groups, and individual believers, are treated under Canadian law. It is sometimes claimed that under the modern liberal state, secularism is arbitrarily privileged over religious worldviews.\(^1\) I want to assess the merits of that claim in this chapter, by examining the ways in which religion is fostered and discouraged under Canadian constitutional law.

There is one general and conspicuous sense in which secularism is favoured over religious worldviews; namely, in the sense that the *Charter of Rights and Freedoms*\(^2\) is the country’s supreme law, and the principles set out in that document are, on their face, secular—with the exception of the Preamble,\(^3\) and particular concessions regarding Catholic and Protestant schooling made at the time of confederation. The first two


\(^2\) Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*].

\(^3\) The Preamble of the *Charter* states that “...Canada is founded upon principles that recognize the supremacy of God and the rule of law...” On its face, this may appear to have implications regarding the place of religion in Canadian law. The courts have been dismissive of this suggestion, however. See *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 178 [hereinafter *Morgentaler*]; *Zylberberg v. Sudbury Board of Education* (1988), 65 O.R. (2d) 641 (C.A.) at 657 [hereinafter *Zylberberg*]. Some commentators have argued nonetheless that the Preamble is important to understanding the *Charter’s* deeper metaphysical roots. See e.g. Brown, *supra* note 1 at 560; Jonathan W. Penney and Robert J. Danay, “The Embarrassing Preamble? Understanding the Supremacy of God and the *Charter*” (2006) 39 U.B.C. L. Rev. 287. Yet, in thinking about public reason, it is unclear what substantive implications one might draw from the fact--assuming it is a fact--that *Charter* rights have theological grounding. These authors do not suggest that sacred texts should be used as a guide in interpreting the *Charter*. Penney and Danay instead reach the modest conclusion that if *Charter* rights are divinely ordained, this “would prevent the courts from ever condoning or approving of a government measure that completely removes or abrogates a right...” (*ibid.* at 322). It is very difficult to imagine a case where the Preamble might come into play as a meaningful interpretive device—let alone justify greater room for state religiosity-- if *this* is its sole function.
chapters of this dissertation were devoted to justifying *that* ‘privileging’ of secularism. Briefly, my claim has been that in settling controversial debates by reference to a set of principles which all citizens accept—the principles contained in the *Charter*—we are not in fact privileging secular worldviews over religious worldviews. Rather, we are privileging consensus points of political morality over points of intractable sectarian division. Arguments framed by reference to those consensus points will be secular arguments, at least on their face, but that is not due to any prejudice against religion, and it requires no apology.  

That said, arguments to the effect that religion should be allowed greater prominence in public discourse need not be framed as wholesale attacks on the idea of public reason. Such arguments can be, and often are, expressed within the spirit of public reason. After all, the *Charter* does not close out religion altogether. For example, one might argue that the *Charter’s* commitment to multiculturalism, if it is to be meaningful, must entail a general openness towards religion in the formulation of law and policy; or one might try to establish a place for religious argument in the public square on the basis of an expansive interpretation of the right to religious freedom; or one might argue that any attempt to block religion’s influence in the public square will offend the *Charter* value of equality (specifically, the equality rights of religious believers). Arguments of these sorts, which attempt to clear a path for the pursuit of religious policy objectives *within* the *Charter*, are relatively commonplace in Canadian debates over controversial issues. In the debate over same-sex marriage, for example, religious opponents have variously argued that changes to the definition of marriage intrude upon established religious/cultural traditions; threaten the religious freedom of

---

4 As explained, the principles expressed in the *Charter* may be embraced, by some citizens, for religious reasons. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at 134-172.  
5 See (e.g.) F.C. DeCoste, *supra* note 1.
believers who disapprove of same sex unions; or that allowing such unions is disrespectful of, and therefore discriminatory to, religious believers. Perhaps the *Charter* interpretations underlying these arguments are unconvincing to some, but those who sincerely advance such arguments can not be peremptorily dismissed as having failed to live up to the ideal of public reason. For the claim in such arguments is not that religious opposition to same sex marriage is reasonable to all citizens. Rather, the argument is that respect for, and protection of, religious belief is reasonable to all, and that changes to the definition of marriage infringe upon the rights of religious believers. The validity of such arguments will depend on how we conceptualize the protections granted to religion under the *Charter*.

No single theoretical proposition can account for the range of special protections extended to religion under the *Charter*. Rather, a cluster of interconnected considerations and values come into play, combining to justify the law’s special interest in protecting religious belief, expression, and practice. This chapter is organized around the different normative themes that play out in the *Charter* jurisprudence on religion. I alluded above to these themes, as I understand them: 1. the promotion of multiculturalism; 2. the protection of autonomy with regard to fundamental personal

---

7 Such an argument was considered by the Court, in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 25 [hereafter “*Reference Re Same Sex Marriage*”].
8 Some disagree: see for example, Benjamin L. Berger, “Law’s Religion: Rendering Culture” (2007) 45 Osgoode Hall L.J. 277. Berger’s claim is that religion is conceived and valued, under Canadian constitutional law, solely as an expression of individual autonomy. This is unavoidable, given the ideological commitments of constitutional liberalism, Berger contends; the regrettable effect is “to substantially impoverish the assertion that religion is a culture.” *Ibid.* at 281. As elaborated throughout this chapter, my view is that the law’s treatment of religion reflects a concern for cultural preservation, personal autonomy, and equality before the law. To focus solely on the law’s concern for individual autonomy is, I shall argue, overly reductionistic. It is telling that liberals who do prioritize autonomy have complaints about the current state of Canadian law. See (e.g.) Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995) at c.8.
9 I refer to these as ‘themes’ rather than ‘principles’ because the meaning and import of each is somewhat contested.
decisions; and 3. the religious believer’s right to equality before the law. I explore each in turn below. My aim, in essence, is to provide a clearer understanding of these themes, and in so doing, provide a better sense of religion’s place within an account of public reason built upon Charter values. The themes just listed are interconnected, of course: the commitment to multiculturalism is best understood as forged out of concerns for equality and autonomy, for example. Part of the challenge, throughout this chapter, is to untangle these different normative themes, to make some sense of what each uniquely contributes to the protection of religion under the Charter.

I am interested as well in exploring whether, and to what extent, any symmetry holds between the protections afforded religious believers relative to the protections afforded to secular belief systems. By disentangling the different normative themes that factor into the protection of religious freedom, I am able to draw out the secular analogues to religious freedom more programatically. So, for example, in considering the commitment to multiculturalism as a rationale for protecting religion, I draw comparisons with secular practices protected under the rubric of multiculturalism—e.g., the protection of francophone culture and aboriginal traditions. In considering the commitment to fundamental autonomy as a rationale for religious freedom, I draw comparisons with cases on assisted suicide and recreational marihuana use. Drawing such comparisons in a clear and programmatic manner can be helpful in highlighting what is unique about the protections afforded to religion. As well, these comparisons speak directly to the question of whether the courts are biased towards secularism.

One of my core contentions is that the courts have been comparatively generous in protecting religious believers. The best explanation, I argue, is that religion is viewed, by the law, as morally sensitive and epistemically opaque. I then argue that these traits also provide a justification for excluding religious arguments from deliberations over law and policy of general application. I argue that this is not discriminatory to religious
believers. It is a matter of simple consistency: the assumptions we make about religion’s moral and epistemic inscrutability in religious freedom jurisprudence are fair game in developing a doctrine of freedom from religion. I begin with the issue of multiculturalism, which I think is a red herring in debates over public reason.

1. Multiculturalism and Religion in the Public Square

Section 27 of the Charter requires that that document be, “...interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” This broad commitment to fostering multiculturalism may go part of the way towards explaining why religion is afforded special protection, for religion is plainly a focal point of most cultures. Churches, synagogues, and mosques serve as gathering points for cultural groups—particularly immigrant cultures—and cultural identity is often expressed most profoundly through religious affiliation. The courts have long recognized a connection between the Charter’s commitment to multiculturalism and the need for an expansive, accommodating interpretation of the right to religious freedom. The following passage from R. v. Videoflicks Ltd. et al. is perhaps the earliest and clearest expression of that connection:

Religion is one of the dominant aspects of a culture which [s.27] is intended to preserve and enhance... Section 27 determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where different religious practices are recognized as permissible exceptions to otherwise justifiable homogeneous requirements.  

---

11 [48 O.R. (2d) 395 (Ont. C.A.) [hereinafter “Videoflicks]].
12 Ibid. at para 56. See also R v. Big M Drug Mart [1985] 1 S.C.R. 295 at para.99. The commitment to multiculturalism not only reinforces religious freedom, it also requires that, in interpreting the right to religious freedom, one denomination not be granted protection denied others. Thus, for example, in R. v. Gruenke [1991] 3 S.C.R. 263, the leading decision on privilege for religious communications, the Court rejects the terminology of ‘pastor-penitent’ privilege, favouring more ecumenical language.
The relevance of multiculturalism to the law’s treatment of religion is vividly illustrated by contrasting recent developments in Canadian and French law. France’s constitutional tradition does not embrace multiculturalism as an ideal, and instead embraces a form of civic republicanism, in which citizens are more strongly encouraged to internalize the republican virtues of liberty, equality, fraternity and state secularism (laïcité). The thinking, in part, is that social cohesion, political stability, and civic engagement, are best achieved when the state actively inculcates these republican ideals—even at the expense of cultural diversity. Ostensibly acting in furtherance of these ideals, France drew international attention, and condemnation from some human rights groups, when legislation was passed in 2004, banning headscarves and other ‘conspicuous’ religious accoutrements (e.g., large crosses, yarmulkes) from state-operated public schools. Then-President Chirac, in a televised address to the citizenry, defended the law on straightforward republican grounds, explaining simply that “[s]ecularism is one of the great successes of the Republic...It is a crucial element of social peace and national cohesion. We cannot let it weaken.”

Within Canadian constitutional discourse, and indeed within broader Canadian public discourse, such arguments seem out of place. This is so in part because secularism per se is not a founding ideal of the Canadian political order; one would not

---

15 Human Rights Watch, for example, condemned the move as a violation of religious freedom. See “Headscarf Ban Violates Religious Freedom” (February 27, 2004), online: <http://hrw.org/english/docs/2004/02/26/france7666.htm>.
16 The legislation followed a report by the Commission de Reflexion sur l’application du Principe de Laïcité dans la Republique, online: <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>.
speak of secularism being ‘one of the great successes of Canadian confederation.’\textsuperscript{18} The conventional Canadian outlook seems instead to be that religious and ethnic multiculturalism are fully compatible with social peace and national cohesion—so much so that the Canadian government, in a variety of ways, actively encourages cultural, linguistic and religious diversity.

Shortly after the French legislature forbade religious accoutrements in state schools, a comparable issue came before the Canadian Supreme Court. In \textit{Multani v. Commission scolaire Marguerite-Bourgeoys},\textsuperscript{19} the Court considered whether Sikh children attending public schools had a right, under the \textit{Charter}, to don ceremonial daggers (\textit{kirpans}) in the classroom. The government’s case for wanting to ban kirpans from the classroom rested entirely upon concerns for the safety of other students, along with ancillary concerns about the violent message that knives in the classroom might carry. It was never argued by government lawyers, nor countenanced by the Court, that the state had a legitimate interest \textit{per se} in promoting state secularism by purging public schools of religious identifiers.\textsuperscript{20} Having found that there were no violent incidents on record involving kirpans in the classroom, the Court in \textit{Multani} ruled that a complete ban was unjustifiable, and inconsistent with Canadian values of religious freedom and multiculturalism.\textsuperscript{21}

Our commitment to multiculturalism therefore directs us away from the French model of state secularism, and obliges us instead to make space for religion in the public square. But how large a space?

\textsuperscript{18} That is to say, there is nothing within our constitutional tradition requiring that religion be thoroughly expurgated from the public sphere. Indeed, as mentioned, state support for religion is written into the very text of Canada’s founding document, in the sections of the \textit{Constitution Act}, 1867 providing for the maintenance of Catholic and Protestant schools.

\textsuperscript{19} [2006] SCC 6 [hereinafter “\textit{Multani}”].

\textsuperscript{20} \textit{Cf. Chamberlain v. Surrey School District No. 36}, [2002] 4 S.C.R. 710 at para. 19 [hereinafter “\textit{Chamberlain}”: “A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community.”]

\textsuperscript{21} \textit{Multani}, supra note 26 at para. 71.
1.1 Does Multiculturalism Conflict with Public Reason?

The Charter’s commitment to multiculturalism clearly entails a need to accommodate religious beliefs. The salient question from the perspective of public reason, though, is whether and to what extent the commitment to multiculturalism requires that weight be given to religious claims in deliberations over laws of general application. There is considerable ambiguity on this question, both in the Supreme Court’s jurisprudence touching on multiculturalism, and in the related philosophical literature.

The Court’s ambiguity is captured, for example, in Chamberlain v. Surrey School District No. 36. There, a central question was whether school board members were permitted to reject gay and lesbian positive books from the curriculum, on the basis of their religious opposition to homosexuality—particularly in light of the fact that the British Columbia School Act requires school board members to “to operate in a strictly secular manner...” The case is of interest for it brings together competing concerns of tolerance/mutual respect, secularism, and cultural diversity. At one point in the ruling, the Court draws a connection between multiculturalism and secularism, seeming to suggest, as public reason suggests, that mutual respect requires non-sectarian reason-giving: “[t]he School Act’s emphasis on secularism reflects the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity.” However, the exact implications of this connection between multiculturalism and secularism are muddied by the Court’s peculiar definition of ‘strict secularism’:

...strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many

---

22 Chamberlain, supra note 27.
23 Ibid. at para. 41.
24 Ibid. at para. 21.
communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people’s lives, and cannot be left at the boardroom door...A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others.  

The understanding of ‘strict secularism’ advanced here is in effect no secularism at all. The religious/secular distinction does no work in sorting out what is allowable: religious and secular views alike are allowed, but disrespectful views of either sort are disallowed. To its credit, shifting to a test of respectfulness in this way has the advantage, as the Court notes, of appearing even-handed towards religious and secular believers, as neither viewpoint is then summarily barred.

This openness to having state policy shaped by religious concerns is, however, somewhat in tension with the standards set out in the leading Charter case on religious freedom, Big M. Recall, there it was found that,

[t]o 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-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 theological content of the legislation remains as a subtle and constant reminder to religious minorities within the

---


The decision to fully fund public secular schools while denying any funding to independent religious schools (other than the constitutionally mandated funding for Roman Catholic schools) is at base a political decision. Its objective, the record shows, is to foster a strong public secular school system attended by students of all cultural and religious groups. Canada in general and Ontario in particular is a multicultural, multireligious society. A multicultural multireligious society can only work, it is felt, if people of all groups understand and tolerate each other...Children of all races and religions learn together and play together. No religion is touted over any other. The goal is to provide a forum for the development of respect for the beliefs and customs of all cultural groups and for their ethical and moral values. The strength of the public secular school system is its diversity -- diversity which its supporters believe will lead to increased understanding and respect for different cultures and beliefs.
country of their differences with, and alienation from, the dominant religious culture.\textsuperscript{26}

Thus in \textit{Big M}, ‘theological content’ is rejected unequivocally; the test is not whether that content is respectful or tolerant, but simply whether it is theological.

Now, in reconciling these two decisions, one might distinguish \textit{Chamberlain} from \textit{Big M} on grounds that decisions about school curricula are not coercive, and do not engage basic rights, to the same extent as “a positive law binding on believers and non-believers alike,” such as the \textit{Lord’s Day Act}. The difficulty with this explanation is that in other cases, the courts have shown extreme sensitivity over what goes on in the classroom, finding that even voluntary classroom prayers are coercive; \textsuperscript{27} in \textit{R. v. Jones},\textsuperscript{28} the Court assumes that a parent’s decisions respecting the education of her children fall within the scope of the s.7 liberty guarantee. There is no reason, then, to suppose that the standards of public reason are laxer in setting school curricula than they are in the regulation of retail business hours.

An alternative explanation, perhaps, is that the Court is primarily concerned with preventing overt religiosity in law and policy making. Thus the commitment to multiculturalism, on the one hand, causes the Court to leave the door open for religious views to influence school curricula in \textit{Chamberlain}; but particular religious doctrines are not to be given such free rein that they end up serving as the \textit{sole} justification for any law or policy; and moreover, overt theological content should never find its way into the wording of legislation. In some respects, this special concern with avoiding overt religiosity, even in the absence of substantive coercion, is understandable. When government actions are justified solely and overtly on religious grounds, this may send an unequivocal message of disrespect to non-believers, in a way that offends equality;

\textsuperscript{26} \textit{Big M}, supra note 14 at para. 97.
\textsuperscript{27} Zylberberg, supra note 3.
\textsuperscript{28} [1994] 2 S.C.R. 229 [hereinafter “\textit{Jones}”].
this idea is explored in section 3 of this chapter. By contrast, government actions partly justified on religious grounds, and partly justified on secular grounds, may not send the same symbolic message, if only because the religiosity is less overt.\(^\text{29}\) One might distinguish, then, between two distinct types of harm that can arise when government actions are taken on the basis of comprehensive doctrines. First, there is the symbolic harm that one feels at being coerced by, or even confronted with, state support for a particular comprehensive doctrine. The harm here is the insult and alienation of knowing that one’s government has acted in the name of religious or cultural traditions to which one is not a party. The risk of this type of harm is present in the overt religiosity of the \textit{Lord's Day Act}, but it is not present when school boards make decisions which, in a more subtle manner, reflect the religious beliefs of community members. Formal disestablishment—that is, the requirement that government not sponsor or endorse any one church—can be seen as addressing this worry about symbolic harm.\(^\text{30}\)

While we should recognize and take steps to avert such symbolic harms, it is surely a mistake to suppose that this is the \textbf{only} source of illegitimacy when comprehensive doctrines are invoked to justify government action. For there is something objectionable in citizens being pressured or coerced in the name of religion, quite apart from whether any symbolic harm is felt. Here I am just restating the core

\(^{29}\) No doubt the Court’s special concern with overt religiosity has partly to do with judicial restraint. Where laws and government actions are subtly directed by religious motivations, the Court will rightly refrain from intervening in the name of religious freedom. A line of judicial deference needs to be drawn somewhere, and it makes sense to restrict judgments of the \textit{Big M} variety to clear and overt cases of religious lawmaking. But notice that this is not a philosophical reason for thinking that less overt forms of religious lawmaking are more acceptable than overt forms; let alone a reason for thinking that only overt forms are objectionable.

claim of public reason: citizens should not be coerced in the name of sectarian beliefs which they reasonably reject.31

There seems to exist, within Canada, an inchoate ideal of public discourse that approaches these separate concerns roughly as follows. By virtue of the commitment to multiculturalism, the views of all cultures and religions are welcomed into debates over law and policy. At the same time, though, there is a sense that the state may not show overt allegiance to any particular culture or religion. Bruce Ryder presents this view as if it were a reflection of commonsense:

...the state’s duty of religious neutrality does not require that arguments grounded in religious beliefs must be ignored when formulating policy. Religious perspectives have played and should continue to play an important role in public debates. Ultimately, though, the validity of state laws and policies must be determined by reference to constitutional norms rather than religious doctrine.32

There is no denying that this general line of thinking might explain some of the actual discursive practice within the Canadian polity. The Multiculturalism Act33 calls upon the Canadian government to encourage the participation of all cultures “in the continuing evolution and shaping of all aspects of Canadian society...”34 Accordingly, it is now common for Canadian lawmakers to consult with a wide range of stakeholders, including religious stakeholders, before legislating on controversial matters. Thus, for example, before drafting wide-ranging legislation on new reproductive technologies (e.g., stem cell research and therapeutic cloning), the Canadian government held extensive public consultations, and invited representatives of the major faiths to submit testimony on a range of pertinent moral and metaphysical questions.35

---

31 This concern is reflected, for example, in R. v. Labaye, 2005 SCC 80 [hereinafter “Labaye”], as the Court ruled that indecency laws must address harms of a sort that have been formally recognized by the Canadian polity, in the Charter for example.
34 Ibid. at 3(1)(c)
There is an undeniable tension between this multiculturalist ideal of public discourse, such as it is, and the idea of public reason defended in previous chapters. Under that latter ideal, one ought to be skeptical—to say the least—when government invites religious leaders to submit official briefings on (e.g.) the ethics of stem cell research or assisted suicide. For insofar as religious leaders possess unique expertise in such matters, it is in precisely the sorts of reasons that should not come into play in deciding government policy. Far from encouraging all citizens to bring their religious views to the table, public reason urges that those views be bracketed from debates involving basic rights. As well, public reason denies that there is any interesting distinction between overt and more subtle forms of religiously motivated government action. If anything, public reason is open to overt religiosity, if it is purely symbolic and non-coercive, because symbolic gestures by the state will often pose a less direct threat to citizens’ autonomy.

In the two subsections that follow, I want to look at two leading Canadian accounts of multiculturalism, as they relate to the idea of public reason: one advanced by Will Kymlicka and the other advanced by Charles Taylor. I want to ask whether either account can provide theoretical justification for the inchoate ideal of public discourse just described.

1.2 Multicultural Liberalism and the Preservation of Religious Culture

It may seem far-fetched to put much weight on the Charter’s commitment to multiculturalism; s.27 has been described by some constitutional scholars as little more than a “rhetorical flourish”. By its very wording, s.27 is meant to serve only as a tool in

---

36 This is not to say that, in public reason, government should never consult with religious leaders. Public reason, for example, supports the idea that religious practices should be reasonably accommodated by the state, and lawmakers will rightly consult with religious leaders to gain a sense of what is required by way of accommodation.


38 Peter W. Hogg, Canada Act 1982 annotated (Toronto: Carswell, 1982).
the interpretation of other rights and freedoms; it does not issue any freestanding right. Nevertheless, there are arguably parallels between the drive to assure a place for religion in the public sphere, and the drive to preserve Canada’s francophone heritage, or to preserve First Nations cultures—both objectives which, though controversial, have gained mainstream acceptance as reflections of Canada’s commitment to multiculturalism. When one hears religious voices opposing the secularization of public life, it often seems that what is feared is the decline and obsolescence of a culture.\textsuperscript{39} As a factual matter, there is no denying that religion is on the decline in Canada.\textsuperscript{40} Religious believers may therefore find it objectionable that, under the auspices of multiculturalism, government has taken steps to protect and enhance the French language, and to preserve aboriginal cultural traditions, while comparatively mild attempts by government to foster religion have been met with opposition from the courts.

Notice how the grievance here is not, in any straightforward sense, that religious believers have been denied some basic freedom, or that they have been denied formal equality.\textsuperscript{41} One of the insights of multicultural theory has been to recognize that citizens can have a legitimate grievance about the decline of their culture, even in the absence of any direct infringement of negative liberty, or any discriminatory practice by the state. Just as business enterprises may die out in a free and unbiased marketplace, so may cultural traditions die out in a facially neutral cultural market. A commitment to multiculturalism qualifies the stark individualism of traditional liberalism, by

\textsuperscript{39} See e.g. Sapir & Statman, \textit{supra} note 10 at 478.

\textsuperscript{40} Statistics Canada reports that between 1971 and 2001, the number of Canadians reporting ‘no religion’ rose from 1% to 16% of the population. These non-believers are concentrated among the young, suggesting that this may be a generational trend. See Statistics Canada, \textit{2001 Census: Analysis series, Religions in Canada}. Catalogue no. 96F0030XIE2001015, online: <http://www12.statcan.ca/english/census01/Products/Analytic/companion/rel/pdf/96F0030XI E2001015.pdf>. Others polls have shown the decline to be more precipitous and more recent—indicating for example that the number of Canadians professing a belief in God dropped from 85% in 1990 to 70% in 1995. George Gallup Jr., & D. Michael Lindsay, \textit{Surveying the Religious Landscape: Trends in U.S. Beliefs} (Morehouse 2000) at 120–121, cited in Eisgruber & Zeisberg, “Religious Freedom in Canada and the United States” \textit{supra} note 17.

\textsuperscript{41} I directly address liberty and equality concerns in subsequent sections of this chapter.
acknowledging that it is unreasonable to ask that citizens stand by and watch their culture dwindle to non-existence, out of deference to the abstract values of liberty and equality.

Following Kymlicka’s important work in this area, a commitment to multiculturalism is often taken to involve, primarily, a willingness on the part of the state to issue special ‘group rights’ to imperiled cultures. Though state support for particular cultures appears on its face to violate liberalism’s general edict against state support for particular conceptions of the good, appearances are misleading here.\textsuperscript{42} State support for minority cultures merely ensures that a range of options are kept alive, without which the majority culture would become excessively dominant, leaving a limited menu of options over which to exercise autonomy.\textsuperscript{43}

Kymlicka argues that support for cultural minorities does not upset any established ideal of neutrality, because the state is never neutral in cultural matters. The state cannot achieve cultural neutrality merely by abstaining from participation in the cultural sphere, for the state will unavoidably favour some cultures over others; this of course is a central argument of Kymlicka’s treatise, \textit{Multicultural Citizenship}:

A multicultural state which accords universal rights to all its citizens, regardless of group membership, may appear to be ‘neutral’ between the various national groups. But in fact it can (and often does) systematically privilege the majority nation in certain fundamental ways—for example, the drawing of internal boundaries; the language of schools, courts, and government services; the choice of public holidays...All of these decisions can dramatically reduce the political power and cultural viability of a national minority, while enhancing that of the majority culture. Group-specific rights regarding education, local autonomy, and

\textsuperscript{42} As explained in previous chapters, for the Rawlsian liberal, there is no general edict against state support for particular conceptions of the good, except where the state attempts to promote a particular conception of the good through the infringement of basic rights and liberties.

\textsuperscript{43} \textit{Cf.} Joseph Raz, \textit{The Morality of Freedom} (New York: Oxford University Press, 1986) at 251:

While religious freedom was usually conceived of in terms of the interest of individuals, that interest and the ability to serve it rested in practice on the secure existence of a public good: the existence of religious communities within which people pursued the freedom that the right guaranteed them. Without the public good the right would not have had the significance it did have. Furthermore, the existence of the right to religious freedom served in fact to protect the public good.
language help ensure that national minorities are not disadvantaged in these decisions, thereby enabling the minority, like the majority, to sustain ‘a life of its own’.  

Given the tacit state support lent to the majority culture, and thus the impossibility of achieving neutrality through benign neglect, Kymlicka urges that our sense of political equality should not be offended when the state opts to support minority cultures.

In thinking about the separation of church and state, one might at the very least point to the Charter’s commitment to multiculturalism as grounds for rejecting the kind of strict separationism that rears its head from time to time under the U.S. Constitution’s ‘establishment clause.’ Under that line of jurisprudence, it has at times been held that the state must avoid any ‘entanglement’ with religion, meaning, in essence, that the state must refrain from supporting religion in any way. That strict separationism rests upon ideas of state neutrality which, as we have just seen, must effectively be jettisoned in embracing multiculturalism. A real commitment to multiculturalism requires a willingness on the part of the state to engage with culture, actively supporting vulnerable cultures for the sake of preserving a diversity of cultural options. Culture and religion are inextricable, as we have seen, and so, just as the multiculturalist rejects the idea of a strict separation between culture and state, he must also reject the idea of a strict separation of religion and state—or so the argument might go.

It should be noted that Kymlicka himself explicitly disavows that his argument for group cultural rights entails any weakening of the separation of church and state. He

---

45 The Establishment Clause of the U.S. First Amendment reads as follows: “Congress shall make no law respecting an establishment of religion…”
46 Lemon v. Kurtzman, 403 U.S. 602 (1971). The strictness of U.S. establishment clause jurisprudence waxes and wanes over time, and at present the Lemon Test has fallen out of favour; at present, government is permitted to finance religious schools, for example, so long as parental choice over schooling is preserved. See Zelman v. Simmons-Harris 536 U.S. 639 (2002). History suggests though that the Lemon Test may again be revived: Justice Scalia has likened the Lemon Test to “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles along, after being repeatedly killed and buried…” County of Allegheny v. ACLU 492 U.S. 573, 655-56 (1989)
argues that religion and culture are disanalogous, for he contends that, unlike culture, 
the state can achieve full neutrality with regard to religion:

> It is quite possible for a state not to have an established church. But the state 
cannot help but give at least partial establishment to a culture when it decides 
which language is to be used in public schooling, or in the provision of state 
services. The state can (and should) replace religious oaths in courts with secular 
oaths, but it cannot replace the use of English in courts with no language.47

There is of course some truth to this—the state can refrain from formally 
establishing a church, and this will superficially achieve state neutrality on religion. Yet 
this argument seems to rest on the facile assumption that the state achieves neutrality on 
matters of religion simply through formal disestablishment. In a way it is odd that 
Kymlicka is so probing about subtle forms of cultural hegemony—looking beyond mere 
symbolic neutrality in matters of culture-- while at the same time being so easily satisfied 
that the state can, through benign neglect, achieve even-handedness in its treatment of 
religion.48 Certainly, the massive literature on public reason seems to belie this idea that 
neutrality vis-à-vis religion is so easily achieved.49 In a manner analogous to Kymlicka’s 
arguments in the cultural sphere, there are those who argue that the state’s withdrawal 
from the religious sphere is bound to favour secular worldviews.50

Ultimately, though, Kymlicka is able to deflect any conflict between his account of 
multiculturalism and public reason by setting constraints on the type of group rights 
issued under his account. His liberal multiculturalism is meant to issue only in external

47 Kymlicka, *supra* note 51 at 111. As discussed above, the Court has also at times equated 
multiculturalism with state secularism. See *supra* note 32.

48 The failure of so-called ‘first-wave’ multicultural theorists to foresee conflicts arising out of 
religious claims for group rights has been noted by others. See Shachar, *supra* note 21 at 57.

49 Some contest that disestablishment achieves even symbolical neutrality, in the way Kymlicka 
supposes— quite apart from the question of whether symbolic neutrality is adequate. Rex Ahdar 
and Ian Leigh write (*supra* note 1 at 678):

...critics of religious establishment point to the symbolic ostracism or alienation 
experienced by those not adhering to the established faith. Yet, to reiterate, it is easy to 
focus on alienation on one side only—believers may feel equally alienated by a secular, 
political regime that extirpates religious symbolism and practice from the public square. 
This kind of secularism is experienced as “a competing partisan position”. Far from being 
neutral or inclusive, it resonates as an ordering of life in accordance with the nonreligious 
values of the community at the expense of the spiritual values of others

50 See Benson, *supra* note 1.
Restrictions: group rights held by cultural minorities which are opposable only against the external, majority culture. The obvious examples here, for Canadians, are the resource rights held by aboriginal peoples, and the language rights held by francophone communities. Such rights ideally allow aboriginal and francophone cultures to persist despite being surrounded on all sides by the influence of Canada’s mainly Anglo-European cultural majority. By their very design, these rights are, at least in the ideal, incapable of justifying the cultural coercion of unwilling citizens; they are accommodation rights that fit complementarily with other liberal rights. This at least partly obviates worries about Kymlicka’s model of multiculturalism leading to an unraveling of public reason. The analogue, for religious groups, of the collective rights issued to French and aboriginal cultures is not a collective right to influence general law and policy in the name of sectarian beliefs; it is rather a right to have those sectarian beliefs reasonably accommodated, and possibly supported by non-coercive means. The one complication—and it is a major complication—includes cases where religious groups seek accommodation for internally oppressive practices. I will return briefly to this topic below (1.4).

This stipulation that group rights ground only ‘external restrictions’ has considerable plausibility when thinking about aboriginal and francophone cultures—and it may well appeal even to members of those cultures themselves. Insofar as these cultural groups have shared concerns, they are inwardly directed—directed towards

---

51 Kymlicka, supra note 51 at c. 3.
52 Some of course will contest whether the measures actually taken by Quebec legislators to preserve francophone culture—notably the legislation banning English commercial signage in the province—actually comply with Kymlicka’s model of multicultural liberalism.
cultural self-preservation. Their views on politics and morality are internally heterogeneous, and so they have no stake in politics as a group, apart from their stake in self-preservation. Religious groups differ in this respect, at times, insofar as they may have a unified and outwardly-directed moral and political agenda. Given this outwardly-directed agenda, members of religious cultural groups may press for a more expansive account of multiculturalism. They may dismiss Kymlicka’s account as accommodationism in the pejorative sense, for his account grants only the necessities of cultural survival, and does not speak to the idea that minority cultures are entitled to a meaningful voice in public deliberations.\textsuperscript{55}

As mentioned above, there is an inchoate sense, within Canadian public discourse, in which multiculturalism is understood to mean more than Kymlicka’s account allows—a sense in which multiculturalism is thought to require that political decisions reflect the diverse comprehensive doctrines of all Canadians. Public reason’s demand that comprehensive doctrines be bracketed from public discourse is, as I say, in some tension with this conception of multiculturalism. Let me therefore explore the possible philosophical underpinnings of this alternative approach to multiculturalism.

1.3 Multiculturalism and the Recognition of Religious Voices

Charles Taylor’s communitarian account of multiculturalism centers around the idea that, “a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.”\textsuperscript{56} Taylor emphasizes the importance of having a full sense of belonging within one’s society—of having one’s identity recognized in full. He


argues that our identity is forged out of a dialogue carried on between our society and ourselves, and hence that societal recognition of our culture is essential to our having an authentic sense of self. We require more from our society, Taylor argues, than is provided by liberalism’s formal recognition of our freedom and equality; the mere provision of such bare and formal political rights will not satisfy our deep yearning for recognition.

In a sense, Taylor’s account is more demanding than Kymlicka’s autonomy-based account of multiculturalism, for he contends that minority cultures are entitled to more than the means of self-preservation. In light of people’s deep need for recognition, we operate under the “presumption... that all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings.” Moreover, “a failure to adopt this presumption might be seen as the fruit merely of prejudice or of ill will. It might even be tantamount to a denial of equal status.” Perhaps is this concern to provide all citizens with a sense of recognition and belonging which, for example, prompts the Canadian government to consult with leaders of major religious faiths before drafting legislation on controversial matters.

One might understand Taylor’s account as an inversion of public reason. In public reason, we bracket comprehensive doctrines and tightly focus on political values over which there is overlapping consensus. On Taylor’s account, comprehensive doctrines are dragged out to centre stage. Rather than oblige religious believers to put aside their faith when entering public discourse, Taylor urges their interlocutors to seek out a deeper understanding of those religious views. The idea seems to be that a deeper mutual understanding will emerge from this process. Where proponents of public reason seek to narrow the focus of political discourse to points of overlapping

---

57 Taylor ibid. at 66.
58 Ibid. at 67.
consensus, Taylor seeks a ‘fusion of horizons’. Employing arguments similar to Taylor’s, others have argued more pointedly that the need to respect other cultures conflicts with the idea of public reason. John Von Heyking writes, for example, that

...showing equal respect to citizens who do not share our religious reasons surely does not require that we transpose our own reasons into secular or public ones which they can reasonably be expected to accept. This is to hold a low opinion of their capacities to enter imaginatively into another citizen’s thoughts, or their capacity humbly and patiently to forebear with a view they cannot (and may never) fully grasp...honouring other citizens as equals means respecting not only that about them which is similar to us (our shared reasons) but, more demandingly, that which is different about them (their comprehensive doctrines).

In a similar vein, Veit Bader writes that, “[r]eligion-blindness is not only an unachievable but also an undesirable ideal. To treat people fairly does not mean that we have to abstract from all their cultural and religious particularities but to take them into account in an evenhanded manner.” This, along with a number of more pragmatic considerations, leads Bader in a separate essay to conclude that,

Religion should, for example, be given specific information rights and corresponding information duties by...state agencies with regard to contested issues...[T]hey should be given rights and opportunities to participate in public fora and public hearings (e.g. on morally contested issues like abortion, euthanasia, genetic engineering)....Indeed, even reserved seats for organized religions in legislative committees with a capacity to participate (but not vote) should be discussed and explored.

One might suppose that there is an affinity between Taylor’s account of multiculturalism and the no-holds-barred accounts of deliberative democracy that were discussed in chapter 1. Recall, some theorists urge that democratic deliberations should

---

59 Rawls, supra note 4.
60 Taylor supra note 63.
61 John Von Heyking, supra note 10 at 672. For a more protracted argument to effect that it is respectful to offer religious arguments in public discourse, see Christopher Eberle, Religious Convictions in Liberal Politics (Cambridge University Press, 2002). Eberle’s ‘ideal of conscientious engagement,’ to which I am here referring, is offered at 104-105.
be entirely open to comprehensive doctrines— the thought being that, so long as discourse is governed by fair procedural rules, an open, free-ranging discourse will tend in the long-run to generate outcomes that are fair and reasonable to all. My objection to these no-holds-barred accounts of deliberative democracy is analogous to J.M. Keynes’ rejoinder to those claiming that free markets are self-correcting in the long run: in the long run, we are all dead. We know today that coercion in the name of religion will never be reasonable, and that insight should be integrated into our present-day rules of public discourse.

But more to the point of the present discussion, there is a very significant difference between these unrestrained models of deliberative democracy, and this account of multiculturalism reflected in Taylor’s politics of recognition. For on Taylor’s account, citizens and the state are obliged to presume that longstanding cultural beliefs contain valuable insights. Under the unrestrained model of deliberative democracy, by contrast, the expectation is that citizens will openly challenge one another’s beliefs, and that, through the rigours of open and ongoing deliberation, some ideas will fall by the wayside. As I will argue later on in this chapter, the Charter’s commitment to religious freedom and equality militates against this kind of rough-and-tumble treatment of religious views. Much of the Charter jurisprudence, I will argue, is driven by an extreme sensitivity towards religion, and a consequent reluctance to probe or second-guess religious beliefs in any way. The broader question I want to ask, toward the end of this essay, is whether we can simultaneously guard religious viewpoints against criticism and scrutiny, in the way that Taylor and others suggest we should, while at the same time allowing those views a place in public deliberations over laws of general application. My

point for now is that, despite superficial similarities, Taylor’s politics of recognition is at odds with the central idea of deliberative democracy.

Taylor’s notion that one ought to assign presumptive value to longstanding cultural traditions may have appeal at first blush, and indeed it has appeal in the case of the particular cultural traditions he relies upon as examples: the tradition of French language use in Quebec, and the maintenance of traditional aboriginal modes of living. But of course there are plenty of instances where longstanding cultural traditions are tied to law and policy objectives which are more controversial—indeed, subsequent chapters of this dissertation will provide a catalogue of these. On questions of sexuality, the origins of life, and the ethics of euthanasia, to name a few topics, traditional cultural views are controversial. For a growing number of Canadians, to demand a presumption that (e.g.) the Judeo-Christian religious tradition has ‘something important to say’ on questions of sexual morality is to demand a profound suspension of disbelief.

There is a happy vagueness to this talk of ‘recognizing’ faith traditions, because in the final analysis one has to decide whether merely to listen to religious worldviews, or to

---

66 Taylor may have in mind that we should assign presumptive weight to cultural traditions broadly construed, as opposed to assigning presumptive weight to specific tenets held within those traditions. On this reading, then, one would be obliged to assign presumptive value the Judeo-Christian tradition, but not to the scriptures’ specific claims about sexuality. This idea that one can assign presumptive value to a belief system as a whole without assigning value to its component beliefs is arguably incoherent, though. At best, it amounts to precisely what Fish labels ‘boutique multiculturalism’. See Stanley Fish, “Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking about Hate Speech” 23 Critical Inquiry 378. For in essence we are asked to browse through other cultural traditions, passing over those aspects that offend our tastes. More to the point, though, if Taylor intends that we selectively recognize religious and cultural traditions in this way, recognizing only those that strike us as reasonable, then his position collapses into Rawls’s. What will be left standing, in the end, are beliefs that strike all as reasonable.

It should be noted, in passing, that in the Supreme Court jurisprudence involving s.27, and even in the general literature on multiculturalism, there is an in-built conservatism, favouring longstanding cultural traditions over emergent ones. Multiculturalism is invoked in virtually all of the leading Supreme Court decisions involving the protection of religion, while it is never invoked in cases dealing with gay and lesbian rights. Perhaps this is justifiable terminologically—that is, perhaps the latter interests are best understood as individual rights issues, and not as group rights issues. Notice, though, that this terminological distinction finds no grounding in the basic premises of Taylor or Kymlicka’s theories of multiculturalism. Emergent cultures, as much as longstanding ones, provide opportunities for the exercise of autonomy, and for the development of a sense of self.
assign those views actual weight in policy deliberations. Should Canada’s *Royal Commission on New Reproductive Technologies* have been open to basing its policy recommendations on the submissions of religious organizations? The diplomatic option, I suppose—and this was the approach taken—would be for the *Commission* to consider the submissions of religious organizations, but only assign those submissions weight insofar as they accord with some wider consensus. So, for example, the Royal Commission might ‘recognize’ the Catholic Church as sharing in some societal consensus regarding the inviolability of human dignity and the importance of respect for human life, while quietly discounting the Church’s claims about ensoulment at conception as being overly sectarian.

This diplomatic approach creates room, in a sense, for religious argument in public discourse, but it is not clear to what end—apart from creating the symbolic impression that government has concerns about respecting diversity. If the submissions of religious groups are given weight only insofar as they happen to accord with some freestanding consensus, it is hard to see how that differs from their being given no weight at all. For it would then seem that it is the freestanding consensus that really controls policy decisions, cherry-picking faith claims where they happen be in accord, dismissing faith claims as sectarian where they happen to be in disaccord.67 There is a sense, perhaps, in which consensus-building always involves cherry picking the beliefs of

---

67 It is sometimes argued that, in certain contexts, citizens should be accorded a *right to a hearing*. Eylon and Harel, for example, defend judicial review on grounds that citizens are entitled to a hearing when their rights have been infringed; they draw parallels with day-to-day moral conflicts, where individuals feel a moral entitlement to air their grievances and receive back a reasoned explanation. See Yuval Eylon & Alon Harel “The Right to Judicial Review” (2006) 92 Va. L.Rev. 991. The novelty of this approach lies in the emphasis Yuval and Harel place on the hearing itself, as distinct from the justice of its outcome. Perhaps communitarians have something analogous in mind—that the politics of recognition requires that all parties receive a hearing, with no requirement that the opinions expressed in that hearing be given weight, ultimately, in the formulation of law and policy. Surely, though, the exercise of one’s right to a hearing can only have value if those listening are open in principle to being swayed by the reasons on offer. There is something distinctly paternalistic about providing someone a hearing while being pre-committed to rejecting their arguments; at the very least, it is misleading to call this a politics of recognition.
constituents, or re-interpreting those beliefs to highlight points of agreement. It is seldom possible to clearly trace back from an established consensus to the unadulterated component beliefs of the parties; consensus-building requires compromises, after all. But the messiness of consensus-building should not lead us to conclude that there are, or should be, no standards as to the kinds of arguments and claims that are to be given weight at the outset of consensus formation.

To some it may seem hard-headed or impolitic to ask probing questions about how multiculturalism is to be reconciled with public reason. It may seem more respectful, more democratic, and more conducive to social stability to go on maintaining a position such as that expressed by the Court in *Chamberlain*—where multiculturalism is taken to imply an openness to religious arguments in political decision-making, so long as a threshold of tolerance and respectfulness is met. For all its diplomacy, I am doubtful that many Canadians actually accept the full implications of such a position. Most, for example, will think it completely unacceptable that students anywhere in Canada might be left ignorant of evolutionary theory, out of respect for the dominant religious views of their community. Likewise, while Canadians may be open to granting the Catholic Church a hearing before the Royal Commission on New Reproductive Technologies, I expect most (non-Catholics, at least) would recoil at the thought of Catholic doctrines actually shaping resulting policy in any meaningful sense. It misdiagnoses things to say that the problem in *Chamberlain* is the disrespectfulness of religious homophobia. There is no disrespectfulness in creationism or in the Catholic Church’s views on the moral status of prenatal life, and yet few would accept that those views should be allowed to direct public policy. The disrespect at work here operates on a more general level: it is disrespectful to press your fellow citizens into complying with

your own faith-based convictions, whether or not those faith-based convictions are themselves demonstrably intolerant.

If Canadians are not in fact open to the use of religious arguments in these and other contexts, then there is something disingenuous in carrying on with an understanding of multiculturalism where it is vaguely claimed that religious views are welcomed into law and policy debates, so long as those views are respectful and tolerant. The alternative is to try to articulate more clearly the rules that are in fact operative. If there is some free-standing consensus that filters faith-based arguments, the content of that consensus, and the scope of its applicability, should be clearly articulated, so that those taking part in deliberations are able to play within the rules. This is what public reason prescribes. In bringing to the fore a shared political conception of justice—i.e., a Charter of rights, shorn of comprehensive doctrines and therefore acceptable to all—we create a real space for belonging: a framework of mutually acceptable principles that all citizens can embrace and deploy in public discourse.

For these reasons, I am skeptical that one can convincingly argue from the premise of multiculturalism to a weakened standard of public reason. At any rate, most multicultural theorists appear to operate within an accommodationist paradigm, roughly of the sort advanced by Kymlicka—though there are deep disagreements within that paradigm. Assuming then Kymlicka’s more limited account of multiculturalism, I want now to briefly explore the tensions that may emerge between religious group rights and the rights of individual believers. A government committed to the idea of public reason may be put in an awkward position when backing religious group rights. Religious groups may, in the name of their own cultural preservation, expect government to tolerate or even support oppression within their ranks. When government or the courts

---

69 McBride, supra note 72 at 509.
refuse to do so, they may be accused of antagonism towards religion, or, again, of pressing a secularist agenda.

1.4 Cultural Preservation and Liberal Individualism

Insofar as we conceptualize the protections extended to religion as multicultural group rights—analogous to the rights to cultural preservation of Canada’s francophone minority, or the collective rights of aboriginal groups—this may impact our judgments on some related questions. This may, for example, serve as a justification for extending charitable tax status to churches, or for providing support to religious schools.\textsuperscript{70} State support for such collectivist institutions is traditionally frowned upon under liberalism, but as explained, multiculturalism can be understood as opening the door to support for such institutions. To be clear, the point is not that a commitment to multiculturalism \textit{requires} state support for collectivist religious institutions—only that the commitment to multiculturalism \textit{allows for} such support.\textsuperscript{71} When critics complain of the secularization of Canadian society under the \textit{Charter}, they sometimes have in mind that, in upholding individual rights, the Court undermines the cohesiveness and internal orthodoxy of religious groups. Religions are collectivist worldviews, and as such, their meaning and value can not survive translation into the individual rights paradigm of public reason.

This tension between individualism and collectivist understandings of religion arose recently in \textit{Syndicat Northcrest v. Amselem}.\textsuperscript{72} There the issue was whether the appellant’s right to religious freedom included a right to erect a ceremonial hut (\textit{succah})

\textsuperscript{70} For a discussion of the constitutional parameters of positive state support for religion, see Bruce Ryder, “State Neutrality and Religious Freedom” (2005) 29 Sup. Ct. L. Rev. 169 at 174.

\textsuperscript{71} This view that state support for cultural institutions is optional has been supported by the Court in \textit{Adler, supra note 32}. One assumes that, given the \textit{Charter’s} commitment to religious equality, state support for such institutions would have to be provided on a neutral basis, showing no favoritism for one faith over another. See \textit{Congregation des temoins de Jehovah v. Lafontaine (Village)}, [2004] S.C.C. 48. Note however that favoritism towards Catholicism in Ontario and Protestantism in Quebec, reflected in s.93 of the \textit{Canada Act, 1982} is defended by the Court in \textit{Adler} on the grounds that it reflects an historic compromise.

\textsuperscript{72} [2004] 2 S.C.R. 551 [hereinafter “\textit{Amselem}”].
on his condominium balcony, in contravention of the condominium’s bylaws. The appellant, Amselem, relied upon his own personal understanding of Orthodox Judaism in claiming that he required a succah on his balcony; authorities in his religious community testified before the Court that a communal succah in the courtyard of the condominium would suffice to meet the demands of the faith, and the condominium managers wanted to pursue that option as a compromise solution. The question for the Court, then, was whether Amselem could invoke his right to religious freedom to demand accommodation for practices which were not clearly mandated by his religion. Deciding in Amselem’s favour, the Court opted to extend protection to his personal interpretation of the faith, and in so doing set out the following preliminary test to be applied in future religious freedom cases:

[A]t the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual’s spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

Notice first how these issues will be dealt with differently in the case of non-religious cultural rights. Compare the reasoning in Amselem, for example, with how

73 Because this was a conflict between private parties, the Charter did not apply, but the Quebec Charter of Human Rights and Freedoms did. However, as the Court explained, the same principles are involved in applying the Quebec Charter as are involved in applying the Canadian Charter of Rights and Freedoms. Ibid. at para. 37.
74 Ibid. at para. 13.
75 Ibid. at para. 56. This test has since been applied in Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256. Amselem is a change of course for the Court, which had previously found that idiosyncratic religious views are not protected under the right to religious freedom. In Ontario v. Dieleman, (1995) 20 O.R. (3d) 229 e.g., the claimant contended that her right to religious freedom encompassed a right to protest abortion clinics. The argument was rejected on the following grounds (at ibid. 331): “If [the defendant’s] belief that her protest activity is required by her religion is not shared by the vast majority of the members of her religion, which is the case, it is difficult to conclude that her conduct constitutes the exercise, practice or manifestation of her religion.”
aboriginal rights claims are handled. The Court has not allowed aboriginal citizens to define aboriginal culture individualistically, insisting instead that “aboriginal rights lie in the practices, customs and traditions integral to the distinctive cultures of aboriginal peoples...”\textsuperscript{76} With aboriginal rights, culture is understood to be defined through collective history, and not as a matter of private choice. It goes without saying that the object of francophone language rights is defined collectively as well, because language is a collective enterprise by nature.

It is in some ways understandable that the Court would opt for a collective, historical understanding of aboriginal rights, and an individualistic, subjective understanding of religious protections. There is arguably a difference in kind between telling a citizen that a particular activity does not fall within the purview of their culture’s traditional practices, versus telling a citizen that a particular activity is not required by their faith. For one thing, cultural traditions can be established on the basis of historical evidence, while ascertaining the requirements of a faith involves deeper and murkier theological questions—and so the latter is more plainly outside the Court’s competence. And the believer’s convictions about those theological questions may lie at the very core of their identity, as one strand in a holistic web of beliefs, so that to second-guess particular religious beliefs may constitute a serious interference with individual dignity and autonomy. There is perhaps no comparable offense (e.g.) in finding that modern, commercial fisheries operations have no clear corollary in aboriginal traditions.\textsuperscript{77} Below, I will explore the special moral and epistemic inscrutability of religion at greater length.

Though on the face of it, then, the Court’s decision in \textit{Amselem} affords generous protection to religious believers, it has been met with criticism from some who complain

\textsuperscript{77} I acknowledge that my treatment of aboriginal rights here is somewhat facile. I mean only to gesture towards the kind of argument that might be used to explain the differential treatment of religious traditions and aboriginal cultural traditions. Perhaps that differential treatment is unjustifiable; it is beyond the scope of the present discussion.
that it reflects an unduly individualistic conception of religion. One commentator worries that *Amselem* may lead to the equation of religious freedom with property rights; that it compels religious groups to “give up any claim that certain religious practices are entitled to special protection because of their fundamental or mandatory nature”; and more generally that the decision foists upon society an individualistic conception of the value of religion, “prescrib[ing]...a world where it is better to be ‘inner-directed’ than ‘outer-directed,’ and more human to follow our own impulses than to accept communal understandings about the nature of the world and our role within it...”78 It is claimed, on these bases, that *Amselem* exerts a subtle coercion upon religious communities.79 This complaint about *Amselem* is merely one instance of the common complaint that liberalism promotes individualism at the expense of communal values. Not only does liberalism block religious communities from pressing their religious doctrines externally---through the idea of public reason-- it also denies them any support in enforcing those doctrines internally.

It is not clear, though, how religious communities can demand, on the one hand, group protections against the pressures of broader Canadian society, while on the other hand demanding that the Court reinforce internal conformity within their ranks. If the law is obliged as a matter of some valid political principle to accommodate cultural difference, then surely that principle bars the subtle imposition of orthodoxies within the ranks of religious groups. For what could justify respecting diversity at the group level and not at the level of individuals? In this way, the Court’s decision can be understood merely to reflect the consistent application of a principle accepted on all sides, and not as the coercive imposition of an atomistic conception of religion.

79 Ibid. at 458. See also Berger, *supra* note 8 at 291.
Some argue that this individualized understanding of religious freedom somehow devalues religion, or equates the value of religion with the object of other individual rights (e.g., property interests). Such arguments are common among those critical of the Court’s handling of religion, and form part of the general grievance that life under liberalism has become excessively individualistic and materialistic. The argument, in part, is that the liberal preference for individual autonomy over group interests is reflective of an underlying economistic ideology. Decisions like Amselem wrongly carry a free market, ‘the customer’s always right,’ paradigm into matters of religion.

Yet there is surely a great leap of logic in claiming that by interpreting the right to religious freedom individualistically, one in any way equates religious freedom with other individual rights. The fact that the Court conceptualizes freedom of religion individualistically in Amselem tells us nothing about how freedom of religion is to be weighted relative to other Charter commitments, let alone relative to general state interests such as the interest in protecting property rights. The message from Amselem is not that freedom of religion enjoys no more protection than ordinary property rights: had Amselem advanced his cause as a simple property rights claim—arguing that as the owner of his condominium, he had a right to do as he pleased with his balcony-- he

---

80 Chan, supra note 84 at 457. Some critics get caught in contradictions as they argue on the one hand for a generous understanding of religious liberty, sensitive to the beliefs of individuals, while on the other hand faulting liberalism for misunderstanding the communal nature of faith. See (e.g.) Paul Horwitz, “The Sources and Limits of Freedom of Religion in a Liberal Democracy: s. 2(a) and Beyond” (1996) 54 U.T. Fac. L. Rev. 1. Horwitz writes that, ...another common error in liberalism’s understanding of religion stems from the fact that its tolerance of religion is based on the value of the autonomous individual: liberalism treats an individual’s religion as a choice, rather than as a compulsion or a facet of participation in a faith community. (Ibid. at 26)

Fair enough, yet earlier on in the same essay, Horwitz faults the court in A.G. Ontario v. Dieleman (supra note 82) for denying protection to idiosyncratic religious beliefs: Dissentience within religious communities is a common phenomenon that both renews and challenges old faiths and leads to the creation of new ones. One need only recall the example of Martin Luther to understand that the doctrinal orthodoxy of one’s beliefs is not a true index of their legitimacy or sincerity. While the courts should be aware of the corporate nature of many religious communities in order to give full meaning to the guarantee of freedom of religion, they should not define religion to reinforce the same tyranny of the majority that led to the s.2(a) right in the first place. (Ibid. at 10)
surely would not have prevailed. He prevailed because the Court recognized, on the facts of the case, that his religious freedom was at stake, and that it outweighed the property interests of the other condominium owners.81

Suppose, though, that the Court had decided Amselem differently, deferring to authorities within Orthodox Judaism who testified that there is no need for a succah in the home. The claim from critics of the Court’s individualistic approach, I take it, is that such a ruling might reinforce communal understandings within Orthodox Judaism, as non-communal interpretations of the faith would be denied the Court’s protection. Notice first how strained it is to characterize this as the promotion of ‘communal understandings’. In effect, these critics of Amselem are pressing to have religious authorities—who provide expert testimony to the court—have the final say on the requirements of their respective faiths. Whether the opinions of such authorities in fact reflect communal understandings is an entirely contingent matter, though; polling data often suggests, for example, that many Roman Catholics disagree with the Vatican’s views on contraception. One should not confuse the promotion of official church orthodoxy with the promotion of communal understandings. Notice as well that, if the Court did extend protection only to well-established religious practices, this would amount to a de facto establishment of religious doctrines by the state. The Court would in effect become the final arbiter of faith requirements, albeit relying on the advice of religious leaders within each faith. Finally, it should be noted that the private/public distinction operative in Charter jurisprudence does allow considerable latitude for

81 The Court’s refusal to find that religious freedom enjoys stronger protection per se than other rights is rooted in the view, explained in above (chapter 2, section 2) that Charter principles can not be ordered in an abstract hierarchy. See Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, at p. 877; Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698 at para. 50. Note also that, in many cases, this refusal to impose a fixed hierarchy upon Charter principles works to the benefit of religious freedom, as in Children’s Aid Society of Metropolitan Toronto [1995] 1 S.C.R. 315 [hereinafter “Children’s Aid Society], where the majority declined to say that a child’s s.7 right to life and security of the person delimits their parent’s right to freedom of religion. In keeping with the general reluctance to impose any abstract hierarchy upon the Charter, the Court found it preferable to sort this out on a contextual basis, within s.1.
religious groups to create and apply their communal understandings within their own ranks. Though the state lends some support to religious organizations, in part by issuing them charitable tax status, this has not been taken to imply that religious organizations must comply with the Charter in their internal dealings.\(^{82}\)

At any rate, so long as religious groups remain voluntary associations, there is no reason to suppose that such an alternative ruling in Amselem would bring about greater communal understandings. It might equally sow division within faith-based communities. For the option would always remain for those holding dissentient views to splinter off and form their own branches of the faith, establishing their views as the new orthodoxy.\(^{83}\) Amselem must be understood, in part, as an attempt by the Court to avoid entanglement in such internal disagreements; as a refusal to turn the courtroom into a forum where individual believers are pitted against their religious leaders.\(^{84}\) Whatever one’s views on the relative merits of individualism versus communalism, surely worthwhile communalism has to arise voluntarily, and not be subtly imposed by the Court’s selective protection of religious freedom.

---

\(^{82}\) See e.g., Reed v. Canada, 14 A.C.W.S. (3d) 344. There it was found that the courts could not review the verdicts of religious tribunals charged with adjudicating the ‘disfellowship’ of Jehovah’s Witnesses. Muldon J. explained, at para. 10, that,

To be sure, the Charter is integral to the Constitution of Canada and, by section 32 thereof it applies to all provincial and federal legislative and governmental power and all matters within their respective authority. But, the Charter notably does not provide for, nor did anyone ever imagine that it would apply to, religious disciplinary tribunals, precisely because, on the contrary, it guarantees freedom of religion. Therefore, this Court will not interfere with the obvious dispute about the practice and procedure of adjudicating disfellowship which has erupted between the plaintiff as a disaffected J.W. and the Watch Tower Bible and Tract Society of Canada. In this regard it is plain and obvious that the plaintiff’s statement of claim discloses no cause of action which is cognizable by this Court.

See also infra note 115.

\(^{83}\) As explained in chapter 5, the courts have declined to interfere with the religious definition of marriage; churches are left to decide this for themselves. The Anglican church is now splintering over the issue of same sex marriage. See “Anglican rift deepens as to sides go to court” The Globe and Mail (25 February 2008) A1.

\(^{84}\) As the Court put it, “[s]ecular judicial determinations of a theological or religious dispute, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.” Amselem supra note 79 at para. 50.
It may be worth noting, finally, how the state’s general refusal to in any way reinforce religious orthodoxies may in fact have the effect of increasing religiosity generally. Some have contended that the United States’ high degree of religiosity is attributable to that country’s longstanding anti-establishment doctrine. Expressed in the language of economics, the wall of separation forbids state monopolies on religion. The resulting free market spurs religious innovation, and new denominations emerge catering to the tastes of religion’s would-be consumers.\textsuperscript{85}

My point in all of this is to deny that there is any serious conflict between the Charter’s commitment to the promotion of multiculturalism and its commitment to individual religious freedom. To weaken individual rights protections would only strengthen religious ‘communal understandings’ by means that seem coercive and, in the long run, ineffective in preserving religious cultures. The fact that the courts opt to view religion in part through the lens of individual conscience does not prevent religious believers from seeing their faith entirely through a lens of collective understanding.

\textbf{2. Freedom of Religion and Fundamental Autonomy}

Concerns about multiculturalism do not reflect the full depth of our commitment to religious freedom. There is also a sense in which we want to protect people’s right to be individuals, and to live in accordance with their own private judgments about the good life, quite apart from the collective judgments of the religious or cultural groupings to which they belong, and moreover, apart from the judgments of Canadian society generally. This right to individual autonomy is particularly pressing where fundamental life decisions are at stake.\textsuperscript{86} When we conclude, for example, that adherents to the


\textsuperscript{86} Morgentaler \textit{supra} note 3 at 163.
Jehovah’s Witness faith should be at liberty to refuse blood transfusions, this conviction has little or no connection with our concern for multicultural diversity.

This concern to protect basic autonomy extends also, to some extent, to fundamental decisions made on non-religious grounds. In this section, I want to contrast the *Charter*’s protection of freedom of religion with its protection of freedom of secular conscience. The general drift of my argument is that religious believers fare well in such comparisons: claims made under the rubric of religious freedom are far more likely than secular liberty claims to make it to the s.1 stage, where government is then obliged to justify its infringement.footnote{In fairness, it should be noted that religious freedom claims often fail at the s.1 stage, and some have pointed to this as evidence that the courts are unsympathetic to religion. See, particularly, Shannon Ishiyama Smithy, “Religious Freedom and Equality Concerns under the Canadian *Charter of Rights and Freedoms*” (2001) 34 *Canadian Journal of Political Science* 85. However, one can not assess how religion has been treated under the *Charter* simply by counting up wins and losses for religious claimants. It may be that the Court has been very generous in handling religious claims, but that the claims advanced have generally been indefensible under s.1. Certainly, some of the prominent claims made under the banner of religious freedom have been far-fetched: parents claiming a right to home school their children while refusing to provide any evidence to the state that they are doing so competently; or parents claiming a right to deny lifesaving medical treatment to their children. Surely, the rejection under s.1 of these far-fetched claims does not indicate a lack of sympathy and respect for religion on the part of the courts. To establish a lack of sympathy for religion, one needs to advance a plausible explanation of why these losses for religious believers should have been wins. Indeed, the courts’ sensitivity to religious claims may mean that a higher ratio of far-fetched claims find their way onto the docket.} A second point I want to make, though, is that this asymmetry as between freedom of religion and freedom of secular conscience reflects certain underlying views about how religious and secular worldviews differ. It reflects the generally held view that religious claims are morally sensitive and epistemically inscrutable. My larger argument is that this hands-off understanding of religion can be carried over as a justification for bracketing religion in deliberations over law and policy of general application.

### 2.1 Comparing Religious and Secular Liberty Protections under the Charter

Individual religious freedom is assured by two separate provisions of the *Charter*: section 2(a) and, indirectly, section 7. Those two provisions read as follows, respectively:
2. Everyone has the following fundamental freedoms:
   (a) freedom of conscience and religion;
   ...
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The first thing to notice is that religious freedom, as guaranteed under these provisions, matters only insofar as it shields religious practices from state-imposed burdens. Freedom of religious thought, expression, and assembly are protected under the Charter's other fundamental freedom guarantees. Let us assume, then, that there is nothing special about the Charter's protection of religious thought and expression. We are interested mainly in the freedom to act on those beliefs.

Now, it may seem that s.7, with its generic liberty guarantee, renders the guarantee of religious freedom somewhat redundant. And in fact it is unclear what factors should determine whether a religious liberty claim is categorized under s.2(a) or the s.7. Often, religious freedom claims are advanced under both headings. However, this choice of categorization is not without consequence, because s.7 has a built-in limitations clause-- allowing that the state can infringe 'life, liberty, and security of the person' provided this is done without violating any 'principle of fundamental justice'. In practical terms, this significantly shifts the burden of proof in asserting rights claims. For under s.7, the claimant, not the government, is charged with establishing that there exists some 'fundamental principle of justice' which has been violated by the impugned government action. This burden is not so easily met. Perhaps the best known example here is Rodriguez v. British Columbia (Attorney General), where the appellant was able to establish that laws forbidding assisted suicide interfered with her liberty and

---

security of the person, but was unable to establish that this was contrary to any well-established principle of fundamental justice. Canadian society is committed to respecting the sanctity of human life, the Court explained, and this negates any suggestion that state interference with assisted suicide violates well-established principles of fundamental justice.90

Rodriguez--which now serves as an important precedent in cases where claimants argue for a right to engage in practices forbidden by the state—in fact leaves considerable room for imposing the moral views of the majority. It says, in effect, that the Canadian majority may limit an individual’s freedom to x, without establishing that the limitation is proportional to some clearly justified end, unless the claimant can produce a widely accepted principle of fundamental justice, according to which one is entitled to x.91 All it may take, in other words, to dismiss a liberty claim under s.7, is a showing that there is widespread societal disapproval of the activity at issue.92 In Rodriguez and elsewhere, the Court has been selective in determining what counts as a ‘principle of fundamental justice’.93 For this reason, religious believers wanting to claim Charter protection for a given practice are well advised to stake their claim under s.2(a)

90 Ibid. at 590-91.
91 Things are muddied somewhat when imprisonment is threatened as a punishment for a forbidden act, for then an indisputable principle of fundamental justice is brought into play: the right not to be jailed without good reason. See Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, Malmo-Levine, supra note 103 at para. 84.
92 Of course, one can succeed, under s.7, in overturning government actions that have some procedural flaw. Thus, for example, in Morgentaler, supra note 3, abortion laws were overturned on grounds that they were procedurally arbitrary and unfair. Had those abortion laws not been procedurally flawed, the appellants in Morgentaler might well have lost out for the same reason as Rodriguez: Canadians’ concern for the sanctity of life undermines the idea that fundamental justice demands open access to abortion.
93 See Rodriguez, supra note 94 at 519: ”A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles…While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are “fundamental” in the sense that they would have general acceptance among reasonable people.”
rather than s.7. Under s.2(a), they avoid the hurdle, faced by those asserting liberty rights on secular grounds, of having to establish that the interference with their religious practice infringes some widely accepted principle of fundamental justice. Indeed, thanks to the precedent set in Amselem, the only hurdle they will face is in showing that the state has non-trivially94 interfered with a practice they sincerely believe to be required by their religion. Once this is established, the burden shifts to government to demonstrate that the infringement was justified under s.1, and that there was no workable means of accommodation.

The Court’s generosity in interpreting the scope of religious freedom is also illustrated by the reasoning in Children’s Aid Society of Metropolitan Toronto.95 In that case, there was disagreement among the judges as to whether a parent’s right to control their child’s medical care encompassed a right to jeopardize the child’s health by refusing blood transfusions on religious grounds. The majority was emphatic that even with these egregious attempts to act on religious beliefs, the Court would not delimit religious freedom. Instead the majority explained that, “[t]his Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the Charter.”96

---

94 See Edwards Books, supra note 93 at para.97: “For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial...” See also Jones, supra note 35, per Wilson J. at 314.
95 Supra note 87.
96 Ibid. at 384. Some have argued that this understanding of the parent-child relationship is inherently flawed, as it in effect makes the child an instrument of the parent’s religious autonomy. It is one thing to say that we ought to defer to parents’ wishes because they are well positioned to judge the child’s best interests, and quite another to say that deference is owed out of respect for the parents’ autonomy. In adopting the latter approach, we may commit ourselves to respecting parental autonomy even when it is exercised to the child’s detriment. This idea that one person’s autonomy encompasses a right to control others is emphatically rejected in other contexts, as when slave owners assert a liberty interest in controlling their slaves, or husbands a right to control their wives. It nevertheless retains an air of legitimacy in the parent-child context, presumably because children are thought to lack the decision-making skills needed to exercise
Things are different for citizens demanding the freedom to engage in practices undertaken on secular grounds. Such cases are normally handled under s.7, and often fail thanks to barriers erected under that heading. They fail because claimants are unable, as in Rodriguez, to meet the heavy burden of showing that the state’s interference violates a well-established principle of fundamental justice. Or else they fail because the Court deems the practice in question too trivial to warrant constitutional protection—as falling outside the sphere of ‘fundamental personal interests’ protected by s.7. This occurred, for example, in R. v. Malmo-Levine, as the Court considered whether recreational marihuana use was protected under s.7:

While we accept Malmo-Levine’s statement that smoking marihuana is central to his lifestyle, the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. One individual chooses to smoke marihuana; another has an obsessive interest in golf; a third is addicted to gambling. The appellant...invokes a taste for fatty foods. A society that extended constitutional protection to any and all such lifestyles would be ungovernable. Lifestyle choices of this order are not, we think, “basic choices going to the core of what it means to enjoy individual dignity and independence” (citations omitted).

autonomy. But the mere fact that good decisions need to be made on a child’s behalf does not justify our saying that parents have an autonomy interest (i.e., a religious freedom claim) over their children. A more sensible approach is to say that parents have a right to noninterference in their parenting insofar as they act in the child’s best interests. It only muddies the waters to conceive of this as an autonomy interest—as though parents are entitled to pursue their religious objectives at the child’s expense. See Michael David Jordan, “Parent’s Rights and Children’s Interests” 10 C.J.L.J. 363; James G. Dwyer, “Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights” (1994) 82 Cal. L. Rev. 1371.

There are some exceptions. For example, activities may gain protection under s.2(b), if the claimant is able to establish that the activity in question is integral to their free expression. So, for example, the right to free expression can be extended to cover the possession of literature. See R. v. Sharpe, 2001 SCC 2 at para.25. Similarly, activities integral to freedom of association may be protected. See Dunmore v. Ontario (A.G.) [2001] 3 S.C.R. 1016 at para.30. In a later chapter, I argue that the scientists’ right to free expression should be understood to include a right to engage in experimentation. The thing to notice here is that secular believers are forced to shoehorn their claims into these compartments, while religious believers face no comparable obstacles in carrying their claims to the s.1 stage.


Ibid. at para. 86.
In short, the Constitution can be stretched to afford protection to whatever activity an individual chooses to define as part of his or her religion; but it can not be stretched to cover practices sincerely thought central to one’s lifestyle on secular grounds. The Court reserves the right to second-guess the importance of activities undertaken on secular grounds, dismissing some as too trivial to warrant protection. In Malmo-Levine the Court also rejected the suggestion that the harm principle counts as a principle of fundamental justice for the purposes of s.7; thus one cannot argue for a liberty right to engage in some practice just on grounds of its harmlessness.100

For the sake of further comparison, one might also contrast the protections granted to religion with those extended to the expression of heterodox sexualities. As some feminist critics have noted, Charter jurisprudence in the area of indecency and obscenity has, over the years, had a distinctly moralistic tone to it.101 The test in obscenity and indecency cases, until recently, was in essence a hybrid of a community standards test and a harm-based test: materials could be deemed criminally obscene if, in the subjective view of the community generally, they are deemed harmful to society.102 This of course means that any irrational or unwarranted fears that happen to be well-entrenched in the community may serve to justify censorship. Now, imagine that a comparable standard were applied in religious freedom cases. Suppose, for example, that in Multani, the Court had deferred to community judgments as to the risks posed by ceremonial daggers in the classroom. Such an approach seems unacceptable, for one

100 Curiously, though, the Court recently relied upon a ‘theory of harm’ in overturning indecency laws, in Labaye, supra note 31. Canadian civil libertarians celebrated the outcome, though it remains to be seen whether the decision will lead to an expansion of secular liberty. The difficulty, obviously, is that liberty protections for secular practices must be advanced under s.7, and claimants must therefore must meet the ‘fundamental interests test,’ as well as establish a principle of fundamental justice violated by the state’s interference. It is only at this point that the burden of proof would shift to government, and a harm based justification might be required. Labaye was technically not a Charter case, and so the appellants did not face these obstacles.
immediately worries that a community of non-Sikhs will have an exaggerated sense of
the risks posed by kirpans, as well as an understated sense of the kirpan’s importance to
the individual believer.\textsuperscript{103} The alternative, taken in \textit{Multani} and not in obscenity cases, is
to try, on the one hand, to understand the value of the activity from the perspective of
participants themselves, and to assess its harms on the basis of actual evidence rather
than blind deference to community predilections.

There is, of course, good sense in the Court’s line of reasoning in \textit{Malmo-Levine},
and it ties back to a general criticism of liberalism. The criticism is that over-expansive
individual liberty protections will tend to crowd out democratic decision-making,
making it difficult if not impossible for citizens to advance any shared vision of the public
good. Citizens’ collective efforts to maintain healthy urban environments could be
challenged by individual citizens asserting a liberty ‘right’ to drive gas-guzzling cars, for
example, and of course equivalent examples might be provided across all domains of law
and policy. I stress, “could be” very busy, because this would be a function of how many
laws were promulgated interfering with secular lifestyle choices, and a function of the \textit{ex ante} feasibility, to citizens, of challenging those laws as infringements of the harm
principle. There are no laws seriously interfering with the freedom to golf or eat fatty
foods, so the Court’s rhetoric in \textit{Malmo-Levine} is somewhat inflated. (And note that one
could as easily offer fanciful examples in arguing that the precedent set in \textit{Amselem}
stretches religious freedom beyond workable limits. An infinite range of activities might
in theory require constitutional protection, now that sincerity of religious conviction is
the only test in advancing claims under s.2(a).\textsuperscript{104}

\textsuperscript{103} There was apparently some public outrage in the wake of the \textit{Multani} decision. See Lysiane
Gagnon, “The kirpan decision isn’t welcome in Quebec” \textit{The Globe and Mail} (13 March 2006); Don
Macpherson, “Kirpan Ruing is Tough Sell in Quebec: Canada’s Cultural Mosaic is not the
Same in this Province, Where the Melting Pot is More the Rule” \textit{Montreal Gazette}, (4 March
2006) at B7.

\textsuperscript{104} In \textit{Employment Division of Oregon v. Smith} 494 U.S. 872 (1990) [hereinafter “\textit{Smith}”], the
U.S. Supreme Court rejected the appellant’s claim that government actions penalizing ceremonial
The point, then, is not that the scope of secular liberty ought to be expanded, or the scope of religious freedom contracted. Rather, my objective is, first, to cast further doubt on this claim that the Court disfavours religion, or promotes secularism. For at least in terms of the scope of negative liberties enjoyed, religious believers fare comparatively well under the *Charter*. Moreover, taking a step back, this asymmetry in the handling of religious and secular liberties should cast some doubts on the assertion—at times made by religious *Charter* critics—that secular belief sets are on a par with religious belief sets, in terms of their public accessibility. That claim may have some validity in an epistemological sense—i.e., in the sense that all beliefs, ultimately, rest upon unproven and unprovable claims—but it is by no means true in a legal sense. Secular beliefs and practices are treated differently by the law: they are challenged more readily, judged more harshly, and more often dismissed as trivial. In what follows I want to consider the justification for this asymmetry of treatment, and ask what that asymmetry entails for public reason (specifically, public reason’s requirement that religious arguments be bracketed from deliberations over laws of general application).

2.2 *Freedom of religion and freedom from religion*

The Court has interpreted s.2(a) as including a right to freedom from religion. The logic is readily understandable: because religions are often in zero sum conflict—to believe in one is to disbelieve the others—it is difficult for the state to affirm one religion without tacitly disaffirming others.105 If one views religion as an aspect of identity that must be guarded as sacrosanct, as one will in embracing strong protections for freedom

---

peyote use infringed the right to religious freedom. The majority’s central concern was analogous to the Court’s concern in *Malmo-Levine supra* note 98: to grant religious believers exemptions from laws of general application “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” *Ibid.* at 879, quoting *Reynolds v. United States*, 98 U.S. 145 (1879). I discuss this at greater length below, in section 3 of this chapter.

105 Though it may be permissible to affirm *theism* in a very general, non-denominational sense. Generic prayers of this sort, recited in government meetings, were deemed to comply with s.2(a) in *Allen v. Renfrew* (2004), 69 O.R. (3d) 742 [hereinafter “*Allen*”].
of religion, then the best, or indeed the only, way for the state to avoid infringements is to avoid endorsing religious views in any way. Read, for example Big M—the leading case in religious freedom—as Chief Justice Dickson explains the justification for overturning the Lord’s Day Act:

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...The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.106

Notice how the Court’s reasoning here shades away from a concern over coercion, to a concern with preventing feelings of alienation for religious minorities. In the final analysis, this concern over feelings of alienation appears to have been pivotal, because in a decision that came quick on the heels of this one—Edwards Books107-- the Court allowed Sunday closing laws to stand when directed towards the (non-alienating) purpose of providing workers a common day of rest. In subsequent decisions, this concern to prevent alienation and protect citizens’ dignity has led the Court to disallow prayers in the classroom, and in town hall meetings, and to generally refuse religious indoctrination in public classrooms irrespective of student consent.108

106 Big M supra note 12 at para.97.
107 Supra note 93.
108 See Zylberberg, supra note 3 (1988) 65 O.R. (2d) 641 (overturning a regulation allowing prayers and biblical studies in public schools); Canadian Civil Liberties Association v. Ontario (Minister of Education) (1990), 71 O.R. (2d) 341 (C.A.) (overturning a regulation requiring two half-hour sessions of ‘religious education’ per week in Ontario schools); Freitag v. Penetanguishene, [1999] 47 O.R. 301 (finding that recital of Christian prayers at the commencement town hall meetings infringed the right to religious freedom of others in attendance). It is noteworthy that similar concerns over feelings of alienation have been advanced by the U.S. Supreme Court, in interpreting the establishment clause of the First Amendment. See, e.g. Lynch v. Donnelly, supra note 37, which looked at whether government could erect Christmas displays. There, ibid. at 688, Justice O’Connor advanced the so-called endorsement test: “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. Government can run afoul of that prohibition...[by] endorsement or disapproval of religion. Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”
Some will see this as a case where religion has been a victim of its own success. It may seem that in its zeal to protect religious minorities, the Court has undermined the religious freedom of the majority. David M. Brown, for example, characterizes all of this as a move to force religion out of the public square, and as an assault on religious freedom:

While the courts...properly sought to protect religious minorities from the coercion of the majority, they ended up by denying any place for religious belief and practices in public schools...Zylberberg started a process which ultimately eliminated religious freedom from public schools--a classic case of throwing the baby out with the bath water. The reasoning which operated to transform the guarantee of freedom of religion into a device to secularize public schools is now threatening to push religious voices out of public debate.\(^{109}\)

This I think is quite misleading. The justification, in *Charter* doctrine, for overturning religiously motivated Sunday closing laws, and banning prayers in public schools, has nothing to do with the promotion of secularism *per se*; the Court is not surreptitiously reading the French constitutional doctrine of *laïcité* into the *Charter*. The Court’s claim has never been that religious freedom is a minor consideration, dwarfed by some competing state interest in promoting secularism. Rather, the claim is that religious freedom is to be guarded so carefully that even the subtlest intrusions—such as tacit, symbolic disaffirmation-- are forbidden by the *Charter*. The difference is not semantic: the difference in underlying doctrine is what enables French legislators to justify banning religious identifiers in public schools. The doctrine underlying freedom of/from religion in *Charter* jurisprudence could never be invoked to justify such legislation. Brown’s claim that the courts have “eliminated religious freedom in the classroom” has no basis in the decisions he cites. What the courts have denied is any place for the state to subtly impose religious doctrines on students the classroom, or to make religious minorities feel like outsiders in government meetings. Religion retains a place in the classroom,

\(^{109}\) David M. Brown, “Freedom From Or Freedom For?: Religion As A Case Study In Defining The Content Of Charter Rights” *supra* note 1 at 615.
and in society generally, as an aspect of students’ and citizens’ fundamental freedom; and in this regard, as we have seen, religion is guarded with unusual jealousy. It is true that citizens will have to look outside the classroom and town hall meetings in search of a setting where their religion receives authoritative affirmation. But note that the Charter’s commitment to multiculturalism, as we have seen, opens the door to state support for those freestanding, voluntary associations.\textsuperscript{110}

\textbf{2.3 The asymmetry of freedom of religion and freedom of secular conscience}

At first blush, many will suppose that the Charter’s guarantee of ‘freedom of conscience’ is the secular counterpart to ‘freedom of religion’, and that s. 2(a)—which protects both—is evenhanded as between secular and religious comprehensive doctrines. It may even seem that s.2(a) single-handedly establishes a standard of public reason. The claim would be, roughly, that all comprehensive doctrines receive symmetrical protection under s.2(a): the theist has his comprehensive doctrine protected by the right to freedom of religion, the atheist has his comprehensive doctrine protected by the right to freedom of conscience. And we assume that, so long as all comprehensive doctrines enjoy symmetrical protection, political decision-making can otherwise be a free-for-all where comprehensive doctrines are deployed at will. If the law veers towards theocracy, the non-believer can guard against its excesses with his right to freedom of conscience; if the law veers towards the imposition of some secular comprehensive doctrine, the

\textsuperscript{110} Religious groups enjoy a comparable degree of religious freedom, even, it seems, while receiving state support in the form of charitable tax status, or while being licensed by the state to provide public services. In the name of religious freedom, such groups are permitted, e.g., to instill intolerant attitudes towards homosexuals. See \textit{Trinity Western University v. British Columbia College of Teachers}, 2001 SCC 31. See also Janice Gross Stein, “Living Better Multiculturally” (2006) 14(7) \textit{Literary Review of Canada} 3. Stein stirred up controversy by proposing that religious organizations should lose their charitable status for failure to respect basic rights and liberties in their internal dealings. See also Kymlicka, \textit{supra} note 8, chapters 3 and 8. It should be noted that other countries have been comparatively unaccommodating of religious intolerance. For example, the Blair government in the United Kingdom announced in early 2007 that Catholic adoption agencies would be denied state support if they continued to discriminate against gays and lesbians. “No exemption from gay rights law” \textit{BBC News} (29 January, 2007), online: <http://news.bbc.co.uk/1/hi/uk_politics/6311097.stm>. 
religious believer can guard against its excesses with his right to freedom of religion.\textsuperscript{111} It is the symmetry of the right to religious freedom and the right to freedom of conscience which guarantees the fairness of the system, as between religious and secular worldviews.

All of this may depend upon whether we can arrive at some symmetrical understanding of the scope of the two rights; above I described the asymmetry that in fact operates in the Court’s handling of religious and secular claims. Perhaps, though, there is a way to tinker with Charter doctrine, to salvage this symmetry-based approach. To explore this possibility, I want to begin by considering what I take to be a plausible explanation of how freedom of religion and freedom of conscience might be conceptualized symmetrically; here I will rely on an account recently advanced by Gidon Sapir and Daniel Statman. My claim is that secularists are bound to benefit less from s.2(a) than do religious believers, even when the right to freedom of religion and freedom of conscience are construed symmetrically, in the way that Sapir and Statman recommend.

In an article titled, “Why Freedom of Religion Does Not Include Freedom from Religion,” Sapir and Statman argue for a symmetrical understanding of freedom of conscience and freedom of religion.\textsuperscript{112} They argue that the justifications underlying our concern with freedom of religion do not justify an absolute right to freedom from religion (i.e., do not justify overturning all religiously-motivated laws). By way of illustration, they consider a law forbidding citizens from driving through Orthodox

\textsuperscript{111}This alternative to public reason may even have a certain appeal to Rawlsians, because it bears a superficial resemblance to justice as fairness, specifically, Rawls’ claim that people in the original position would choose the most extensive individual liberties compatible with \textit{equal liberty for all}. See also Christopher L. Eisgruber & Lawrence G. Sager, \textit{Religious Freedom and the Constitution} (Cambridge, Mass.: Harvard University Press, 2007). Eisgruber and Sager argue for abandoning the ‘wall of separation’ metaphor in First Amendment jurisprudence, and adopting instead an approach grounded in the idea of equal liberty.

\textsuperscript{112}Gidon Sapir & Daniel Statman, “Why freedom of religion does not include freedom from religion” (2005) 24 Law & Phil.467.
Jewish neighbourhoods on the Sabbath day.\textsuperscript{113} Their contention is that drivers imposed upon by such laws are not made to act \textit{against their conscience}; they are inconvenienced, but their integrity and dignity are not compromised as a result. Secularists who demand that such laws be overturned are demanding more than a right to freedom of secular conscience equivalent to religious freedom; they are demanding freedom from inconvenience.\textsuperscript{114} This argument asserts that freedom \textit{of} religion is meant only to prevent citizens from being \textit{coerced against their conscience}, and then argues that freedom of conscience should be delimited by reference to that same underlying purpose. Sapir and Statman concede that this is not how religious freedom has been understood under the \textit{Charter}. They argue, for example, that \textit{Big M} was wrongly decided: that the \textit{Lord’s Day Act} did not infringe the right to freedom of conscience, properly interpreted, because it merely inconvenienced store owners, and did not compel them to act in any way contrary to their beliefs.\textsuperscript{115} \textit{Big M} emphasizes legislative \textit{purpose}, whereas Sapir and Statman would have the law return to an emphasis on legislative \textit{effects}. The \textit{Charter} should, on their view, only stand in the way of laws which have the effect of forcing individuals to act contrary to their conscience.

To start, it is worth clarifying that this argument does not disprove the connection between freedom of religion and freedom from religion, as the title of Sapir and Statman’s article suggests. In fact it explicitly assumes that freedom of religion entails freedom from religion, insisting only on that a certain kind of symmetry hold between the two. Rather, what the authors demonstrate, if their argument succeeds, is that the Court should generally be less sensitive in interpreting both freedom \textit{of} religion and freedom \textit{from} religion. Both rights should be limited to instances where individuals

\textsuperscript{113} \textit{Ibid.} at 494.
\textsuperscript{114} \textit{Ibid.} at 494.
are made to act contrary to their conscience, and should not cover instances where individuals are merely inconvenienced or made to experience feelings of alienation.

Now, my concern is that an account of public reason that focuses attention solely on preventing individuals from being compelled to act contrary to their beliefs will tend to cater to religious moral views. This should come as no surprise, really, because the right to freedom of conscience grew, historically, out of the right to religious freedom. I concede this is anecdotal, but my sense is that many secularists do not view morality through a lens of strict commandments and prohibitions in the way that religious believers do, paradigmatically. It is difficult even to offer many examples of secular moral views that fit this mold, though I suppose there are a small handful—e.g., vegetarians and pacifists. Secularists tend more often, I think, to make moral judgments on a contextual basis: for those of a utilitarian bent, these will be judgments about what produces happiness or alleviates suffering; for those of a Kantian bent, judgments about what course of action best accords with universalizable moral rules. (Even to focus on the examples of utilitarianism or Kantianism overstates the rigidity of the average secularist’s moral view.) For citizens whose morality operates in this contextual manner, ‘freedom of conscience’ as understood by Sapir and Statman is of little or no use as a defense against impositions of religious morality. Such secular

---

116 I do not mean to assume that religious believers necessarily view morality through rigid systems of commandment and prohibition, or that they are insensitive to contextual utility calculations or considerations of universalizability. But note that religious freedom, as understood by Sapir and Statman, will only be of value to those who do view morality in this way.


118 This idea that claims of secular conscience must fit the mould of religious claims has been voiced by the courts. In R. v. Videoflicks, supra note 18 at 422, for example. Tarnopolsky J.A. describes how the guarantee of freedom of conscience applies only to rigid moral views:

In my view, essentially the same reasoning would apply to the fundamental freedom of conscience, except that freedom of conscience would generally not have the same relationship to the beliefs or creed of an organized or at least collective group of individuals. None the less, and without attempting a complete definition of freedom of conscience, the freedom protected in s. 2(a) would not appear to be the mere decision of any individual on any particular occasion to act or not act in a certain way. To warrant constitutional protection, the behaviour or practice in question would have to be based
views do not contain any neatly isolable commandments or prohibitions, to which the secularist might point in demanding accommodation by the state.

These difficulties are illustrated in *Allen v. Renfrew* (Corp. of the County), where the appellant, a secular humanist, sought to enjoin the Renfrew County Council from commencing its monthly meeting with a non-denominational prayer. Allen plainly felt a need, in arguing his case, to present secular humanism as a rival religion; his submission to the court even included a statement of the “Ten Core Beliefs of Humanists.” Allen was well-advised to state his claim in this way, for one of the first questions the court raised in adjudicating his case was whether humanism qualified as a religion. The court relied upon expert testimony to find that, “from a theological perspective, the reference to God or to a divine being in a prayer renders the prayer not sufficiently generic to include certain belief systems such as the applicant’s, which do not accept God, but are nonetheless regarded as religions.” Though Allen was successful in establishing secular humanism as a religion, the court ultimately found that the County Council’s favored prayer was sufficiently non-sectarian, notwithstanding its mention of God. The very fact, though, that one is obliged to characterize secular humanism as a religion, with its own Ten Commandments, in order to garner protection for that worldview, speaks to the way in which religion sets the mold for the protection of

---

upon a set of beliefs by which one feels bound to conduct most, if not all, of one's voluntary actions. While freedom of conscience necessarily includes the right not to have a religious basis for one's conduct, it does not follow that one can rely upon the *Charter* protection of freedom of conscience to object to an enforced holiday simply because it happens to coincide with someone else's Sabbath. Rather, to make such an objection one would have to demonstrate, based upon genuine beliefs and regular observance, that one holds as a sacrosanct day of rest a day other than Sunday and is thereby forced to close one's business on that day as well as on the enforced holiday. No appellant informed this Court of any such fundamental belief based upon conscience rather than religion.

---

119 Supra note 105.
120 Ibid. at para. 11.
121 Ibid. at para. 14 [emphasis added].
122 Incidentally, this decision reinforces my earlier claim that freedom from religion is predicated largely on sensitivity to religious believers themselves. While denominational prayers are elsewhere disallowed for fear of causing feelings of alienation, in *Allen*, the court allows non-denominational prayers, notwithstanding the alienation this may cause to atheists.
individual conscience. It is little wonder that in asserting liberty claims, secularists tend to rely on other Charter provisions—the right to free expression, free assembly, security of the person, and so on.\textsuperscript{123}

The deeper question, to which I now turn, is \textit{why} the law extends special protection to religion. In formal terms, as I’ve explained, this asymmetry emerges as a structural feature of Charter jurisprudence—a byproduct of the decision to categorize claims under s.2(a) or s.7. As such, the Court has not had cause to explicitly account for this asymmetry. In a moment, I will offer what I take to be the best explanation—namely, that religion is assumed to be epistemically and morally inscrutable—but first I want to rule out the competing explanations.

The usual explanation, of course, is that religion is protected as part of a broader commitment to the protection of individual conscience. Yet as I’ve just explained, the most plausible notion of ‘conscience’ available here—where conscience consists in isolable commandments and prohibitions—requires justification. Why should interferences with liberty of this sort (i.e., where people are made to act contrary to their convictions) be categorically prioritized? As a conceptual category, interferences with the satisfaction of preferences seem every bit as likely to pose a serious threat to autonomy. To many it will seem, for example, that Sue Rodriguez’s desire to control the timing of her death reflected a more compelling liberty interest than Mr. Amselem’s convictions about the need for a private succah. (If only Sue Rodriguez could have sincerely claimed that her desire to control the timing of her death was a matter of

\textsuperscript{123} Though, as I explain above, secularists are disadvantaged by the need to state their claims as cases of free expression or free assembly, or else to overcome the hurdles set up by s.7’s internal limitations. In a later chapter, I will discuss whether scientific experimentation receives any Charter protection. There I will argue that scientific experimentation should be understood as a form of expression, and accordingly protected under s.2(b). I will not go through those arguments here; my point is only that religious believers are not compelled to go through such contortions in order to gain protection for their religious practices.
religious conviction! So this conception of freedom of conscience, as a justification for the special treatment of religion, is question-begging.

Some may instead be tempted to justify the special protection extended to religion by citing the benefits that religion brings to society, or to the individual. It is said that religion provides a needed counterpoint to the shallow consumerism of our society; that it fosters deep and independent reflection on questions of morality, metaphysics, and the meaning of life. Plainly, though, these considerations will not justify our singling out religion alone for special protection, because secular worldviews and lifestyles may be equally valuable in this regard. And anyway, the evidence that religion brings net benefits to society is debatable. Religion has as much a capacity to encourage divisiveness and dogmatism, after all. The claim that religion brings unique benefits to the individual is likewise a dubious generalization, given how religion may at times be felt as a repressive force.

We might look back to our discussion in section 1 of this chapter, and postulate that religion deserves special protection due to its importance to culture. But again this seems question-begging. There is no reason to suppose that secular values and lifestyle choices are any less important to the development of culture. True, religious traditions will often have a longer history, but why should that fact carry such weight? At any rate, the doctrine set out in Amselem—protecting private religious convictions—plainly is not aimed directly at the preservation of culture, as religious critics have been at pains to point out.

Let me therefore venture my own explanation. The doctrine established in Amselem can be traced back to a passage in a 1986 decision, R. v. Jones. The case

---

involved a father who refused to acquire state certification to home-school his children, claiming that to do so would be an acknowledgement “that the government, rather than God, has the final authority over the education of his children.”

To make such an acknowledgement would defy his religious convictions, he argued. Foreshadowing the doctrine later entrenched in Amselem, Justice La Forest reasoned (in part) as follows: “Assuming the sincerity of his convictions, I would agree that the effect of the School Act does constitute some interference with the appellant’s freedom of religion. For a court is in no position to question the validity of a religious belief...” This point about the Court being in no position to question religious beliefs has been reiterated in subsequent jurisprudence, and, as I say, made a centerpiece of the doctrine on religious freedom in recent years.

The explanation for religion’s special treatment lies, I believe, in this point about religion’s inscrutability.

Why exactly is the Court in no position to question the validity of a religious belief? Imagine if something analogous were said in Malmo-Levine—if it were said that “a court is in no position to question the validity of claims about the harmfulness of recreational marijuana use.” This would seem utterly misguided. The court’s legitimacy as an institution, and indeed the very authority of the law, rests on the notion that the state is in a position to answer these questions, and answer them better than the average citizen. So this concession made to religious believers—that their beliefs are inscrutable—is a drastic concession; it cuts to the core of the state’s authority. Yet the Court does not spell out the justification for this concession. No need is felt for justification, I think, because the Court is merely adhering to a broader societal norm, which dictates that one should refrain from questioning people’s deeply-held religious beliefs.

---

127 Ibid. at para. 19.
128 Ibid. at para. 20 [emphasis in original].
convictions. It is not clear what justifies this societal norm, and indeed atheists have long argued that it has no justification. At any rate, to those who think this norm has a justification, it has to do with the epistemic and/or moral inscrutability of religious claims. In the remainder of this section, I want to consider the epistemic inscrutability of religious beliefs. I will turn to their moral inscrutability in the section 3, as I believe that point is best explained as a feature of equality norms—i.e., it is thought that questioning a person’s religious beliefs is somehow intolerant or discriminatory.

The idea that religious beliefs are epistemically inscrutable is familiar enough. The evolutionary biologist Stephen Jay Gould offered perhaps the definitive statement of this view, arguing that the fact-based world of science and the value-based world of religion represent two ‘non-overlapping magisteria’. As mutually exclusive provinces of inquiry, the claims of science cannot be used to disprove the claims of religion, and vice-versa, Gould claimed. Perhaps the Court sees its competencies as lying outside the majesty of religion, and this is what justifies its hands-off approach. This is not a very compelling justification, however, in part because Gould’s basic distinction is dubious, on reflection. It certainly seems that religious claims have implications for science, and that these instances of magisterial overlap give rise to controversies in the political sphere; the controversy over the teaching of creationism and evolution in public schools is an obvious example. Moreover, even if one accepts Gould’s approach, it is unclear which of the two majesties the courts’ competencies fall within. The courts plainly do feel competent to adjudicate factual, empirical claims (though of course there are debates over the limits of the courts’ competence within the majesty of the social and natural sciences). Yet the courts will also weigh in on certain questions of morality.

Perhaps some finer distinction might explain the epistemic limits of the courts’ competence relative to religion. In light of the discussion in chapter 2, we might suppose

---

that *within* the domain of values and morality, the court’s competence is limited to the sub-domain of foundational *political* values. We saw how the Court has said essentially this in its most recent decision on criminal indecency, *R. v. Labaye*.\(^{132}\) Yet even this will not explain the Court’s utter deference to religious belief. In situations where religious beliefs come into conflict with foundational political values, the Court persists in its deference. In *Ross v. New Brunswick School District No. 15*,\(^{133}\) for example, a school teacher claimed that his right to religious freedom was infringed when the school board reassigned him from the classroom, after he published an anti-Semitic screed in the local newspaper. One might have thought that, given their experience in explaining and upholding the *Charter* value of equality, the Court would be in a position to question the validity of such anti-Semitic views. The Court has shown no reluctance to question the validity of secular hate propaganda. In *R. v. Keegstra*, the Court considered the claim of another anti-Semitic schoolteacher, prosecuted under Canada’s hate speech laws.\(^{134}\) There the Court showed no reluctance to question the truth of Keegstra’s beliefs. Indeed, the evident falsehood of those beliefs was counted, at the s.1 stage, as a reason for rejecting Keegstra’s appeal. Yet in *Ross*, the Court again demurred that it could not comment on the validity of a religious belief.\(^{135}\) We see religious beliefs receiving this kind of hands-off treatment in the legislative sphere as well. As I will explain in chapter 5, for example, Canada’s hate speech legislation contains just one exception—for hate speech rooted in religion.

Whether defensible or not, this idea that religious beliefs are epistemically inscrutable is deeply entrenched in our political and intellectual culture. Debate is bound to persist over the distinct epistemic status of religious claims, and I do not pretend to have offered conclusive arguments. Be that as it may, there is an *ad hominem*

---

\(^{134}\) [1990] 3 S.C.R. 697.
argument that can be leveraged out of this debate. Anyone who accepts—in debates over
the scope of religious freedom— that religious arguments have a special epistemic status,
rendering them inscrutable from the perspective of the law, will have to reconcile that
commitment with their views on public reason. As I have mentioned at various points
above, critics of the idea of public reason routinely claim that secular and religious
viewpoints are on an epistemic par. Plainly, that claim is not open to those who cite the
epistemic inscrutability of religion to justify the generous accommodation extended to
religious believers.

For many of us, I expect, our reluctance to question others’ religious beliefs is
rooted primarily in moral, rather than epistemic, considerations. To question a person’s
religious beliefs has a tinge of intolerance or even discrimination. I want to explore this
approach in the section that follows. Supposing that religion is protected on grounds of
its moral inscrutability, what does that indicate regarding the place of religious
argument in political discourse? Is there something discriminatory in the idea of public
reason? Or does the moral inscrutability of religion speak in favour of bracketing
religious claims from the public square?

3. Religion, public reason, and the right to equality

Religion gathers additional protection under s.15 of the Charter, which reads in
part:

(1) Everyone has the right to equality before the law and to equal protection of the
law without discrimination because of race, national or ethnic origin, colour,
religion, age or sex...

As a practical matter, the equality protections extended to religious believers under s.15
are in a way redundant, due to the generous reading that has been given to the s.2(a)
guarantee of religious freedom. Any law that directly discriminates on the basis of
religion, or that has an adverse effect upon religious believers, can be effectively
challenged under s.2(a). To see the overlap of s.2(a) and s.15 protections in the context of religious freedom, consider for example how the Lord’s Day Act might have instead been challenged as a form of adverse effect discrimination upon Saturday Sabbatarians. It seems, generally, that any instance where state action impinges upon the free exercise of a religion might be restated as a case where government has failed to give equal consideration to members of that religion. The redundancy of s.15 as a protection for religious believers is evidenced by the dearth of Supreme Court cases in this area.

It is more accurate, though, to say that equality concerns have been integrated into s.2(a), rather than made redundant by it. From the perspective of underlying theory, the Charter’s guarantee of religious freedom reflects a kind of hybrid of autonomy and equality concerns. We saw earlier how religious freedom differs from other liberty guarantees, insofar as the threshold for establishing coercion in religious freedom cases is very low. Something as seemingly un-coercive as the recitation of a prayer at the start of a government meeting may be deemed an infringement of religious freedom. The aim in protecting religious freedom, it seems, is to ensure that all citizens have an equal sense of belonging within the Canadian polity.

These notions are familiar within equality jurisprudence. Unlike standard liberty rights, equality rights can be infringed by symbolic harms, for the indignities that underlie our concern with prejudice and discrimination can be inflicted through symbolic gestures. Our rejection of ‘separate but equal’ arrangements—a commitment

137 Freitag v. Penetanguishene, supra note 113.
138 It may well be, in fact, that a more coherent and defensible story can be told about the protection of religion, if the value of equality rather than liberty is emphasized. See Christopher L. Eisgruber & Lawrence G. Sager, “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,” (1994) 61 U. Chi. L. Rev. 1245. Others have expressed doubts as to whether the protections extended religion can be plausibly defended on the basis of equality concerns alone. See (e.g.) Noah Feldman “From Liberty to Equality: The Transformation of the Establishment Clause” supra note 37.
that has been central to North American thinking on equality since Brown v. Board of Education\textsuperscript{139}--- reflects this sense that symbolic actions by the state can infringe the right to equality. Where some law or government action draws a distinction on the basis of an enumerated or analogous ground, our sense of equality may be offended even though no tangible benefit or detriment is allocated on the basis of that distinction. Thus a school system that segregates students on the basis of race will offend our sense of equality, even if all schools within the system are of equal quality. Something akin to this concern for symbolic equality surely underlies concerns about the feelings of alienation that result from government endorsement of particular religious denominations.

When the suggestion is made that religious concern be discounted in certain political deliberations, some will see this as an offense to the equal standing of religious citizens.\textsuperscript{140} Supposing that religion is like race and gender---a fundamental trait which should never bear on one’s political standing---some may suppose that to discount religious claims is remotely akin, say, to denying women the right to vote. One of the goods available to us in a free and democratic society is the opportunity to shape our polity to conform to our own worldview. Public reason attempts to deny that good to religious believers, it might be argued.

In the earlier discussion of Chamberlain, we saw one view of how we might extend equal treatment to religious views in public deliberations.\textsuperscript{141} Recall, there the Court proposed that religious doctrines (and, one presumes, all comprehensive doctrines) ought to receive equal consideration, up to the point where those doctrines become

\textsuperscript{139} (1954) 347 U.S. 483.
\textsuperscript{140} See (e.g.) Brown, supra note 1 at 604, complaining of the lower court’s decision in Chamberlain, which found that school curricula should be formed “independent of religious considerations”. Brown writes that, “[w]ith one stroke of the pen, a judge has excluded from the educational political process in British Columbia a significant portion of the electorate and constructed a new constitutional principle that religious persons are disqualified from participating in the debates of public, secular institutions...” See also Sapir & Statman supra note 112.
\textsuperscript{141} Supra note 27.
intolerant or disrespectful. This was thought to achieve optimal fairness, as under such an approach religious views receive as much recognition as might reasonably be demanded, consistent with the equal recognition of all. My sense is that this account of what equality requires in public deliberation may, at first blush, have widespread appeal. In the debate over same sex marriage, for example, one widely-favoured option was to create a separate legal institution for the recognition of same sex couples—-a form of civil union, differing from marriage in name only. The appeal of that option may trace back to this idea that religious concerns deserve equal consideration: civil unions strike a compromise between the religious concerns of those who favour the traditional definition of marriage, and the equality demands of same sex couples wishing to access the benefits of marriage.\footnote{This compromise approach was advocated by then Opposition Leader Stephen Harper, as same sex marriage was debated in parliament House of Commons Debates (16 February 2005): What we put forward, in my judgment, is the real Canadian way. The Canadian way is not the blindly, ideological interpretation of the Charter put forward by the Prime Minister. It is not a case where one side utterly vanquishes the other in a difficult debate on social issues. It is a constructive way, and as debate in other jurisdictions has shown, and I draw this to the attention of the House, this debate will not reach a conclusion or social peace until equal rights, multicultural diversity and religious freedom are balanced...}

Recall, my objection to this approach, in our earlier discussion of multiculturalism, was that it failed to account for many cases where we often suppose religious views ought to be bracketed: creationism is not a disrespectful or intolerant doctrine, yet many of us would deny that creationism is entitled to equal recognition, or indeed any consideration at all, in setting public school curricula. In the remainder of this chapter, I want to argue against this view that equality requires the equal consideration of tolerant religious doctrines. Where basic rights are at stake, public reason holds that strictly religious concerns should be given no consideration, not equal consideration. In what follows, I want to examine more squarely whether this bracketing of religious views is in any way prejudicial or discriminatory to religious believers, as discrimination has been understood within the Charter. In so doing, I will return to
arguments made earlier in this chapter, for obvious reason: in a sense, this entire chapter has been about the equal treatment of religious and secular worldviews.

3.1 Equality rights and the element of choice in religious identity

To begin, let me provide a sense of how religion stands apart from other enumerated grounds. First, the equality guarantee provides religious believers a right not to be intentionally singled out on the basis of their religious affiliation, and denied a benefit, or made to bear a burden, on that basis. This type of direct discrimination is by now, one would hope, a thing of the past. Second, as the case law has developed, the right to equality has been interpreted as barring not only direct, intentional discrimination, but also so-called ‘adverse effect’ discrimination. This refers to cases where a facially neutral policy has an adverse effect upon an enumerated or analogous group. So, for example, if a government building lacks wheelchair access, this offends equality for its adverse effect on some disabled citizens, though there may be no direct intent to discriminate. Similarly, a police dress code requiring that officers be clean-shaven and not don headwear might be deemed a form of adverse effects discrimination against male Sikh applicants, whose faith requires that they wear turbans and beards. The overarching idea here is that a person’s membership in an enumerated or analogous class should not stand in the way of their accessing the benefits and opportunities provided by their government. Beyond refraining from intentional discrimination, government must take reasonable care to ensure that a person’s possession of enumerated and analogous traits is not an obstacle to them.

Not all types of discrimination or unequal treatment are wrongful. In allocating hospital resources, we rightly discriminate between the sick and the healthy, for example.

---

143 Woehrling, supra note 131 at para. 12
Wrongful discrimination arises when people’s needs or abilities are assessed prejudicially, and they are denied benefits, or made to bear burdens, on the basis of arbitrary considerations. Arbitrariness alone is not even the central concern here, though. It would be better to allocate a benefit by lottery than on the basis of race, though both methods of allocation are arbitrary in the sense that neither tracks recipients’ moral worthiness. The race-based allocation is worse insofar as it may reinforce and perpetuate historical stereotypes, and may stigmatize core aspects of a person’s identity. It sends the message that people bearing certain identity traits are of lesser worth. In Canadian equality jurisprudence, the overarching concern is to prevent only those forms of unequal treatment that stigmatize people and offend human dignity in this way.\footnote{Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497}

The obligation to respect the dignity of religious believers raises some unique questions. Apart from religion, the enumerated traits listed under s.15 are relatively bare, immutable traits, in the sense that race, gender, disability status and so on do not carry with them any particular beliefs and attitudes. Thus, in saying that we will respect a person’s equal dignity regardless of their race or gender, we do not run into the problem of having to distinguish between (e.g.) respecting the race and respecting the attitudes and beliefs of the race. Even the hypothetically mutable traits protected under s.15 by analogy to religion\footnote{There is a certain irony when religious conservatives oppose equality protections for gays and lesbians on grounds that sexual orientation is a matter of choice. For the decision to extend equality protection to mutable traits was made when religion was added to the list of enumerated grounds.} are relatively barren of content. In saying that we will treat

\begin{quote}
It is obvious that this Court could not have adopted an enumerated and analogous grounds approach if, instead of there being nine enumerated grounds in s. 15(1), there had been none. Would the absence of "particularities" in s. 15(1) have changed the basic guarantee of equality without discrimination? In the alternative, what would have happened under the "analogous grounds" approach if, instead of setting out nine enumerated grounds, s. 15(1) had set out only three or four? What if, furthermore, religion was not one of them? Most would agree that the common characteristic of all of the enumerated grounds other than religion is that they involve so-called "immutable"
people with equal respect regardless of sexual orientation, we commit to very little in terms of respect for anyone’s worldview. One’s sexual orientation does not carry with it a robust worldview, akin to a religion.

Normally, when we say that we will accord people equal respect regardless of some content-bearing trait (such as, for example, their political, aesthetic or moral views) we have in mind a very stripped-down notion of respect. We commit to respecting the individual’s right to freely hold and express those views; we do not commit to respecting those views in the sense of shielding them from negative appraisals, let alone to celebrating those views, or making special accommodations for them. Thus, with this stripped-down notion of respect, one can speak sensibly of respecting a Marxist’s right to hold his views, while at the same time avowing that one despises Marxism. Our respect for his dignity requires that we accord him a certain sphere of negative liberty, and nothing more. We feel no obligation to put ourselves out accommodating the Marxist’s special needs: say, his desire to have Marxism portrayed favourably in public schools, or his desire to be exempt from work on May Day.

As a society, we generally commit to respecting one another’s equal dignity in this minimal way because it is impossible, or at least undesirable, for us to commit to anything more. It would of be impossible, and moreover unfair, to attend to the costs associated with people’s exercise of autonomy, ensuring that people are not made worse off by their adopted attitudes and beliefs. Given autonomy over the development of personal tastes, some citizens will develop a taste for caviar and champagne, and those tastes may be burdensome in the sense that they are costly to fulfill. We can at most

characteristics. Religion, on the other hand, has been described as being premised on a "fundamental choice". Does this mean that s. 15, despite being consciously left open-ended by the drafters, could never have encompassed discrimination on the basis of religion, or any other characteristic which involves a "fundamental choice"? This result seems absurd, yet it seems to flow inevitably from an approach to "discrimination" that relies exclusively on drawing analogies from the essential characteristics of the enumerated grounds.
respect these tastes in a negative sense, by not interfering with their fulfillment. To do more would require that we interfere with other citizens’ plans, taxing them to subsidize the champagne lover’s tastes.\textsuperscript{147} As I hinted at in discussing Taylor’s account of multiculturalism, it seems excessive even to demand that we accord people’s choices respect in the mere sense of positive appraisal, without tangible subsidy. For our own autonomy is at stake in our decisions about what things we will grant positive appraisal. In short, we generally do not feel an obligation to respect and accommodate people’s autonomous choices, in any way beyond noninterference. Religion as a s.15 enumerated ground is unique, then: our commitment to averting adverse effects discrimination may put us in the unusual position of having to shield religious believers from the costs of their autonomous choices.\textsuperscript{148}

Though citizens can ostensibly exercise autonomy over their religion, members of the Court have, at times, rejected the argument that religious believers ought to bear the costs of their choices, as the man with champagne tastes is made to do. In her dissenting reasons in \textit{Adler v. Ontario}, Justice McLachlin (as she then was) writes that:

\begin{quote}
If a charge of religious discrimination could be rebutted by the allegation that the person discriminated against chose the religion and hence must accept the adverse consequences of its dictates, there would be no such thing as discrimination. This Court has consistently affirmed a substantive approach to equality. The substantive approach to equality is founded on acceptance of the differences which lie at the heart of discrimination. Be they differences of birth, like race or age, or be they differences of choice, as religion often is, the law proceeds from the premise that the individual is entitled to equal treatment in spite of such differences. The state cannot “blame” the person discriminated against for having chosen the status which leads to the denial of benefit. The person is entitled to the benefit regardless of that choice.\textsuperscript{149}
\end{quote}

\textsuperscript{147} Alternatively, the state could assure that citizen’s needs and desires receive equal fulfillment by shaping the needs and desires themselves. This achieves equality of outcome by wholly sacrificing autonomy, though.

\textsuperscript{148} Of course there is some disagreement as to whether religion is chosen or a fixed attribute of the self. See David M. Brown, “Neutrality or Privilege? A Comment on Religious Freedom” (2005) 29 Sup. Ct. L. Rev. at 221. Religious views are sometimes chosen, at any rate, they receive constitutional protection whether chosen or not. As we have seen, the \textit{Amselem} decision affirms that religious beliefs are protected under s.2(a) even if they have no basis in the communal understandings of one’s religious group.

\textsuperscript{149} \textit{Adler, supra} note 32 at para. 208
On this view of what equality requires, then, religious believers have at least a *prima facie* right to demand, for example, that the state fund separate schools for them—assuming their religion requires that they receive a religious education. Here the idea would be that the exclusive funding of secular schools results, *prima facie*, in adverse effect discrimination against religious believers.

For the sake of comparison, consider the approach taken in the U.S. Supreme Court’s decision, *Employment Division of Oregon v. Smith*.

There, the issue was whether religious believers might have their ritual use of peyote accommodated, notwithstanding criminal and regulatory sanctions that normally apply. In rejecting their claim, Justice Scalia expressed concern that, if religious believers were granted exemptions from laws of general application, they would in essence be empowered to create a law unto themselves. A better approach, Justice Scalia reasoned, was for the court to impose the law as it stands, and direct religious objectors to press the legislature for accommodation. The obvious shortcoming of this approach is that it doles out accommodation on the basis of lobbying power. One wonders, for example, how the appellants in *Multani* might have fared, lobbying the Quebec National Assembly to accommodate ceremonial daggers in the classroom. In effect, nothing remains in the way of special protections for religious believers, if one takes the view that they must seek accommodation through the legislature. Justice Scalia, for example, is led to the view that religious freedom claims ought to succeed only when the activity in question falls within the scope of some freestanding right, such as the right to free assembly or free speech. This renders the guarantee of religious freedom wholly redundant.

---

150 *Supra* note 110.
153 The U.S. Congress responded to *Smith* with a legislative override: the *Religious Freedom Restoration Act* (42 U.S.C. § 2000bb), which re-established the pre-*Smith* protections for
If we instead adopt the approach taken by Justice McLachlin in Adler, though, Justice Scalia’s worry that religious believers might enjoy a ‘law unto themselves’ becomes a live concern. However, the concern is readily mitigated by the presence of s.1 in the Charter, which permits the infringement of religious believers’ rights to accommodation, provided this can be “demonstrably justified in a free and democratic society.”

Even on Justice McLachlin’s generous interpretation, equality for religious believers requires only accommodation. As such, it presents no obvious conflicts with the idea of public reason. Is there any sense in which religious believers are entitled, as a matter of equality, to have their religious doctrines given weight in law and policy deliberations, in a way that public reason forbids? Generally, citizens are assured an equal right to influence general governance just in the sense that they receive an equal vote, a right to publicly express their views, and so on. But imagine that government took the idea of public reason to heart, and publicly proclaimed, at the outset of parliamentary hearings on some controversial matter, that religious viewpoints would not be given weight in their deliberations. Let us consider whether a government decision to formally deny consideration to religious concerns would run afoul of the equality rights of religious believers.

3.2 Does public reason disadvantage religious believers?

In Reference re Same-Sex Marriage, the Court considered a claim to the effect that, on grounds of equality, marriage laws must be respectful of religious groups:

Some interveners submit that the mere legislative recognition of the right of same-sex couples to marry would have the effect of discriminating against (1) religious freedom, requiring that government burdens to religious practice serve a compelling state interest, and meet a proportionality test. The Religious Freedom Restoration Act, was overturned by the Court in 1997, in City of Boerne v. Flores, 521 U.S. 507, as falling outside of Congress’ powers.

Supra note 7.
religious groups who do not recognize the right of same-sex couples to marry (religiously) and/or (2) opposite-sex married couples.\textsuperscript{155}

In dismissing this argument, the Court reasoned in part that the proposed legislation, allowing same-sex marriage, “withholds no benefits, nor does it impose burdens on a differential basis”\textsuperscript{156} to religious believers. The logic here seems straightforward enough: there is no tangible sense in which religious believers are made directly worse off by the decision to legalize same sex marriage, and so they have no grounds for complaining of unequal treatment. This may strike some as a good, general reason for supposing that equality rights are not infringed when religious concerns are discounted from law and policy deliberations.

On its own, this is not a knock-down rejoinder to the religious believer’s equality claim. Above, I explained how we sometimes perceive wrongful inequality even in cases where no tangible benefit is denied—for example, where students are segregated on the basis of race, but all receive an education of equivalent quality. This idea that equality rights are not engaged unless the direct allocation of tangible benefits is at stake is particularly implausible in the context of the same sex marriage debate. For there is a sense in which all sides in that debate are pursuing intangible benefits. Proponents of same sex marriage reject the option of creating a ‘separate but equal’ legal institution to recognize those unions, though it is unclear how that option denies any of the tangible benefits provided by marriage. The benefit that both sides are after, arguably, is the intangible benefit of societal recognition for their respective viewpoints.\textsuperscript{157} Why not

\textsuperscript{155} Ibid. at para. 45; a similar claim is advanced in Hendricks c. Quebec (Procureur general), [2002] J.Q. No. 3816 (C.S.) (QL) at para.29.

\textsuperscript{156} Supra note 7 at para. 45. The Court is here relying on the s.15 test set out in Law v. Canada, supra note 143.

\textsuperscript{157} See (e.g.) B. MacDougall, ”The Celebration of Same-Sex Marriage” (2001) 32 Ottawa L. Rev. 235 at 253: To have full legal equality within a society, members of a (minority) group need: 1) to be free from discrimination (compassion); 2) to have access to benefits others have (condonation); and 3) to be included as a \textit{valuable} group by the society (celebration). That debate in Canada with respect to gay and lesbian rights has moved to symbolic
suppose that the discriminatory allocation of such intangible benefits can ground equality claims? My point at this stage is only that when religious sensibilities are offended by some government action, and discrimination is alleged, that putative harm can not be explained away just on the basis of its intangibility.\textsuperscript{158}

3.3 Dignity and the discounting of religious argument

As explained, the driving concern in equality jurisprudence is to defend and uphold human dignity, against the undermining effects of prejudice, stereotyping, and general unconcern for the interests of those belonging to enumerated and analogous groups. The question, then, is whether any of these wrongs is incurred when believers are asked to bracket religious claims in the manner required by public reason, or when government officials opt to discount religious arguments from policy deliberations. My view is that the strictures of public reason do not offend the dignity of religious believers. For we do not view the differential treatment accorded to religious believers, when they stand in the position of rights-claimants, as an indignity. We do not suppose that there is any prejudice or stereotyping involved in concluding that theological claims made within Sikhism, or Orthodox Judaism, are inaccessible to the majority of Canadians. Indeed, it is the very inaccessibility and sensitivity of religious beliefs which qualifies religious claims for special treatment and accommodation under s.2(a). We understand

that the particular religious concerns of the Sikh community are not likely to be accessible, let alone pressing, for most Canadians. And moreover, we recognize that it may be divisive and demoralizing for believers to submit their faith claims to the full rigours of public deliberation. These are reasons for according special protections to religious belief under s.2(a), but these are also reasons for discounting religious arguments in deliberations over law and policy of general application.

Conversely, what disqualifies the marihuana user’s claim from special consideration, deference, and accommodation within the Charter is that we can fully understand and appraise his arguments. The marihuana user has a fair chance at winning the day in our democratic deliberations, and if he fails to garner support for his position, we are comfortable saying the loss is due to the inadequacy of his arguments. We feel no compunction in ruthlessly scrutinizing, and publicly falsifying, the claims of marihuana activists, for we do not suppose that their views on this matter are bound up with their sense of self.

Another way of applying this symmetry thesis is to consider whether secularists receive any benefit, tangible or intangible, from the strictures of public reason. The claim often made by religious critics is that secularism is itself a comprehensive doctrine, so that in the event of a conflict between religious and secular worldviews, some comprehensive doctrine will in the end be vindicated. Framed within s.15, the claim would then be that public reason systematically privileges secularists, relegating religious citizens to second-class status. Notice, though, that when secularists stand in the position of rights-claimants, we do not suppose that their every claim is tied into some deep comprehensive doctrine. We do not presume, in other words, that in rejecting the secularist’s claims, we inflict the further harm of symbolically disaffirming

---

159 Benson, *supra* note 1 at 679.
their worldview. Thus, for example, it is sometimes alleged that liberalism with respect to sexual orientation is underpinned by some secular comprehensive doctrine. Notice, though, that in the series of Charter cases dealing with such matters, homosexuality has never been treated as an issue of freedom of conscience, falling under s.2(a). This is no surprise, of course: as explained, the guarantee of freedom of conscience has been shaped doctrinally to fit the mold of religious morality, which paradigmatically operates as a system of commandments and prohibitions. The liberty concerns at stake with the treatment of homosexuals are not easily understood on those terms: when homosexuals have their sexual identity denigrated and discouraged, the resulting wrong is not, in any obvious sense, that they are thereby compelled to act contrary to the dictates of their conscience.

In short, if no prejudice or stereotyping is at work when religious beliefs and practices are singled out for special protection under s.2(a), then it stands to reason that no prejudice or stereotyping need be at work when religious claims are singled out as inapt for the justification of general law and policy. For religion is singled out for the same reasons in both instances. One can not, on the one hand, demand hands-off treatment for one’s religious views on grounds that they are morally (or epistemologically) inscrutable, while at the same time accusing others of prejudice or

---

160 As mentioned previously, there are some instances where secular claims are treated as a reflection of the claimant’s comprehensive doctrine, as in Allen, supra note 111. But this is the exception, rather than the norm. Even in Allen, it is unclear that the ‘religion’ of secular humanism is taken as seriously as theistic comprehensive doctrines are taken. While denominational prayers are disallowed as alienating to members of minority faiths, theistic prayers are not thought to alienate secularists to the same degree, and hence the latter are allowed in Renfrew v. Allen.
stereotyping when they discount those views as categorically inapplicable to themselves.\textsuperscript{162}

4. Conclusion

The challenge in arguing for the separation of religion and politics is to demonstrate that there is something unique about religious claims, which sets them apart from secular claims. It is commonly objected that all viewpoints—secular and religious alike—rest ultimately upon tenets of faith, and that it is therefore arbitrary (or even discriminatory) to bar religion from politics.\textsuperscript{163} As an epistemological claim, this is difficult to refute. Faced with this challenge, one tactic is to concede, as Rawls does, that secular and religious comprehensive doctrines are on an epistemic par, and then try to show how public reasoning can proceed on terms that are acceptable to all. On the Rawlsian account, we are to construct a freestanding political conception of justice, and reason strictly by reference to that conception. In chapters 1 and 2, I have rejected this approach. Public reason does not require convergence upon a complete political conception of justice. It can instead proceed on the basis of the open-ended framework of deliberation employed by the Supreme Court.

Rawls’s concern, in arguing for the importance of theoretical completeness, is that political values will otherwise be manipulated in the service of people’s comprehensive doctrines. Something like that concern has driven my discussion in this chapter: within my open-ended approach, some may advance interpretations of the right to religious freedom (and associated political values of multiculturalism and equality) which undermine the very idea of public reason. They may advance a conception of religious freedom which requires that the state cater to religious views on the issue of religious freedom.


\textsuperscript{163} Benson \textit{supra} note 1 at 529.
same sex marriage, for example. (This example is not imaginary, as I will explain in chapter 5.) Rather than address this problem by advancing a grand theory of the *Charter*, my tactic has been to engage specifically with the right to religious freedom (and associated values of multiculturalism and equal treatment). I have insisted upon a kind of symmetry: the assumptions we make about a comprehensive doctrine, when shielding it from laws of general application, are fair game in establishing standards of public reason. The assumption of religion’s moral and epistemic opacity in s.2(a) jurisprudence is carried over, by my symmetry thesis, as an argument for bracketing religion from political deliberations.

Of course, there are other ways of achieving this symmetry. Religious believers could opt to forego the generous treatment they receive as rights-claimants, exposing their beliefs to the unbridled public scrutiny usually reserved for secular worldviews. They could then argue that it is arbitrary to exclude religious arguments from public deliberations. Yet I assume that our current practice has something to recommend it; that nobody wants to see the law’s current distinction between religious and secular reasons erased. To erase that distinction in practice, we would either have to treat religious reasons as we now treat secular reasons, or treat secular reasons as we now treat religious reasons. The former option would mean scrutinizing religious beliefs, second-guessing them, and sometimes dismissing them as trivial; this would be an offense to the autonomy and dignity of religious believers, and might lead to political instability. The latter option would lead us to the state of affairs decried in *Malmo-Levine*, where state interference with any and all secular practices would be open to judicial review. I take it that both of these options are unattractive to religious and secular believers alike, so that the distinction between religious and secular reasons will remain a fixture of constitutional practice.
Moreover, it must be said that our habit of treating religious doctrines as morally and epistemologically inscrutable is deeply engrained in our culture. It is not an artifice of Charter jurisprudence, reflecting the limited competencies of the Court. This is starkly apparent, for example, in debates over the morality of homosexuality. Discrimination against homosexuals is nearing the point where it is regarded as tantamount to racism. And yet elected officials, and the courts, continue to accommodate religious viewpoints that oppose homosexuality. It may be unrealistic to suppose that this deep-seated feature of public discourse will fade away in the near term. As I have explained, religious convictions have been assimilated with immutable identity traits (such as race and gender). This suggests to me that religious views will forever be treated with a special sensitivity, in political and broader public discourse. So long as this rule of discourse persists, there will be an air of unreality to the claim that religious and secular arguments are on a par. It is a virtue of my approach that it accounts for this enduring sociological reality.

In making this symmetry argument, I have had to rely on a degree of oversimplification. Specifically, I have focused on command-deontological religious claims—the commands and prohibitions that religious believers point to, paradigmatically, when invoking the right to religious freedom. Not all religious arguments are command deontological, of course. As an example of an intervention in public affairs straddling the religious/secular divide, scholars sometimes point to the “Pastoral Letter on Catholic Teaching and the U.S. Economy”—a social democratic manifesto, produced by the National Conference of Catholic Bishops, which denounced the individualism and materialism of ‘trickle-down economics’. The Letter weaves together command-deontological claims (e.g., New Testament verses urging concern for the poor) with foundational political values (the American constitutional imperative to

secure ‘justice for all’) and secular arguments (that full employment and strong labour unions are economically feasible). The interweaving of these claims obviously creates some challenges in applying the idea of public reason. One has to unweave the command-deontological claims from the secular arguments. The problem is compounded by the fact that the command-deontological claims contained in the letter overlap perfectly with widely-accepted political values (e.g., claims about the overriding importance of human dignity). All of this to say that cases will arise which straddle the distinctions I have relied upon throughout this chapter.

Is this a fatal problem for my symmetry argument? I do not see why it should be. In upholding the right to religious freedom, we face the problem of distinguishing between religious and secular claims. This may be a difficult task, but few argue that we should abandon the concept of religious freedom in the face of such difficulties. What aspects of the Pastoral Letter might a devout Catholic invoke to ground a religious freedom claim? Can she demand a right to unionize on the basis of the Letter’s endorsement of labour unions? (Put aside the question of whether some separate constitutional provision protects unionization.) Perhaps we wish to say that the Letter’s claims about unionization are purely secular, and can not ground religious freedom claims. Or perhaps we take the opposite view: the sincerity-of-belief test set out in Amselem would seem to allow the claims of divinely-inspired union activists. I do not have a ready answer to this question. The point is that the existence of this puzzle does nothing to discredit my symmetry thesis, for that thesis claims only this: the assumptions that guide our delineation of ‘religion’ in adjudicating religious freedom claims should be carried over to our understanding of public reason. It may well be that the moral and epistemic opacity that surrounds most divine commands does not apply to all parts of the Pastoral Letter. If so, the parts we deem non-religious will not ground a

---

165 An exception is Brian Leiter, “Why Tolerate Religion” supra note 124.
religious freedom claim, and, following the symmetry thesis, are entitled to a place within public reason. Surely a plausible account of public reason will not require a hard and fast distinction between religious and secular claims, for there are bound to be cases that straddle the line. The criterion of symmetry allows us to proceed without such hard and fast distinctions. I regard all of this as a virtue of my approach.

One final point. It may seem that my application of the symmetry thesis has singled out religious comprehensive doctrines in particular. That is not due to any assumption, on my part, that secular comprehensive doctrines are universally accessible while religious doctrines are utterly opaque. It is merely a reflection of how—as a matter of sociological reality—this notion that comprehensive doctrines are morally and epistemically inscrutable is most often advanced as a shield for religious beliefs. The canon of symmetry can be directed at secular worldviews as well. I have explained, for example, how the bulk of the utilitarian’s interventions will comply with public reason. The utilitarian limits her moral ontology to handful of very uncontroversial claims: that the welfare of sentient beings matters, and matters equally. Most of the time, the utilitarian is in the enviable position of being able to participate in political discourse without directly invoking her comprehensive doctrine. When debating with utilitarians, we often do so on their terms: we engage with their claims about what best promotes welfare, without engaging their deeper conviction that welfare is all that matters. At the very core of the utilitarianism, though, lie claims which are epistemologically inscrutable in much the same way as religious convictions. Utilitarian philosophers speak, for example, of the ‘pure white light’ of Henry Sidgwick’s proofs of the principle of utility. To non-believers, such talk has a road-to-Damascus ring to it.\(^{166}\)

Now, in accommodating utilitarians, it is one thing to dispute the veracity of their utility calculations, and another to dispute the truth of utilitarianism. Imagine, say, that

---

a prisoner requests vegetarian meal options, citing her utilitarian moral convictions. The state might reasonably dispute her utility calculations, regarding the impact of meat consumption on the welfare of sentient beings. Seeing that the prisoner is on the winning side of that argument, the fallback argument might be to attack the foundational tenets of utilitarianism, arguing, say, that human welfare matters more than the welfare of non-human animals. We might want to assimilate this case with Amselem, and say that the state has no business second-guessing the core doctrines of utilitarianism in this way. The pure white light of utilitarianism is opaque to non-believers, but that opacity signals a need for respect and accommodation. Applying the symmetry thesis, it would then follow that the truth of utilitarianism can not be invoked as a justification for coercive laws of general application. A similar analysis would apply, mutatis mutandis, to other secular comprehensive doctrines. As in the case of religious belief, there are alternative ways of handling secular comprehensive doctrines, and the implications of the symmetry thesis will vary accordingly.
CHAPTER 4: THE CASE OF THERAPEUTIC CLONING

Few topics arouse the sort of deep, intractable disagreement brought on by debates over the moral status of prenatal human beings. It is one of those topics where opposing sides can scarcely arrive at mutually acceptable terminology with which to carry on discussion, let alone reach consensus on more substantive matters. This explains why philosophers regularly turn to the abortion debate as a testing ground for accounts of public reason. If an account of public reason can provide us a way through these intractable disagreements, that account has promise. This same intractability plagues debates over stem cell research and therapeutic cloning, the subjects of this chapter. Can we create and destroy embryonic human life for the advancement of scientific understanding? Or for the sake of potentially life-saving therapies? The Canadian government has said no on both counts, unequivocally: in 2004, it became a criminal offense, punishable by up to 10 years in prison, to create or clone human embryos for the purpose of harvesting stem cells.¹

As is well known, Canada has, since R. v. Morgentaler;² had a kind of legislative void surrounding abortion. In Morgentaler, the Supreme Court struck down provisions of the Criminal Code which narrowly and arbitrarily restricted access to abortion. But in striking down those criminal provisions, the Court refrained from offering a completely theorized account of the scope of the Charter’s s. 7 liberty guarantee.³ Rather, Morgentaler was decided on the narrow grounds that, “state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person.”⁴ Such bodily interference and

² [1988] 1 S.C.R. 30 [hereinafter “Morgentaler”].
³ Justice Wilson’s concurring decision, it should be noted, did theorize about the broad purpose of s.7, and of Charter rights generally-- finding that the document, on the whole, is directed towards the promotion of human dignity. See ibid. at 162-81.
⁴ Ibid.
state-imposed stress might be permissible, the Court reasoned, but only when imposed in accordance with the principles of fundamental justice, as s.7 requires.\(^5\) The Court in essence found that the impugned laws regulating access to abortion were procedurally arbitrary and unfair, and on those grounds made a finding of invalidity.\(^6\) Parliament was free to enact response legislation, which might have continued to regulate access to abortion, so long as that legislation was tailored to avoid the specific procedural defects of the legislation overturned in *Morgentaler*. Indeed, the Mulroney government attempted just that, but abandoned the project when draft legislation was met with vociferous opposition from all sides, and was blocked by a tie vote in the Senate.\(^7\) Successor governments have preferred to let sleeping dogs lie, leaving Canada with its current legislative void.\(^8\) All of this to say, *Morgentaler* did not close the book on constitutional debates over reproductive freedom and the legal status of prenatal human life.

The moral status of prenatal human life again became a topic of controversy in the early 1990s, as the federal government began contemplating legislation to address a range of new reproductive technologies, including the use of embryonic stem cells, and

---

\(^5\) Recall, section 7 states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

\(^6\) The test of arbitrariness employed in *Morgentaler*, supra note 2, has since become an important fixture of s.7 jurisprudence: in determining whether a law or government action accords with principles of fundamental justice, the court inquires into its arbitrariness. See *Chaoulli v. Quebec* (Attorney General), [2005] 1 S.C.R. 791. For a discussion of the evolution of s.7, see Jamie Cameron, “From the MVR to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7” 105.


\(^8\) The Supreme Court has, since *Morgentaler*, issued further rulings on the legal status of fetal life, finding that fetuses are not protected under the Quebec Charter (see *Tremblay v. Daigle* [1989] 2 S.C.R. 530). The Court has not ruled specifically on whether fetuses are protected under the Charter, and some have supposed it remains partially an open question. See Barbara Billingsley and Timothy Caulfield, “The Regulation of Science and the Charter of Rights: Would a Ban On Non-Reproductive Human Cloning Unjustifiably Violate Freedom of Expression?” 29 Queen’s L.J. 647 at n.72. Constitutional expert Peter Hogg has nevertheless concluded, on the basis of the Court’s other findings on fetal life, that “[a] foetus is not a legal person, either at common law or civil law, until the child is born by being separated alive from the mother. A foetus is not entitled to a right to life under s. 7, or any other right under the Charter.” Quoted in Billingsley and Caulfield, *ibid.*
the creation of such cells through human cloning.\textsuperscript{9} One can hardly accuse the federal government of having acted impetuously in this area. The Royal Commission on New Reproductive Technologies (hereinafter, the Royal Commission) was called in 1989, and issued its multi-thousand-page report, \textit{Proceed with Care},\textsuperscript{10} in 1993. The Royal Commission’s recommendations in effect set the groundwork for legislation in this area,\textsuperscript{11} and led, in 1996, to the introduction of Bill C-47, the first attempt at legislation. Health Canada released a new discussion paper to coincide with Bill C-47, titled, \textit{Setting Boundaries}.\textsuperscript{12} However, Bill C-47 died on the Order Paper with the call of a federal election in 1997. In 2001, a new draft bill addressing these issues was introduced, and a Standing Committee on Health was convened to hold further public consultations, culminating in yet another report: \textit{Assisted Human Reproduction: Building Families}.\textsuperscript{13} Legislation in this area, titled the \textit{Assisted Human Reproduction Act},\textsuperscript{14} was finally enacted in February 2004, after nearly 15 years of intermittent research, legislative proposals, public consultation, and parliamentary debate.\textsuperscript{15}

One of the more controversial aspects of this newly enacted legislation is its criminalization of therapeutic cloning.\textsuperscript{16} For those who favour regulating rather than criminalizing therapeutic cloning, the hope is that cloned embryos might one day be used to generate stem cell lines that match a patient’s DNA—thus avoiding the immunological problems that may arise when injecting stem cells derived from foreign DNA. These

\textsuperscript{9} This culminated in the enactment, in 2004, of the \textit{Assisted Human Reproduction Act}, supra n.1
\textsuperscript{10} Canada, Royal Commission on New Reproductive Technologies, \textit{Proceed with Care} (Ottawa: Canadian Government Publishing, 1993) [hereafter \textit{Proceed with Care}].
\textsuperscript{11} Government reports following the \textit{Royal Commission on New Reproductive Technologies} tended to arrive at the same conclusions, though sometimes emphasizing differing rationales for a given proposal, and at times expressing these rationales in a more, or less, moralizing tone. See
\textsuperscript{12} Health Canada, New Reproductive Technologies and Genetic Technologies: Setting Boundaries, Enhancing Health (Ottawa: Health Canada, June 1996) [hereafter \textit{Setting Boundaries}].
\textsuperscript{13} Canada, House of Commons Standing Committee on Health, \textit{Assisted Human Reproduction: Building Families} (Ottawa: Government of Canada, 2001) [hereafter \textit{Building Families}].
\textsuperscript{14} Supra note 1.
\textsuperscript{15} Alison Harvison Young, “Let’s Try Again...This Time With Feeling: Bill C-6 and New Reproductive Technologies” (2005) 38 U.B.C. Law Rev. 123.
\textsuperscript{16} \textit{Assisted Human Reproduction Act supra} note 1, at s. 5(1)(a).
genetically-matched stem cells could potentially be used in treating an array of life-threatening ailments: Parkinson’s disease, type-1 diabetes, heart disease, cancer, spinal cord injuries, and stroke damage, to name a few. Researchers in the United States and the United Kingdom, among other countries, are now actively investigating the potential of therapeutic cloning. In early 2008, researchers in the United States announced that they had successfully cloned a human embryo for the purpose of harvesting stem cells. Canada has long been a world leader in stem cell research—in fact stem cells were first discovered by University of Toronto researchers James Till and Ernest McCulloch—and Canadian research in this area may be hampered by the criminalization of therapeutic cloning. Canadian researchers are permitted by law to carry on research using stem cells derived from other sources: specifically, spare embryos from in vitro fertilization (IVF) clinics. This may be sufficient for pure research done in laboratories, but stem cells from cloned embryos avoid the risk, just mentioned, of rejection by the patient’s immune system, and so this criminal prohibition may impede the discovery of therapeutic applications.

Canadian health law experts and bio-ethicists at the liberal end of the spectrum have speculated that the decision to criminalize therapeutic cloning was, at root, motivated by religious beliefs concerning the moral status of embryonic life. Government officials have never, to my knowledge, offered overtly religious justifications for the policy, nor have they ever overtly relied upon any clearly articulated claims about

---

the moral or metaphysical properties of human embryos. The supposition that religious views motivated the ban on therapeutic cloning is an inference to the best explanation: the reasons that government officials have offered for the ban are so vaguely articulated and unconvincing, it is claimed, that one can only speculate that the real reasons lie elsewhere, and were left unstated for a reason.\textsuperscript{21}

It is worthwhile beginning with a rough sense of the varying concerns at play in this debate, and a sense of how they interrelate. There are those who object to any and all instrumentalization of embryonic human life. Sweeping opposition of this sort is in fact a mainstream view in U.S. policy debates over stem cell research and therapeutic cloning. While stem cell research and therapeutic cloning are allowed in that country, federal funding is provided only for research on stem cell lines derived before 2001.\textsuperscript{22} Researchers have complained that this limitation is hampering their work, and have urged lawmakers to allow federal funding for research involving newly created stem cell lines. Attempts to change the law were vetoed by President Bush, who explained that the destruction of embryos for research purposes “crosses a moral boundary that our decent society needs to respect.”\textsuperscript{23} President Bush’s view that embryos deserve respect is shared by many Canadians, no doubt—and the issue of respecting embryos is explored below. What really sets U.S. law apart is the irrational absolutism of President Bush’s stance: as explained, embryos are routinely created and destroyed in the process of IVF treatments, leading many to wonder what harm there could possibly be in harvesting their stem cells prior to their destruction. As explained, Canadian law presently allows research on ‘spare’ embryos of this sort. Now supposing we allow this instrumental use of embryos, the next question is whether we should to allow the creation of embryos directly for

\textsuperscript{23} \textit{Ibid.}
research purposes. This is where Canadian law draws the line. Now, whatever motivates this opposition to the creation of embryos for research or therapeutic purposes—concerns about the instrumentalization or commodification of human life, e.g.—may also motivate opposition to therapeutic cloning. Yet there may be some further factors at play in the opposition to cloning. Some are viscerally repelled by the very idea of cloning (the so-called ‘yuk factor’); others believe it amounts to ‘playing God’ with human life. Generally, it seems that opposition to cloning involves a combination of concerns over creating human life for instrumental purposes, along with additional worries of the ‘yuk-factor’ or Frankenstein variety.

With the model of public reason developed in chapters 2 in mind, I want to ask two broad questions here. First, does the Canadian government’s decision to criminalize therapeutic cloning engage constitutional rights, such that the strictures of public reason apply to debates over this matter? I consider two distinct arguments on this front. First, it might be argued that the criminalization of therapeutic cloning infringes scientists’ freedom of expression. Scientists’ freedom to experiment has scarcely been considered in Charter jurisprudence, but I will contend that experimentation should be protected, in light of the Court’s very plausible account of the purpose of the right to free expression. Second, it may be argued that the denial of access to such therapies constitutes an infringement of patients’ s.7 right to liberty and security of the person. I make the case for both of these infringements in section 2, below. Having made the case that an infringement results from the criminal prohibition of therapeutic cloning, I turn, in section 3, to explore the various rationales that have been offered by government officials, asking whether those rationales are publicly reasonable.

---

When, as in this case, a single piece of legislation is enacted to regulate a vast and complex area of human activity, and that legislation is researched, debated and drafted over a period of fifteen years, it becomes a complicated forensic task to pin specific objectives to particular statutory provisions. Beyond this, even where one can isolate specific objectives, those objectives may be quite vague or very broadly stated, making them difficult to assess from the perspective of public reason. The best one can do is to sift through the legislative history, and try to piece together a sense of the rationale for the statutory provisions at issue. There is nothing unusual about this as a matter of constitutional practice: the courts have done just this sort of forensic work in a number of cases, over a range of different Charter issues.25

One might nevertheless object that complex legislation such as the Assisted Human Reproduction Act reflects a compromise between competing views in Canadian society, and that it is somehow naïve or facile to go looking for the reason for this or that provision of the Act. It is one thing to ask whether a simple piece of legislation such as the Lord’s Day Act is rooted in a particular comprehensive doctrine;26 in such cases there is hope for a straightforward answer (and mention of ‘the Lord’ in the title of an Act is a tip-off). By contrast, omnibus legislation such as the Assisted Human Reproduction Act is unlikely to have a singular objective; it reflects negotiation and compromise.

These problems of discerning legislative intent are ubiquitous in the law; we constantly appraise law and policy on the basis of our best estimate of the legislator’s intent. We suppose, metaphorically, that though there will be debate and dissent, when laws are passed, the legislature speaks with one voice. Though government officials have cited multiple objectives for the controversial provisions of the Assisted Human Reproduction Act, and though the underlying comprehensive views of lawmakers are not transparent, it is still possible to appraise this legislation from the perspective of public

reason. To do so, we examine the proffered rationales, asking whether they are grounded in values and principles which all citizens can reasonably be expected to accept. So, for instance, if the claim is that therapeutic cloning must be criminalized out of respect for human dignity, we carefully examine how dignity is conceptualized in this context. We want to ensure that the concept of human dignity is employed in a manner that fits with other key constitutional values (notably, equality and autonomy). If we are unwilling to poke and prod at government justifications in this way, then it is a mystery why we ask for justifications at all. Any policy can be superficially ‘justified’ by reference to some vaguely articulated value or state objective. The test, in public reason, is whether the value and objectives cited in the government’s justification are values that, when clearly articulated, all citizens can reasonably accept. The simplest way to demonstrate that citizens can reasonably reject a given justification is to show that the value, as conceptualized, can not be reconciled with other Charter values.

One final preliminary point regarding my method of argumentation throughout this and subsequent chapters: I often draw upon on Charter jurisprudence, though in so doing, I wish only to rely upon the persuasive power of the Court’s reasoning. The Court’s opinions are not authoritative in the domain of public reason, and one can abide by public reason while disagreeing with the Court’s interpretation of Charter provisions. That said, the Court’s decisions are a repository of carefully considered opinions on the interpretation and application of Charter principles, and as such they provide a good starting point for tracing the lineaments of our shared political values.

1. The Appeal of Stem Cell Therapies and Therapeutic Cloning

1.1 Why Embryonic Stem Cells?

The therapeutic promise of stem cells lies in their capacity to continually regenerate, and replace or repair damages cells in the body. There is hope, even, that
stem cells might be used to grow replacement organs, in vitro, for transplantation. Stem cells can be derived from three sources: 1. embryonic stem cells derived from human embryos; 2. adult (or somatic) stem cells, which are found in adult tissue and organs; 3. stem cells derived from umbilical cord blood. Embryonic stem cells in particular have been the source of great controversy, because the harvesting of such cells normally requires that 4-5 day old embryos be destroyed. At present, in Canada, embryonic stem cell research can only be undertaken using embryos left over from fertility clinics. In providing in vitro fertilization (IVF) treatment, fertility clinics will normally fertilize more eggs than are strictly needed, so that spare embryos are available for future cycles should the first attempt at implantation fail. In some instances, such as when the early attempts at implantation succeed, these ‘surplus’ embryos are not needed, and Canadian law allows for their use in stem cell research. It is thought to be comparatively uncontroversial to destroy these embryos for their stem cells, as they are destined for destruction regardless.

---

27 Scientists at Advanced Cell Technology, a U.S. biotech firm, recently developed a technique by which stem cells can be harvested without destroying the embryo. This breakthrough was widely hailed in the media as providing a way around the ethical dilemmas posed by stem cell research. The importance of this breakthrough has surely been overstated. In Canada, as explained below, stem cells are harvested from ‘spare’ embryos left over from IVF treatments. Such embryos are destined for destruction regardless, and so there is no great ethical import to their surviving the process of stem cell harvesting. For this breakthrough to be meaningful, one has to imagine scenarios where embryos are implanted after the harvesting of stem cells. But this would surely be unethical, as we have no knowledge of the impact that removing stem cells at the embryonic stage might in later stages of life. See “Scientists make human stem cells without destroying the embryo,” Guardian Unlimited (August 24, 2006). One might argue that this new technology permits us to harvest stem cells without actively destroying them; the embryos might, after harvesting, be frozen indefinitely. If we agree, though, that embryos which have been tinkered with in this way should never be implanted and brought to term, then in effect the harvesting of stem cells seals the fate of the embryo. This idea that some moral gain is made by returning an embryo to laboratory freezers after harvesting stem cells, never to revive them—as opposed to destroying the embryo during harvesting—is sensible only if one begins with President Bush’s puzzling absolutist stance. The flaw of moral reasoning here is the untenable distinction drawn between doing and allowing: actively destroying an embryo, during harvesting, is taken to be far worse than allowing an embryo to remain indefinitely frozen. See James Rachels, “Active and Passive Euthanasia” (1975) 292 New England Journal of Medicine 78.


29 Some hold that fertility clinics should be prevented from creating ‘spare’ embryos, claiming that this in itself instrumentalizes human life. This argument carries weight, surely: spare embryos are not, strictly speaking, created for the sake of producing life, but rather to avoid the future risk
A minority of Canadians would, like President Bush, prefer to avoid the willful destruction of embryos altogether, and favour a moratorium on embryonic stem cell research. It is often claimed that stem cells derived from adult stem cells or from umbilical cord blood show comparable promise for therapeutic use, without the ethical controversy that surrounds the destruction of embryos. Those opposed to embryonic stem cell research have tended, over the past decade, to overstate the relative promise of adult stem cells. In their natural state, embryonic stem cells are pluripotent, meaning they can develop into any type of cell. Adult stem cells, by contrast, are multipotent, meaning they can differentiate into a limited variety of cell types. However a scientific breakthrough has very recently occurred, showing that adult stem cells can be manipulated so as to become pluripotent, potentially obviating the need for embryos as a source of stem cells.

1.2 Why Therapeutic Cloning?

Human cloning, simply put, is the process of creating a genetically identical copy of a human organism. Of course, human clones exist in nature, as identical twins are genetically matched. But when we speak of human cloning, we have in mind clones created by artificial means. To create a clone artificially, one requires a human ovum and a somatic cell (say, a skin cell) from the individual to be cloned. The nucleus of the ovum is removed, and replaced with the nucleus from the somatic cell of the individual and inconvenience of harvesting additional eggs. Those who oppose the instrumentalization of human embryos face difficulties in justifying this practice of creating spare embryos. Other countries have grappled with this issue. Italian law, for example, forbids the creation of spare embryos. In 2005, Italy held a national referendum on the issue, but a lack of voter turnout meant that the restrictive law stayed on the books. See “Italian Vote to Ease Fertility Law Fails for Want of Voters” New York Times (June 14, 2005) at A1. This legislation has raised debates over the separation of church and state in Italy. For a discussion of how Roman Catholic doctrine has shaped Italy’s current laws on assisted reproduction, see Rachel Anne Fenton, “Catholic Doctrine Versus Women’s Rights: The New Italian Law on Assisted Reproduction” 14 Medical L. Rev. 73.

30 A 2002 poll found that 76% of Canadians approve of using spare embryos from IVF clinics for the purpose of stem cell research. See Caulfield supra note 21, at 454, n.19.

to be cloned, using a technique called somatic cell nuclear transfer (SCNT). The resulting embryo will be genetically identical to the individual who donated the somatic cell. That embryo can be then implanted into the uterus of a surrogate mother, and brought to term, or else destroyed in order to harvest embryonic stem cells genetically matched to the donor of the somatic cell. As mentioned, the Human Reproductive Technologies Act forbids the creation of cloned embryos, whether that cloning is undertaken for the sake of creating a new life (what is called reproductive cloning) or for the sake of harvesting stem cells that match a patient’s DNA (what is called therapeutic cloning).

There is widespread agreement that a ban on reproductive cloning is, at least at present, a good thing. As famously evidenced by Dolly, the cloned sheep, cloned organisms face a variety of poorly understood health problems, resulting in a shortened lifespan, and for these and other reasons, it is generally thought that the risks involved in reproductive cloning of human beings outweigh the benefits. Canada’s ban on therapeutic cloning is more controversial. I have touched upon the major selling point of therapeutic cloning already: the possibility of generating a line of stem-cells custom tailored to one’s own DNA. We will have the opportunity to further explore the advantages and disadvantages of stem cell research and therapeutic cloning as we consider, below, the arguments pro and con offered in Canadian public discourse.

As explained, scientists have recently shown that pluripotent stem cells can be created by manipulating adult (i.e. non-embryonic) stem cells. Using this technology, it...
may be possible to create genetically matched, pluripotent stem-cell lines for therapeutic use, without cloning embryos.\textsuperscript{33} The specific discussion that follows may then become obsolete. Be that as it may, the topic is worth exploring as a test case for thinking about the issues of scientific freedom, and patient autonomy, within public reason. The controversy over therapeutic cloning is not unique in its potential evanescence. Quite often, with issue involving scientific freedom, we can imagine how future breakthroughs might allow us to sidestep present-day dilemmas. The question—and it is a perennial question—is how to proceed in the face of uncertainty.

\section*{2. Stem Cell Research, Therapeutic Cloning, and Charter Principles}

In section 3, below, I will explore the objectives cited for Canada’s criminal prohibition of therapeutic cloning, asking whether the ban is religiously motivated, and more broadly, whether the stated rationales are publicly reasonable. In keeping with the account of public reason defended in chapter 2, I begin by making the case that the prohibition of therapeutic cloning engages constitutional essentials, before scrutinizing the underlying objectives of that prohibition. Specifically, I wish to examine whether this prohibition infringes the freedom of expression of the scientific community, and the liberty interests of patients who might otherwise avail themselves of these potential therapies.

To start, it is worth noting that throughout the numerous government reports on new reproductive technologies listed above, it is repeatedly claimed that the \textit{Charter of Rights and Freedoms} ought to play a guiding role in setting policy over such controversial matters.\textsuperscript{34} The Royal Commission’s final report emphasizes that law and policy in this area should not be grounded in any particular comprehensive doctrine.\textsuperscript{35}

\begin{flushleft}
\textsuperscript{33} Cibelli, Jose, “Is Therapeutic Cloning Dead?” (2007) 318 \textit{Science} at 1879.
\textsuperscript{34} \textit{Proceed with Care}, supra note 10 at 61.
\end{flushleft}
Throughout the report, though, there appears to have been a countervailing effort to avoid individual-rights discourse, in part due to the Commission’s stated ethical framework:

>[O]verarching ethical frameworks like utilitarianism or social contract theory often are premised, in one way or another, on an understanding of human nature that sees people as individuals first and foremost, protecting their own interests against the encroachments of others. Yet human beings are connected to one another in families, communities, and social bonds of all sorts...In our view, an ethical principle that gives priority to this mutual care and connectedness and tries to foster it is particularly helpful. The ethic of care means that a large part of ethical deliberation is concerned with how to build relationships and prevent conflict, rather than being concerned only with resolving conflicts that have already occurred.”

In applying this ethic of care, the Royal Commission then advanced eight principles, explaining that each principle would serve as a touchstone in deliberations. Those eight principles were as follows: individual autonomy, equality, respect for human life and dignity, protection of the vulnerable, non-commercialization of reproduction, appropriate use of resources, accountability, and balancing individual and collective interests.

---

36 Proceed with Care supra note 10 at 50. The ‘ethic of care’ is an ethical theory first developed by Carol Gilligan in, In A Different Voice (Cambridge, Mass.: Harvard University Press, 1982). The Royal Commission summarizes the key elements of this account as follows:

The ethic of care holds, broadly speaking, that moral reasoning is not solely, or even primarily, a matter of finding rules to arbitrate between conflicting interests. Rather, moral wisdom and sensitivity consist, in the first instance, in focusing on how our interests are often interdependent. And moral reasoning involves trying to find creative solutions that can remove or reduce conflict, rather than simply subordinating one person’s interests to another. The priority, therefore, is on helping human relationships to flourish by seeking to foster the dignity of the individual and the welfare of the community.” (Proceed with Care, ibid. at 52)

The ethic of care account was widely debated and discussed following the publication of Gilligan’s book, and space here does not permit meaningful engagement with that literature. It should be noted, though, that the account of public reason defended in chapter 2 is not entirely at odds with the ethic of care approach. Under both accounts, the aim is for individuals arrive at mutually agreeable solutions to disagreements—public reason tries to achieve this by building upon points of agreement that exist in the political sphere despite disagreement over deeper comprehensive views. Public reason does aspire to arrive at rules that can be used to arbitrate between conflicting interests, but this aspiration is tempered by the desire to arrive at an overlapping consensus.
Others have criticized the Royal Commission’s report, in part, for the apparent lack of rigour in its chosen ethical framework.\(^\text{37}\) One shortcoming of the Royal Commission’s approach is that the above listed values and principles are advanced in certain contexts, but overlooked in others. At times this selectivity appears justified, when a given principle has no clear bearing upon the issue at hand. Still, as I will try to show in the case of therapeutic cloning, there were cases where principles were unjustifiably overlooked. A second problem has to do with the vagueness of the Royal Commission’s conceptualization of many of these principles. Little emphasis is put on clearly articulating or conceptualizing particular values as they are raised, leaving the impression that conclusions are at times reached on an \textit{ad hoc} basis.

Throughout the Royal Commission’s report, and in other government statements on this matter, it is often presumed that a consensus exists among Canadians, favouring the prohibition of cloning. Perhaps the Royal Commission felt that, given this alleged consensus, there was no need to ask questions about scientific freedom and the rights of individuals who favour therapeutic cloning—to investigate such questions would only stir up controversy and undermine feelings of connectedness and mutual care. In section 3, below, I will show that there is not a consensus among Canadians on the wrongness of therapeutic cloning, but more fundamentally, I will argue that consensus alone is insufficient to justify an infringement of individual rights. Here I only want to note that the Royal Commission made a conscious decision not to offer a reasoned account of the right to free expression, and the right to liberty and security of the person, as those rights are impacted by the criminalization of therapeutic cloning. In my view, this is unacceptable for reasons explained in chapter 2. When citizens and public officials invoke a shared political conception of justice, such as the \textit{Charter of Rights and Freedoms}, they must not do so selectively, invoking only those principles that are

thought to support their conclusions (here, the *Charter* values of equality and dignity) while putting aside principles which do not support those views (here, freedom of thought, freedom of expression, and the liberty interest in patient autonomy). The task is to balance *all* of those values, insofar as they are engaged by the issue at hand.

### 2.1 Arguments for Delay

Before launching into a discussion of the *Charter* rights engaged by the ban on therapeutic cloning, it is worth taking a moment to consider some commonly-raised arguments to the effect that, whether therapeutic cloning is right or wrong, a decision to allow it should be delayed. These arguments for delay are very common in bioethics debates, and have an air of public-reasonableness to them, as they appear superficially to provide a means of temporary resolution, without obliging that we take a substantive position on the issues. This perhaps explains why politicians are so often drawn to arguments for delay, and hence why such arguments surface in many contentious debates. In certain contexts, including this one, these arguments for delay fail to meet the strictures of public reason--not due to the sectarianism of the reasons on offer, but due to the fact that, when closely examined, they offer no reasons at all.

The *Assisted Human Reproduction Act* calls for the establishment of an Assisted Human Reproduction Agency of Canada, and moreover requires that, within three years of that Agency’s creation, a parliamentary committee review the administration of the Act. Given this built-in review mechanism, one might construe the ban on therapeutic cloning as a kind of temporary moratorium. Given that, at present, there are

---

38 See article 21 of the *Act, supra* note 1.
39 See article 70 of the *Act, ibid*. Some controversy arose in 2006, as the minority Conservative government made its first appointments to the Agency. No stem cell scientists or fertility experts were appointed, and many of the appointees were known to hold conservative viewpoints. See “Experts slam fertility board for ignoring other voices” *The Globe and Mail* (30 December 2006) A1. For a response to complaints on this front, see Francoise Baylis, Carolyn MacLeod, Jeff Nisker, and Susan Sherwin, “Nothing extreme about protecting fresh embryos” *The Globe and Mail* (16 January 2007) A21.
no viable applications for therapeutic cloning, one might reason that a temporary moratorium of this sort offers an ideal stopgap solution. Why not allow public debate over cloning to continue for some years before leaping into this area of research? Perhaps it is better for Canadians postpone its decision on this matter, until therapeutic cloning has been proven safe, or until a general consensus has formed regarding its ethical propriety.40 Conservative bio-ethicists are fond of saying that once the ‘genie is out of the bottle,’ it from then on become impossible to contain. This concern is often paired with the so-called ‘precautionary principle,’ which states, roughly, that if some new technology carries potential dangers, the burden rests upon its proponents to conclusively demonstrate its safety.41

The question is whether these arguments for delay have any independent force, that is, whether they hold any sway absent more substantive arguments against therapeutic cloning. Begin with the ‘genie out of the bottle’ argument. This argument, taken on its own, has no force at all, for if cloning ultimately offers viable therapies for debilitating and life-threatening ailments, then, absent some independent argument against cloning, one should be glad to see the genie permanently un-bottled.

The precautionary principle, when advanced in this debate, is also puzzling. The precautionary principle owes its appeal, in environmental debates, to our supposition that the status quo in nature reflects a delicate equilibrium—and that we ought not to tinker with that equilibrium unless we clearly understand the consequences.42 Yet it is

40Angela Campbell, “Defining a Policy Rationale for the Criminal Regulation of Reproductive Technologies” 11 Health L. Rev. 26 at 28.
41 A ‘precautionary approach’ is advocated, for example, in Building Families supra note 13 at s.2(B)ii. See generally Carolyn Raffensperger & Joel Tickner, eds., Protecting Public Health & the Environment: Implementing the Precautionary Principle (Washington, D.C.: Island Press, 1999).
42 I do not mean to claim that the precautionary principle only applies in environmental debates, and has no place in bioethics debates. For example, the precautionary principle is sensibly applied to the question of xenotransplantation—the transplantation of, for example, pigs’ heart valves to humans. There is reason to fear that the transplantation of tissues from one species to another may precipitate the spread of diseases between species, and so, on this bioethical issue, there are relevant concerns which speak in favour of the precautionary principle. The point is
unclear that the no-cloning \textit{status quo} has anything analogous to recommend it. To be clear, the point is not that there are no valid causes for concern over therapeutic cloning. But unlike debates over the environment, there are no \textit{a priori} reasons for preferring the no-cloning \textit{status quo}, and therefore for shifting the burden of proof to those who would upset that \textit{status quo}. \footnote{Whether the precautionary principle is reasonable even in the case of environmental debates is unclear. Cass Sunstein argues that the principle, in all cases, plays upon our reluctance to carefully attend to probabilities. See Cass Sunstein, “Probability Neglect: Emotions, Worst Cases, and Law” (2002) 112 Yale L.J. 61; Cass Sunstein, “Beyond the Precautionary Principle” (2002) 151 U. Pa. L. Rev. 1003. The overall validity of the precautionary principle is beyond the scope of the present discussion. I claim only that, whatever the precautionary principle’s overall plausibility, it is especially implausible when invoked in the debate over therapeutic cloning.}

Moreover, unless the risks posed by therapeutic cloning can be clearly specified, it is unclear how proponents could ever meet the burden of proof imposed upon them by the precautionary principle. As it stands—and as I discuss in detail below—policy makers opposed to therapeutic cloning have, for the most part, pointed only to vague worries about the impact of cloning upon dignity and equality. Supposing we adopt the precautionary principle in this context, how would proponents of therapeutic cloning go about meeting the heavy, one-sided, burden of proof imposed by that principle? In environmental debates, where there is some sense of the empirical data needed to demonstrate the ecological soundness of a given practice, the precautionary principle may be a sensible one. By contrast, there is something mysterious in the suggestion that Canadians should forestall therapeutic cloning research pending further study of its impact on human dignity.\footnote{Cf. Chaoulli \textit{v. Quebec} (Attorney General), [2005] 1 S.C.R. 791 at para.97 (finding that uncertainty can not, on its own, justify the \textit{status quo} in health care provision, where citizen’s fundamental rights are being infringed).} The argument may be that more dialogue and debate is needed, though this seems far-fetched, given the years and years of public hearings and parliamentary debates that have already taken place.
Perhaps the idea here is that, through a temporary moratorium, Canadian lawmakers can avoid needless ethical controversy—waiting in the wings while scientists in other countries pursue this avenue of research. Should this research undertaken in other countries lead, in time, to viable therapies, Canadians will be set to revisit the question of prohibition, thanks to the review clause in the Act. Something like this view appears to be reflected, for example, in Health Canada’s rationale for the ban on therapeutic cloning: “at this time, the emphasis should be on a better understanding of stems cells taken from existing embryos.”45 Though on its face this may appear reasonable, it does violence to the idea of free scientific inquiry (and, as explained below, free scientific inquiry rests at the core of the Charter’s commitment to individual liberty). Freedom of inquiry, if it is to have any purpose at all, must encompass a right to explore new and untested avenues of research. To postpone freedom of inquiry over some matter, pending its being tested and approved in other jurisdictions, is to do away with meaningful freedom of inquiry altogether. Liberty delayed is liberty denied, to paraphrase a familiar notion. There may be justifications for limiting scientists’ freedom in this area, but a criminal prohibition on cloning—whether temporary or permanent—requires a reasoned articulation of those justifications.46 I discuss the proffered justifications in section 3, below, but first I will explain how a ban on therapeutic cloning infringes scientists’ right to free expression, and the right of patient autonomy.

45 Health Canada, Proposals for Legislation Governing Assisted Human Reproduction: Executive Summary (Ottawa: May 2001) [emphasis added]. One notable cost of this approach is that, in the interim, Canadian researchers may opt to relocate to jurisdictions with more liberal regimes on cloning and stem cell research. This may put Canada at an economic disadvantage, and impact the quality of scientific research in Canada. See Peter A. Singer, “Canada needs therapeutic cloning” The National Post, (25 May 2005).
46 For a helpful discussion of this theme, as it related to the regulation of biotechnology, see Patrick Healy, supra note 37 at 919-45.
2.2 Research into Therapeutic Cloning and the Right to Free Expression

There is little in the way of Charter jurisprudence directly bearing on the right to engage in scientific experimentation, and so there has been some debate in academic journals as to whether the prohibition of therapeutic cloning constitutes an infringement of fundamental freedoms.\(^{47}\) Section 2(b) of the Charter issues the following guarantee:

2. Everyone has the following fundamental freedoms:

\[(b)\] freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

As explained in chapter 2, the Court has long held that these freedoms must be given a large and liberal interpretation.\(^{48}\) Thus, at the infringement stage of s. 2(b) challenges, the Court does not qualify the term ‘expression’, but rather inquires, straightforwardly, whether the activity for which the claimant seeks protection is indeed expressive— that is to say, whether the activity in question intended to convey content.\(^{49}\) The sole exception


\(^{49}\) Irwin Toy Ltd. v. Quebec (Attorney General) [1989] 1 S.C.R. 927 at 968. Note the importance of intent here: as the court explains in Irwin Toy, the expressiveness of a given act may turn on the intent of the actor. The Court offers the example of an individual who parks his car in a given location as a form of political protest, versus an individual who parks in his car in that location solely for convenience sake. The former may garner protection under s.2(b), the Court reasons, due to the actor’s intent to convey meaning. See Irwin Toy, ibid.
here is that violent or unlawfully destructive expressive acts will be deemed outside the scope of protection.\textsuperscript{50}

While it is easy to see how research into therapeutic cloning may lead to the creation of expressive content (e.g., articles in medical journals), it is less clear that research and experimentation is \textit{itself} expressive and therefore deserving of \textit{Charter} protection. This is really the crux of the matter here, and most Canadians, one would expect, will have conflicting intuitions as to whether the right of free expression covers scientific experimentation. Our intuitions sway depending on the sort of experimentation at issue: were the law to prohibit the use of telescopes or the unearthing of fossil records, many would take this to be a clear-cut infringement of freedom of thought and expression. Other types of research and scientific experimentation arouse the opposite intuition: we may have initial doubts as to whether s.2(b) covers animal vivisection, for example. Presumably, though, the preliminary question of whether experimentation is covered by the right to free expression should be answered in the abstract, as opposed to asking, on a case-by-case basis, whether this or that type of experimentation falls under the scope of protection.\textsuperscript{51} This is so because our judgments about the content of a particular expressive act should not decide the preliminary question of whether acts of that sort are expressive, and therefore protected by the right to free expression.

Moreover, those who would generally deny that scientific experimentation falls within the scope of s.2(b) will face difficulties in reconciling that view with the Court’s very plausible account of the underlying rationale for the protection of free expression.

\textsuperscript{50} \textit{RWDSU v. Dolphin Delivery Ltd} [1986] 2 S.C.R. 573 at 588. One might suppose that therapeutic cloning in some way involves violence or unlawful destruction, and hence that any activity related to it falls outside the scope of \textit{2(b)} protection. But the determination that therapeutic cloning constitutes an act of violence is a controversial one, and presumably government should bear the burden of justifying that position at the \textit{s.1} stage.

\textsuperscript{51} The limit of course being ‘experimentation’ that is uncontroversially violent. See \textit{Irwin Toy, \textit{supra}} \textit{n.39} at p. 970.
The Court has quite plausibly supposed that three objectives underlie the protection of free expression: the search for truth, the promotion of democratic participation, and the promotion of self-realization.\textsuperscript{52} Scientific research and experimentation represents, for many, the paradigmatic example of humanity’s search for truth. And to the scientific researcher, the freedom to experiment is as vital to self-realization as (say) the painter’s freedom to experiment on the canvass.

Those who favour the prohibition of therapeutic cloning have a ready \textit{reductio ad absurdum} for this line of argument. They argue that there is no end to the range of human activities that might, in some way, promote self-realization and the search for truth; but no one supposes, on that basis, that this entire range activities therefore warrants s.2(b) protection. Downie \textit{et al.} highlight the potential for absurd consequences here:

For example, would a ban on parking in the area surrounding one’s laboratory constitute an infringement of the right to free expression if one could show that the parking facilitated the research? Would a ban on importing research materials be a breach of section 2(b) if importation was the only way to gain access to them?\textsuperscript{53}

A line needs to be drawn somewhere, and, as explained, the Court draws that line by asking first whether the activity in question is expressive.

However, the Court has not been entirely strict in limiting s.2(b) protection to expressive acts. In \textit{R. v. Sharpe}, for instance, the Court addressed the question of whether the possession of child pornography could be deemed expressive activity. Chief Justice McLachlin there wrote that,

As to the contention that prohibiting possession of expressive material does not raise free expression concerns, I cannot agree. The right conferred by s. 2(b) of the \textit{Charter} embraces a continuum of intellectual and expressive freedom --

\textsuperscript{52} The Court at times lists the pursuit of scientific truth specifically, as in \textit{R. v. Keegstra}, [1990] 3 S.C.R. 697 at 762: “At the core of freedom of expression lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavors or in the process of determining the best course to take in our political affairs.”

“freedom of thought, belief, opinion and expression”. The right to possess expressive material is integrally related to the development of thought, belief, opinion and expression. The possession of such material allows us to understand the thought of others or consolidate our own thought. Without the right to possess expressive material, freedom of thought, belief, opinion and expression would be compromised. Thus the possession of expressive materials falls within the continuum of rights protected by s. 2(b) of the Charter. 54

The operative idea here is that if a non-expressive activity is integrally related to free expression, then that activity may fall under the protection of s.2(b). This principle addresses (at least partly) the concern raised by Downie et al.: the parking ban example can be explained away by noting that accessible parking is not integral to scientific research. The question then becomes whether experimentation is integrally related to the scientist’s development of thought, belief, opinion and expression. On the face of it, this seems undeniable.

It might be argued, however, that experimentation involving cloning is not integral to stem cell research, because, as mentioned, there are alternative sources of stem cells (i.e., adult stem cells and stem cells derived from umbilical cord blood). 55 There is much disagreement on the question of whether stem cells from these alternative sources will suffice for research and therapeutic purposes. Downie et al. argue, for example, that cloning for stem cells is unnecessary, citing research which suggests that some types of adult stem cells may in fact be pluripotent, as well as research suggesting that transplanted embryonic stem cells do not trigger an immune response. 56 This is by

55 Ibid.
56 Cibelli, Jose, “Is Therapeutic Cloning Dead?” supra note 33. See also ibid. at 378. To be clear, Downie et al. cite these findings in the context of arguing that the ban on therapeutic cloning meets the minimal impairment test; they do not explicitly suggest, as I have, that the availability of alternative avenues of research is relevant to the preliminary question of whether there has been an infringement of the right to free expression. (Though they allude to such an argument at ibid. n31.) They cite a study which found that human embryonic stem cells triggered no detectable immune response when injected into mice, nor when exposed to human blood containing immune cells. The authors of that study speculate that embryonic cells may be ‘immune-privileged’ in this way so that a mother’s immune system is not triggered by her fetus. See Li Li et al., "Human Embryonic Stem Cells Possess Immune-Privileged Properties. Stem
no means a point of consensus, though, as other Canadian researchers and bioethicists have argued for the unique value of therapeutic cloning.\footnote{Peter A. Singer “Canada Needs Therapeutic Cloning” supra note 19.}

In reasoning about the infringement of basic freedoms, we should be cautious with arguments of this general form: where it is claimed that criminalizing activity \( x \) does not infringe basic freedom, because some alternative activity \( y \) is available to the claimant, which is as good as \( x \). A useful analogy can be drawn here with cases that arise under the \textit{Charter}’s guarantee of religious freedom. The right to religious freedom does not issue an all-encompassing right to do whatever one chooses, so long as it is done in the name of religion. Instead, only activities integral to one’s religious beliefs are protected.\footnote{R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 336-7, 351; Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 at para. 32-41.} Cases have arisen, though, where it has been argued that a contested activity was not integral to religious belief, on grounds that some alternative activity was available to the religious believer. As we saw in chapter 2, in \textit{Syndicat Northcrest v. Amselem},\footnote{[2004] 2 S.C.R. 551} an Orthodox Jewish family sought an exemption from the bylaws of their Montreal condominium, allowing them to install a \textit{succah}—a religious ceremonial hut--on the balcony of their unit. Syndicat Northcrest argued, in part, that it was not integral to the practice of Orthodox Judaism that one erect a succah on one’s own property, and offered to instead situate a communal succah in the courtyard of the condominium. The Court reasoned that, so long as the religious beliefs at issue were sincerely held, they fell within the right to religious freedom. Thus it would not suffice to show that some alternative was available—such as a communal succah in the condominium courtyard. A parallel reasoning might be applied to the question of scientific experimentation: the scientist should not be made to demonstrate that there are no viable alternatives to her

\begin{itemize}
\item Cells” (2004) 22 Stem Cells 448. If embryonic stem cells are immune privileged, that undermines immunological advantage of therapeutic cloning.
\end{itemize}
favoured avenue of experimentation, in order merely to assert the protection of the right to free expression.

Moreover, this discussion of whether therapeutic cloning holds unique promise takes us very far away from the simple question of whether such experimentation is integral to expression, and onto the terrain of s.1 analysis. We are now, in effect, appraising the substantive arguments for therapeutic cloning, trying to discern whether that activity is integral to any research project. As most commentators seem to agree, this question should really be addressed in the context of s.1 contextual balancing, where the unique value of therapeutic cloning can be weighed against the government’s objectives in prohibiting such research. Put differently, one should avoid making substantive appraisals of the value of therapeutic cloning at this preliminary stage—because even-handedness requires that the unique benefits of this research be balanced against arguments for prohibition. This isn’t a finicky, formalistic concern: it is a cornerstone of s.2(b) jurisprudence that assessments of the value of a given expressive act shouldn’t play a part in answering the preliminary question of whether a freedom of expression has been infringed. To claim that therapeutic cloning offers no unique benefits is to make a judgment about its value, and a controversial one at that. The point can be made in plain, non-legalistic language: if I live in a society that purports to value scientific freedom, and, citing that value, I demand a justification for why I have been threatened with jail for undertaking particular research activities, the majority can not reasonably dodge my demand by dismissing that research as unnecessary. If they are serious about their commitment to free scientific inquiry, they owe me a carefully reasoned justification.

---

In denying that scientific experimentation falls under the protection of s.2(b), Downie et al. focus on arguments made by the Court in Dunmore v. Ontario.\(^6\) There, in a labour relations context, the Court affirmed that the Charter’s guarantee of freedom of association does not ground an independent right to strike or bargain collectively. Downie et al. claim that there is a “clear analogy” here to freedom of expression and scientific experimentation:

> For the same reason that one cannot use the right to associate to ground a right to carry out the purposes or goals of the association, one cannot use the fact that research findings convey meaning to ground a right to pursue whatever processes produce these results. Such processes would have to find their own independent source of protection. In other words, they would have to be found to constitute expressive activity, completely apart from their role in the production of information.\(^6\)

This analogy fails. First, the analogy drawn here fails because collective bargaining and the right to strike are not integral to free association in the way that, as explained, experimentation is integral to freedom of scientific thought and expression. Workers can go on freely associating though they are denied the right to strike (or so the majority reasoned in Dunmore, at any rate); conversely, the scientist’s freedom of expression is fatally undermined when the state criminalizes activities integral to the development of ideas and knowledge. Simply put, experimentation is a necessary antecedent to scientific expression, while striking and collective bargaining are a possible consequence of free assembly. The analogue of a ban on experimentation for scientists, would be (e.g.) a ban on all road travel to the site of a workers’ assembly.

Second, Downie et al. imply that a clear line is drawn in Dunmore, distinguishing the right to associate (which is protected) from the right of an association to pursue its collective goals (which is not protected). But the Court does not draw such a clear-cut distinction. Rather, the Court explains that collective activities may or may not attract

---

\(^6\) Dunmore v. Ontario (A.G.) [2001] 3 S.C.R. 1016 [Dunmore].
\(^6\) Downie et al., supra note 32 at 363.
protection depending on their importance in achieving the underlying purpose of the right to free assembly:

Insofar as the appellants seek to establish and maintain an association of employees, there can be no question that their claim falls within the protected ambit of s. 2(d) of the Charter. Moreover, the effective exercise of these freedoms may require not only the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one’s employer. These activities are guaranteed by the purpose of s. 2(d), which is to promote the realization of individual potential through relations with others...\footnote{Dunmore, supra note 61 at para. 30.}

This brings the reasoning in Dunmore in line with Sharpe. Following this reasoning from Dunmore, an analogous question might be posed: is experimentation needed to achieve the underlying purposes of s.2(b)? As explained above, I take it to be obvious and indisputable that scientific experimentation is vital to the goals of truth and self-realization that underlie s.2(b).

For these reasons, I do not believe that a reasoned account can be given of the Charter’s s.2(b) guarantees that excludes protection for scientific experimentation. And by this I do not simply mean that such a position cannot be reconciled with the precedent set in Sharpe and Dunmore. Though I have drawn, in some detail, upon certain Charter decisions in making this argument, all of this is intended only as persuasive (as opposed to authoritative) argument. Simply put, my view is that on any tenable understanding of the right to freedom of thought and expression, one would expect protection to be extended to scientific experimentation. The Court’s account of the purpose of that right is a sensible one; and as a conceptual matter it is difficult, in light of that purposive interpretation, to see how one can justify a strict and unyielding adherence to the expressive/non-expressive distinction. The right to free expression is an empty right unless activities that lead to the generation of knowledge and ideas are
also afforded some protection. This is not to say that scientific experimentation can never be criminalized, but only that its criminalization must be justified by reference to some pressing and substantial objective. (As explained, that question is the subject of section 3, below.)

### 2.3 Section 7 and the Criminalization of Therapeutic Cloning

Section 7 of the Charter states that:

> Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In what follows, I want to explore whether the criminalization of therapeutic cloning infringes the s.7 rights of patients who might one day avail themselves of medical discoveries in this area.

As research into therapeutic cloning is now in its infancy, criminal prohibition does not presently have the effect of depriving any patient of the right to life, or security of the person; there are no therapies to be had. Were the arguments in this section brought before a court, they might well be dismissed for lack of ripeness. As Dickson J. explained in *Operation Dismantle*,

> Section 7 of the Charter cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person.\[64\]

However, my objective here is to ask what sorts of arguments meet the standard of public reason set out in chapter 2. Canadians afflicted with life threatening diseases, who see a glimmer of hope in therapeutic cloning, are entitled to an explanation of how this prohibition can be reasonably reconciled with s.7 of the Charter. Questions of justiciability are a separate matter, and turn on concerns about the competencies of the courts. While such concerns provide grounds for thinking that the courts should not, at

---

\[64\] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at para. 29 [emphasis in original].
this stage, be considering the s.7 implications of the ban on therapeutic cloning, those same problems of legitimacy and competence do not face citizens and elected officials. If some citizens and lawmakers favour a blanket prohibition of research in this area, they are obliged to explain to the scientist how that stance can be reconciled with freedom of scientific inquiry, and they are obliged to explain to the Parkinson’s disease sufferer how that stance can be reconciled with patient autonomy and concern for security of the person. At any rate, unlike the fact situation in Operation Dismantle, it may not be long before the prohibition of therapeutic cloning ripens into a live s.7 dilemma.\(^65\)

A second somewhat legalistic objection is that the Assisted Human Reproduction Act targets only those who knowingly “create a human clone,”\(^66\) while presumably any patients hoping to benefit from therapeutic cloning would not undertake to create a clone themselves. However, the courts have allowed standing in comparable situations, where a law targeting one individual has the effect of infringing the Charter rights of a third party. The Morgentaler decision is perhaps the best known of these: there, provisions of the Criminal Code that applied to medical professionals were overturned on grounds that those provisions had the effect of infringing patients’ rights under s.7 of the Charter. Indeed, Charter rights and freedoms would be undermined altogether if rules of standing were not accommodating in this way, because so often the exercise of rights and freedoms requires the involvement of third parties. An author’s right to free expression might easily be infringed through the state’s regulation of printing presses and internet service providers, yet there could be no remedy for this infringement if rules of standing were too narrowly interpreted.

\(^{65}\) Justice Dickson’s concern in Operation Dismantle was with claims that are profoundly and insurmountably speculative, such as the claim that permitting cruise missile testing in Canada increases the likelihood of nuclear war. See Operation Dismantle, ibid. at para. 38. By contrast, the claim that the criminalization of therapeutic cloning infringes patients’ interest in autonomy and security of the person is not impossible to confirm in principle. The development of demonstrably viable treatments using those technologies would serve as confirmation.

\(^{66}\) Assisted Human Reproduction Act, supra note 1 at c. 2, s. 5(1)(a).
There are really two distinct arguments that can be made, under s.7, against the criminal prohibition of therapeutic cloning. First, the issue might be framed as an infringement of liberty: here the argument would be that individuals are entitled to a ‘sphere of privacy’ regarding the handling and use of their bodies, gametes, and genetic information, and medical decisions; that is to say, s.7 grounds a right of patient autonomy, and this right is infringed by the prohibition on therapeutic cloning. Second, the issue might be framed as an infringement of the right to security of the person: patients are entitled to access viable treatments, and societal moral views regarding the propriety of those treatments should not stand in their way, unless some genuine risk of harm to Charter values can be established. As I will explain, the line between liberty and security based arguments quickly blurs, because we value and protect patient autonomy in large part due to the direct impact that medical decisions have on security of the person. I will focus mainly on the principle of patient autonomy, as I believe that this principle generates more comprehensive arguments against the prohibition of therapeutic cloning.

The rights guaranteed under s.7 have not been interpreted by the Court as providing a boundless, all-purpose right to do whatever one pleases, but nor have those rights been interpreted in narrow, proceduralist terms.\(^ {67}\) The Court has asserted that s.7 provides citizens a “sphere of privacy,” which protects them against state intrusions that seriously compromise dignity or autonomy;\(^ {68}\) those protections are limited to “matters that can properly be characterized as fundamentally or inherently personal.”\(^ {69}\) Justice Wilson’s concurrence in Morgentaler eloquently expresses this understanding of the s.7 liberty guarantee:

> I believe that the framers of the Constitution in guaranteeing “liberty” as a fundamental value in a free and democratic society had in mind the freedom of

\(^{67}\) Re. B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486


\(^{69}\) Godbout v. Longueuil (City), [1997] 3 S.C.R. 844 at para. 66.
the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in to-day's parlance, "his own person" and accountable as such...Thus, one aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty...In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.\footnote{Morgentaler supra note 2 at 166-7. Wilson’s concurrence has since been cited approvingly by the court: see B. (R.) v. Children’s Aid Society of Metropolitan Toronto [1995] 1 SCR 315 at 368.}

Some have supposed that whatever principle underlies freedom of choice in abortion must also ground a right to engage in therapeutic cloning.\footnote{See (e.g.) the editorial, “From Kaitlyne, stem cell lessons” National Post (10 April, 2006) arguing that a ban on therapeutic cloning is “strange and hypocritical limitation in a country where the abortion of viable fetuses is perfectly legal.”} But this will depend on how reproductive freedom is conceptualized in the abortion case. As mentioned at the outset, the issue of abortion has been under-theorized in Charter jurisprudence. Reproductive freedom in abortion might be understood simply as a right against bodily interference.\footnote{See (e.g.) Canadian Advisory Council on the Status of Women, Brief to the Royal Commission on New Reproductive Technologies (Ottawa, ON: Canadian Advisory Council on the Status of Women, 1991).} Understood in this way, reproductive freedom may not have clear implications for debates over therapeutic cloning, as prohibitions on therapeutic cloning do not involve bodily interference—cloning is undertaken in a laboratory after gametes are removed from the donor’s body. Reproductive freedom might be understood instead as entailing a right to do as one chooses with one’s reproductive materials. It might then be understood to protect a range of activities, in addition to the freedom of choice in abortion: in vitro fertilization, contraception, surrogacy arrangements, and use of the ‘day after’ pill.\footnote{It is worth noting that the present pro-choice/pro-life paradigm is a fairly recent development. Some contend that societies’ historical intrusion into women’s reproductive freedom was motivated not by a concern for fetal life, but instead out of a concern to maintain traditional gender roles and traditional family structures. The anti-abortion movement adopted ‘right to life’ rhetoric only in the latter part of the twentieth century. As traditional families became less and less the norm, and family law was decisively liberalized, emphasis shifted to the embryo’s right to...} Yet even on this more generous...
understanding of the scope of reproductive freedom, it is unclear that cloning for therapeutic purposes would fall within the scope of this liberty right. All of the activities just listed are undertaken to control whether and when one will reproduce; the reasoning may be that procreation is a basic human right, and that the right of control over one’s gametes is grounded in that basic interest. As therapeutic cloning is by definition not directed towards reproduction, it would therefore fall outside the scope of the right, so understood.

For these and other reasons, it may be more fruitful, in thinking about therapeutic cloning under the Charter, to steer away from the issue of reproductive freedom, and to think in more general terms of patient autonomy. Patient autonomy is a governing principle in medical ethics, and it is natural to suppose that s.7 should ground a broad right to pursue medical therapies of one’s choice (as well as a right to refuse treatments). The courts have certainly recognized this, and so, for example, they will uphold an individual’s informed decision to refuse medical treatment though that decision may have fatal consequences. In *R. v. Parker* the Ontario Court of Appeal examined whether the criminalization of marijuana possession and cultivation infringed the s.7 rights of those who use the drug for medicinal purposes. Drawing a connection with this strand of s.7 jurisprudence linking liberty with a sphere of personal autonomy, Rosenberg J.A. found that, “...the choice of medication to alleviate the effects of an illness with life-threatening consequences is a decision of fundamental personal importance.” Rosenberg J.A. then inquired whether the criminalization of medical marijuana served any state interest, and, finding that it did not, declared that marijuana

---

74 Indeed, ‘individual autonomy’ was given pride of place within the ethical framework advanced by the Royal Commission. See *Proceed with Care* supra note 10 at 53.
76 49 O.R. (3d) 481 at 527.
77 *R. v. Parker* ibid. at 516.
prohibitions in the province of Ontario were invalid.\textsuperscript{78} It is hard to imagine how any reasoned understanding of the s.7 liberty right could exclude medical decisions from the scope of that right.

It is somewhat surprising, then, that the issue of patient autonomy scarcely arose as a concern in the Royal Commission’s discussion of therapeutic cloning, nor in later government pronouncements on the matter. Though, as discussed below, the value of human dignity is the most often cited ground for the criminalization of cloning, the value of human dignity also, surely, directs us to respect patient autonomy. Possibly, the Royal Commission understated the importance of patient autonomy in its discussion of cloning for the simple reason that viable applications of therapeutic cloning have yet to be developed. Were it the case, ten years ago, that researchers had succeeded, say, in using cloned stem cells to replace pancreatic islets in diabetes sufferers, then surely the Commission would have paid greater attention to the impact of criminalization upon patient autonomy. In other words, the remoteness of viable therapeutic applications was taken (tacitly) to weaken concerns over patient autonomy. Patient autonomy is not impacted by a ban on treatments that have yet to be developed.

This line of reasoning would make sense for a court facing a s.7 challenge of the ban on therapeutic cloning, in the here and now. For reasons explained above, the Court will consider only ‘ripe’ Charter challenges, and until there are developed applications for therapeutic cloning, the matter will remain unripe. But in the broader arena of public discourse these concerns about ripeness have little bearing. If we hold that patients have, under s.7, a \textit{prima facie} right to access therapeutic cloning if and when such therapies become viable, then presumably we believe that research into this line of therapies should also be allowed. Research is needed to develop the range of therapeutic options over which patients may exercise autonomy.

\textsuperscript{78} \textit{Ibid.} at 551. The declaration of invalidity was suspended for 12 months, however, though Parker was specifically exempted from their application.
Recall, in the above discussion, the argument to the effect that prohibition of cloning does not infringe scientists’ right to freedom of expression, because the option remains for scientists to use adult stem cells, or spare embryos from IVF clinics. A similar argument might be raised against the view that criminal prohibition violates patient autonomy. It is commonly argued that stem cell research and therapies should rely exclusively upon cell from uncontroversial sources—from umbilical cord blood and adult stem cells, for example. Failing that, stem cells from ‘spare’ embryos from IVF clinics might be used. Therapeutic cloning is, on this view, deemed a superfluous option, and therefore its prohibition is held not to infringe patient autonomy.

One can easily cite a wealth of expert opinion supporting either side on this question of whether therapeutic cloning holds out unique promise; it is by all accounts a topic of reasonable disagreement among experts. Perhaps it is therefore more sensible to ask whether, in cases where experts disagree about the promise of some therapeutic option, should research into that option nevertheless be allowed, and the therapies thereby developed made available to patients? Many therapies are controversial, yet we do not generally suppose that controversial therapies can be prohibited without infringement of patient autonomy. The right to patient autonomy encompasses a right to make controversial or even bad medical decisions, and so it should generally be presumed that the criminalization of medical treatments infringes this right, and requires compelling justification.  

Autonomy and privacy-based arguments of the sort discussed in this section can at times blur with the arguments grounded in the right to security of the person. In the

---

79 In a 2004 editorial, a group of Canadian legal scholars and bioethicists pled with Canadian Members of Parliament to allow therapeutic cloning, arguing \textit{inter alia}: “that arguments about the possible efficacy and utility of therapeutic cloning, while interesting and important from a science policy perspective, are not, on their own, relevant to a consideration of a statutory ban. You don’t ban something because it doesn’t work or is unnecessary. There has to be an independent and principled reason for the ban itself, usually associated with a clear social harm.” Caulfield, Daar, Knoppers, Singer, Castle, and Forbes, “Not all cloning is alike” \textit{Hill Times} February 24, 2004.
case of abortion, for example, a central reason for valuing the freedom to choose is just that, without that freedom, a pregnant woman’s security of the person is exposed to the risks of childbearing. The liberty interests at issue here cannot be conceptually reduced to the right to security of the person, however. Patient autonomy grounded solely in concern for security of the person is no autonomy at all. If security of the person were all that mattered, there would be no reason, in principle, not to overlook the will of patients, and defer instead to the recommendations of the attending physician, or the opinion of experts in the Ministry of Health. I mention this because, as discussed below, patient safety is often cited as a ground for the criminalization of therapeutic cloning. This should not be dispositive of the matter because, among other things, autonomy interests often prevail over concerns for patient well-being, and rightly so.

Opponents of therapeutic cloning might argue that the s.7 right to liberty does not include a right to harm to others, and differentiate medical marijuana from therapeutic cloning on grounds that embryos are harmed by the latter. This line of argument can be constructed in one of two ways: first, as a ‘clash of rights’ between the rights-claimant and the embryo, or second, it might be conceded that the embryo has no rights under the Charter (and hence cannot be embroiled in a clash of rights), but argued that the state nevertheless has a valid interest in protecting embryonic life, which justifies infringing patient autonomy. I leave option 2 to be discussed below, in Part 3, and will here focus solely on the question of whether a ‘clash of rights’ arises in therapeutic cloning.

The suggestion that a patient’s liberty interest in therapeutic cloning ‘clashes’ with the embryo’s rights under s.7 is difficult to sustain in light of Charter jurisprudence, as the Court has never found that an embryo or fetus is entitled to Charter protection
prior to birth. The Supreme Court put the matter succinctly in *Winnipeg Child and Family Services*:\(^ {80}\)

The position is clear. Neither the common law nor the civil law of Quebec recognizes the unborn child as a legal person possessing rights. This principle applies generally, whether the case falls under the rubric of family law, succession law, or tort. Any right or interest the foetus may have remains inchoate and incomplete until the birth of the child.\(^ {81}\)

Ontario courts have likewise found, in interpreting the *Charter*, that a fetus (prior to birth) is not a rights-holder.\(^ {82}\) There are indications, however, in some of the Court’s rulings, that the state has a legitimate interest in protecting a fetus insofar as doing so will promote the best interests of the baby once it is born.\(^ {83}\) In *Morgentaler*, Wilson J. finds, in her concurring decision, that the state has a legitimate interest in the protection of the fetus, particularly at later stages of pregnancy, though the fetus is not construed as a rights-bearer.\(^ {84}\) As emphasized above, however, the Court’s rulings are not dispositive of this matter, in public reason.

The aim in public reason, of course, is to avoid making pronouncements on intractable moral and metaphysical questions, such as the question of when a human being obtains personhood, and it is not my intention to proffer an answer to that question here.\(^ {85}\) However, it does bear noticing that *were one* to suppose that a clash of rights arises in therapeutic cloning for stem cells, that supposition would have to rest on a rather extreme claim about when pre-natal human beings gain personhood. Embryos cloned for stem cells are destroyed 4-5 days after their creation, before even the

\(^{81}\) Ibid. at para. 15
\(^{83}\) *Tremblay v. Daigle* supra note 8 at 563.
\(^{84}\) *Morgentaler* supra note 62 at 181.
\(^{85}\) Public reason’s agnosticism on such questions receives legal expression in this often-quoted passage from Justice Blackmun’s ruling in *Roe v. Wade*: “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, in not in a position to speculate as to the answer.” *Roe v. Wade* 410 U.S. 113 at 163.
primitive streak-- the most elementary embryological structure-- is established. At 4-5 days, an embryo consists of roughly 100 cells, is insentient, and can not even be said to be a unique life form, as the potential remains at that stage for the embryo to divide into identical twins.

As explained in chapter 2, the reconciling rights approach can obviate the need for balancing, but it is reserved for instances where a rights-claimant relies upon a clearly over-broad interpretation of a right; for example, where a parent asserts a liberty interest so extensive that it would altogether eclipse the state’s interest in promoting the best interests of the child. The reconciling rights approach is misused if the supposed conflicting right is even minimally controversial. Imagine, by way of illustration, if it were claimed that hate speech legislation does not infringe the right to freedom of expression, because that right must be ‘reconciled’ with the security interests of the victims of hate speech. This is a plain misuse of the reconciling rights approach. Laws censoring hate speech must be shown, in context, to have a pressing and substantial objective, a rational connection to that objective, and so on. The claim that a 4-5 day old embryo possesses a right to life is, similarly, a controversial claim. To claim that patients have no s.7 interest in therapeutic cloning, on grounds that s.7 rights are limited by the conflicting rights of embryos, is, in effect, to smuggle in a very controversial claim through the reconciling rights approach. Were this misuse of the reconciling rights approach generally allowed, the Charter’s requirement that infringements be demonstrably justifiable in a free and democratic society would be seriously undermined.

---

86 Opponents of stem cell research often point to the fact that all embryos are unique as grounds for their sanctity. See President G.W. Bush, “President Discusses Stem Cell Research” (9 August 2001), online: White House <http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html>. Notice that those who hold this view should favour therapeutic cloning as a source of stem cells, for cloned embryos lack uniqueness; though of course this consequence of the uniqueness argument is seldom embraced. Nor (e.g.) is the destruction of non-human animal life, also genetically unique, deemed a profound loss.
3. Rationales for the Prohibition of Therapeutic Cloning

In this section, I want to consider three broad rationales offered for the criminalization of therapeutic cloning: arguments from public consensus (3.1), human dignity (3.2), and the equality rights of women (3.3). On the face of it, these justifications appear rooted in core Charter values: democracy, respect for human dignity, and equal protection under the law. I will argue, though, that these values are strained beyond recognition as they are deployed as justifications in this context.

3.1 Public Consensus

In the Royal Commission’s report, and also in subsequent government publications addressing the matter, it is claimed that a consensus exists within Canadian society, holding that all forms of cloning are unethical and should therefore be banned.87 The following passage from the Royal Commission’s Final Report is representative:

We have judged that certain activities conflict so sharply with the values espoused by Canadians and by this Commission, and are so potentially harmful to the interests of individuals and of society, that they must be prohibited by the federal government under threat of criminal sanction. These actions include human zygote/embryo research related to ectogenesis, cloning...

Polls taken in recent years contradict this claim. In a 2001 poll by Leger marketing, 55.4% of respondents said they were in favour of cloning to produce stem cells;89 a 2002 poll by Ipsos-Reid found that “[s]ix in ten (61%) Canadians approve the creation of cloned human embryos for the sole purpose of collecting stem cells to be used in research.”90

---

87 Proceed with Care, supra note 10 at 140; Health Canada, Setting Boundaries supra note 12 at p.6-7 and p.9.
88 Proceed with Care, supra note 10 at 1022.
Proponents of therapeutic cloning are naturally fond of citing these polls, in arguing that criminal prohibition is unwarranted.\textsuperscript{91} However, one need not interpret the Royal Commission as claiming that Canadians oppose cloning; the claim may instead be that a consensus exists on the importance of some value (e.g., human dignity), and that cloning is incompatible with that value. An argument of that general form is perfectly acceptable in public reason. Indeed, public reason \textit{requires} that positions be framed by reference to values that are the subject of general consensus and rejects the view that poll results are determinative of what is publicly reasonable. What matters is that the proposed policy be defensible by reference to a reasoned understanding of shared political values.

There is nevertheless an important practical sense in which societal consensus is relevant. When activities are criminalized despite a lack of such consensus, the effect may be to undermine general respect for the rule of law.\textsuperscript{92} Because stability is a valid and important concern in public reason, one should generally advocate criminal sanctions only against those activities which, by general consensus, are deemed harmful or contrary to some important value. Some have argued, on these grounds, that the blunt instrument of criminal prohibition is an especially poor tool in the area of biotechnology, where public opinion is in constant flux. A regulatory system is thought to be preferable, as it would allow for nimble adjustments, in the face of emerging technological developments and resulting shifts in public opinion. Where consensus is lacking,

\textsuperscript{91} Some dismiss public support for therapeutic cloning as a product of media ‘hype’, reflecting a mistaken belief that viable therapies will be available in the near term. (The objection is discussed for example in Timothy Caulfield, “Politics, Prohibitions and the Lost Public Perspective: A Comment on Bill C-56: The Assisted Human Reproduction” 40 Alberta L. Rev. 451 at 455.) It is unclear though why mistaken beliefs of this sort should be taken to discount public opinion. Suppose the public, when informed of the bleak near-term prospects of therapeutic cloning, were to change its opinion, preferring instead a complete ban. From the perspective of public reason, that shift in opinion appears unreasonable: why should the current generation’s prospects of benefiting from therapeutic cloning be in any way decisive of its moral permissibility? Ignorance of the near-term promise of therapeutic cloning may in fact be a good thing, in assuring that our scientific research agenda gives due weight to the interests of younger and future generations.

\textsuperscript{92} Healy \textit{supra} n.36 at 924.
regulatory systems are also preferred on grounds that their sanctions do not carry the heavy moral disapprobation of the criminal law.\textsuperscript{93} In sum, then, the argument from public consensus fails on its own terms, because there is no consensus in opposition to cloning. Moreover, in cases where consensus is sorely lacking, our concern to promote respect for the rule of law furnishes a second-order reason for disfavouring criminalization.

3.2 Human Dignity

Concern for human dignity is, by far, the most-cited ground for opposition to therapeutic cloning, both in Canada and in other countries.\textsuperscript{94} However, in official government statements defending the prohibition of therapeutic cloning, little effort is made to elucidate what is meant by the concept.\textsuperscript{95} In this context, the idea of human dignity has several ambiguities. The analysis from the perspective of public reason will vary depending on how these ambiguities are resolved.

The concept of human dignity undoubtedly plays an important, perhaps even indispensable, role in our shared conception of justice. As explained in greater detail below, dignity serves as an important qualifier on Charter principles. For example, dignity serves as a qualifier on the right to equality: insofar as unequal treatment is wrongful, we can explain that wrongfulness by reference to the value of human dignity.\textsuperscript{96} Dignity also serves as a qualifier on the right to liberty: out of respect for the dignity of a self-directed life, the right to liberty covers fundamental decisions; trifling decisions are

\textsuperscript{93} Timothy Caulfield, “Politics, Prohibitions and the Lost Public Perspective: A Comment on Bill C-56: The Assisted Human Reproduction” 40 Alberta L. Rev. 451. As Healy explains (supra n4 at 924) the line between criminal and regulatory regimes is often blurred in Canadian law.

\textsuperscript{94} See Proceed with Care supra note 10 at 1023; Building Families supra note 13 at s.5(i).


\textsuperscript{95} Proceed with Care supra note 8 at 695.

\textsuperscript{96} See (e.g.) Miron v. Trudel, [1995] 2 S.C.R. 418; Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.
not important to one’s dignity, and therefore fall outside the scope of the right.\textsuperscript{97} Dignity is a slippery concept though, and it becomes slipperier when it is invoked as a value freestanding of these concerns for equality and autonomy.

In ordinary language, dignity is often invoked as a kind of perfectionist goal: we say that a dignified life is one lived in this or that way, on the basis of our particular worldview. In committing to public reason, though, we respectfully accept that people will disagree on how life should be lived, and so we must avoid slipping from invoking dignity in a publicly reasonable sense (i.e., as qualifier on our shared political values) to invoking it in an unreasonable sense (i.e., as defining life’s worthy ends). We must draw some principled lines around how the notion of human dignity is invoked in justifying infringements of rights, if those rights are to retain any of their intended value.

The Royal Commission offers the following as an explanation of how dignity is compromised by therapeutic cloning:

...all forms of human life (and indeed human tissue in general) should be treated with sensitivity and respect, not callousness and indifference. Although the law does not treat zygotes, embryos, and fetuses as persons, they are connected to the community by virtue of their origins (having been generated by members of the community) and their possible future (their potential to become members of the community). Not only all persons but also zygotes, embryos, and fetuses should be treated with appropriate respect because of this.\textsuperscript{98}

How is the concept of dignity, as evoked here, best understood? To whom is this respect owed?

Begin with the view that therapeutic cloning offends the dignity of the embryo. The view that human embryos possess dignity certainly finds expression in certain religious worldviews: Roman Catholicism (among other Judeo-Christian sects) has held, at least since the mid-19\textsuperscript{th} Century,\textsuperscript{99} that embryos are ensouled by God at conception,

\textsuperscript{97} See Wilson J.’s concurring decision in \textit{Morgentaler supra} note 3 at 166-7.
\textsuperscript{98} \textit{Proceed With Care supra} note 8 at 55
\textsuperscript{99} The Roman Catholic church’s official view on the moral and metaphysical status of embryonic life has changed over the centuries, though just how and when those changes have occurred is the
and this is sometimes expressed by saying that embryos possess inherent dignity. A similar view might find grounding in secular ethical theories. For example there is the Kantian view which holds, roughly, that human beings possess a dignity which prefigures any particular psychological traits; an inherent and equal dignity which derives from human beings’ status as equal, autonomous selves—as beings who choose their ends. These two notions of dignity are similar inasmuch as both call upon us to respect human beings just by virtue of their humanity, so that no further fact has to be established to trigger this duty of respect.

These conceptions of dignity, tied as they are to the values of autonomy and equality, certainly have a place within the overlapping consensus that finds expression in the Charter. It is the extension of such views of human dignity to encompass embryonic human beings that is extremely controversial. Many Canadians will no doubt reject the idea that 5-day old embryos are of equal moral status to other members of our society. That view would call for extreme restrictions on access to abortion. It would also call for an end to the creation of ‘spare’ embryos for use in IVF treatments. There is no need to belabour this point, as it is clear from the quotation above, and other government statements justifying the ban, that the intent was not to extend the Roman

---

100 See (e.g.) the Vatican’s “Observations on the Universal Declaration on the Human Genome and Human Rights” (1997) online: http://www.vatican.va/roman_curia/secretariat_state/documents/rc_sect_25091998_genoma_en.html. Other religions hold that personhood is conferred later in life. On certain readings of Islamic religious teachings, life is thought to begin one hundred and twenty days after conception, and some Islamic scholars have embraced stem cell research and therapeutic cloning on this basis. See Carolyn Abraham "Islamic Scholars Wade into Debate on Stem Cells" The Globe and Mail (13 June 2002) A7. There is disagreement within Judaism as to the propriety of therapeutic cloning. Some contend that it is strictly forbidden See Dina Honke, “Reproductive Technologies and Human Experimentation: A Jewish Perspective” 21 Health L. Can. 103. I do not mean to suggest that Kantians must adopt this view on the dignity of embryos, but only that the Kantian view of how moral obligations arise from metaphysical properties of persons has some similarities to the Roman Catholic view. For an in-depth discussion of the similarities between the Christian and Kantian conceptions of dignity, see George Fletcher, “In God’s Image: The Religious Imperative of Equality Under Law” (1999) 99 Colum. L. Rev. 1608

101 Supra note 29.
Catholic/Kantian conception of human dignity to embryonic human beings. That is to say, it was nowhere claimed that embryos deserve equal treatment, but rather, more vaguely, that embryos are deserving of respect. I shall in a moment explore the notion that embryos deserve respect in the way, say, that the bodies of the deceased deserve respect. That is an altogether separate line of argument, and care should be taken not to conflate such arguments with the more absolutist arguments about dignity that come out of Roman Catholicism. Conceptual clarity is crucial here, for our sense of whether rights can be overridden for the sake of an embryo’s dignity will vary depending on which conception of dignity we have in mind. The Kantian and Catholic views, if accepted as publicly reasonable when extended to embryonic life, will provide strong justifications for overriding the rights to freedom of expression and patient autonomy outlined above. The difficulty, as I say, is that the Kantian and Catholic views, when raised in this context, will reasonably be rejected by very many Canadians.\footnote{One might object that I have given short shrift to the Kantian and Catholic views here— for couldn’t adherents of those views reasonably reject the majority’s view that moral personhood arrives at some point after conception? Indeed they could, and if both sides were unyielding, this would lead public reason to a standstill. The challenge in public reason is to reformulate debate so that it is expressed within a political conception of justice that all citizens reasonably accept. In other words, the Catholic will need to express his views on embryonic life in a way that accounts for our shared understanding of, among other things, the values of patient autonomy and bodily integrity. As mentioned, the view that embryos must be treated as societal equals—their destruction treated as murder—will be very hard to square with widely held views on patient autonomy. Embryos are routinely destroyed by IVF clinics; abortion is almost universally condoned where the life of the mother is put at risk by continued pregnancy—and this is never conceptualized as a case where the doctor’s murder of an innocent party is exculpated as an act of rescuing the mother; IUD contraception is widely accepted, though in many cases those devices work after conception, by preventing fertilized embryos from implanting in the uterine wall.}

An alternative view, just alluded to, holds that embryos deserve to be treated with dignity in a less absolutist sense—as beings worthy of serious respect, but not as societal equals. This conception of dignity has the advantage that it does not (necessarily) posit any particular interests on the part of the 5-day old embryo, let alone the interests commonly associated with dignity in constitutional jurisprudence: interests in equality, autonomy, bodily integrity, and so on. We can speak meaningfully of the need to treat,
for example, the bodies of the deceased with dignity, by which we mean that they should be treated with due respect. We may have difficulty explaining the harm that is done when a corpse is desecrated, but many of us nevertheless feel that laws forbidding such desecration are warranted. A similar sort of reasoning might underlie the invocation of dignity in justifying a ban therapeutic cloning. So understood, human dignity is invoked, in this context, not as a right possessed by some individual, but as an inherent value shared by citizens. One might draw an analogy here to the idea that very base and dehumanizing pornography should be outlawed, irrespective of its concrete impact upon the wellbeing of individuals. In both cases, it is the offense to shared values that justifies criminalization, and not some further concern that any individual is discernibly harmed by the offending activity.

Some principled limits must be set on the kinds of shared values that can be imposed through the infringement of fundamental rights—at least, if our rights and freedoms are to remain meaningful. In setting limits on the values that may be invoked to justify state coercion, we may be reluctant to draw a line as strict as that set out in Mill’s harm principle, for we may wish to allow greater room for the promotion and protection of shared values. A common objection to the harm principle is that it forbids coercive action against seemingly harmless, isolated acts, overlooking how those isolated acts, when replicated across a society, may in subtle ways undermine important shared values.\(^\text{104}\) As we saw in chapter 2, the Court has at times suggested that the state may infringe rights for the sake of promoting shared values, but only when, first, those values have been publicly recognized in the Charter, and second, the activity in question seriously impacts the value at issue, in a way that threatens the proper functioning of society.\(^\text{105}\) This approach—which I have called Charter Moralism— is more permissive


\(^\text{105}\) *R. v. Labaye [2005]* 3 S.C.R. 728
than the harm principle, as it allows the state to take action to protect a value, without evidence of a direct risk of harm.

Adopting this approach, we may start by asking: does therapeutic cloning offend the shared Charter value of human dignity? The difficulty here is that the concept of human dignity, as employed against human cloning, has scarcely anything in common with the concept of dignity as employed elsewhere in constitutional discourse. I do not mean to imply that the concept has been perfectly elucidated by the Court—indeed there are considerable ambiguities in the Court’s discussions of human dignity.\textsuperscript{106} But as explained, talk of dignity is typically linked with other values in Charter jurisprudence: it guides judgments about what counts as wrongful unequal treatment, what counts as an infringement of autonomy, and so on. As the Court put it in Blencoe v. British Columbia (Human Rights Commission),\textsuperscript{107}

Respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the Charter. This does not mean, however, that dignity is elevated to a free-standing constitutional right protected by s. 7 of the Charter. Dignity has never been recognized by this Court as an independent right but has rather been viewed as finding expression in rights, such as equality, privacy or protection from state compulsion...In my view, the notion of “dignity” in the decisions of this Court is better understood not as an autonomous Charter right, but rather, as an underlying value.\textsuperscript{108}

When invoked instead as a freestanding value, dignity is not, as Rawls would say, a point of overlapping consensus. We each have our own perfectionist views about the things that matter most to dignity: for some it is devotion to God, for others it is the examined life, for others dignity derives from connectedness with family and community, and so on. But these perfectionist ideals of dignity do not underlie the Charter. Instead, the Charter prioritizes autonomy and equality, on the supposition that, with those values

\textsuperscript{107} [2000] 2 S.C.R. 307
\textsuperscript{108} Ibid. at para. 77
secured, citizens will find dignity by their own lights. As a Charter value, our commitment to dignity just is our commitment to liberty, equality, and autonomy. Thus we should be skeptical of attempts to justify Charter infringements which are predicated on the freestanding value of dignity, and where the offense to dignity can not be expressed as an offense to these other values.

Thus to recap: my contention is that the concept of dignity, as invoked in the therapeutic cloning debate, is meant either in a Kantian/Catholic sense, as reflecting the inherent equality and autonomy of all human life, or else in an alternative sense, in which dignity is held out as a freestanding value, not tied to the rights claim of any particular individual. The Kantian/Catholic understanding of human dignity undoubtedly has a place within public reason, but its application to blastocysts can not be sustained on anything but quasi-religious grounds. There is nothing in our current practice to suggest that 4-day old embryonic life is widely regarded as equal and autonomous; and indeed to adopt that view in public reason would require drastic changes to our practices.

The alternative view avoids talk of the autonomy or equality interests of embryos, and conceives of dignity as a value standing free of these other Charter principles; on this alternative view, dignity is vaguely understood to require respect. But by severing any connection with concerns over equality and autonomy, this notion of dignity as a freestanding value loses all connection with the concept of dignity that operates within Charter Moralism.

None of this is meant to deny that embryos deserve to be treated with some respect, as that seems undeniable. But it is one thing to say that our laws should show respect for something, and quite another to say that the state should foster that respect coercively, through the infringement of basic rights and freedoms. Moreover, it is unclear how proponents of therapeutic cloning are advancing a position that is
disrespectful of human life. The issue here is not the *wanton* destruction of embryos, after all, but strictly their potential use in treating debilitating and life-threatening diseases. Opponents of therapeutic cloning often presuppose that to use an embryo is necessarily to show disrespect; borrowing from Kantian moral terminology, they object to any research that ‘instrumentalizes’ the embryo. This argument is shifty, though, at least when it comes from those who disavow that the Roman Catholic/Kantian conception of the dignity is at work here. We are bothered when *people* are used as instruments, because people have autonomous ends that ought to be respected. Unless the claim is that embryos possess a right to autonomy—a claim that opponents of therapeutic cloning have shied away from—concerns about instrumentalization are out of place here. If the concern is, instead, to show respect for embryonic life, that concern seems compatible with using embryos for the sake of advancing potentially life-saving research. Most of us feel an obligation to respect the natural environment, but we do not suppose on this basis that forests can never be exploited for human benefit. In such cases, respect demands that we not needlessly squander the thing in question—but not that we treat it as sacrosanct and allow people to suffer and die for its preservation.

The concept of human dignity plays an important role in *Charter* discourse, and nothing said here is meant to deny that. But the value of human dignity can not be treated a wild card in our deck of political values— an undefined quotient that trumps other values.

### 3.3 Equality Concerns and Potential Harms to Women

Throughout the Royal Commission’s report, and in subsequent policy papers, government officials have rightly emphasized that women are more directly and profoundly impacted than men by laws regulating new reproductive technologies. Unsurprisingly, then, the *Charter* value of equality has figured prominently in these debates. Threats to reproductive autonomy and bodily integrity are often treated also as
threats to the value of equality, since laws governing reproductive technologies will often have a differential impact upon the sexes. This can lead, unfortunately, to some blurry justifications: kitchen sink arguments where all of these values (autonomy, bodily integrity, and equality) are mentioned, without clearly explaining how each is implicated. Thus, for example, seemingly faint and speculative threats to bodily integrity are bolstered by invoking the importance of women’s equality.

Broadly speaking, the equality concern with therapeutic cloning is that women may face coercion or exploitation, as society seeks egg donations for use in generating custom-tailored stem cell lines. Somatic cell nuclear transfer is done manually, under a microscope, and has a considerable margin of error, thus it is to be expected that multiple eggs will be needed to produce a single line of stem cells. To get a sense of the numbers involved, consider, for example, that 277 eggs were employed in the creation of Dolly the sheep.\textsuperscript{109} Downie \textit{et al.} explain that,

\ldots even if the derivation of cloned embryos becomes maximally efficient—one cloned stem cell line from one egg—there will still need to be one egg per patient requiring stem cell treatment. As the number of maladies amenable to stem cell treatment continues to expand along with the number of patients afflicted with these maladies, so will the need for eggs for treatment. The physical and psychological harms associated with egg retrieval are significant. They range from minor harms such as vomiting and mood swings to significant harms, including future infertility and even death from severe ovarian hyper-stimulation. As, well, with the current purchase price for eggs for research use set at approximately $4,000 US per cycle, the potential for coercion is significant. Even if there is no payment, the potential for coercion and exploitation remains, as women undergoing infertility treatment may be forced or enticed to give some of their eggs for research in order to have access to IVF treatment at all, or at reduced or no cost.\textsuperscript{110}

Downie \textit{et al.} suppose that every Canadian would, at some point in their lives, have an illness that could be treated with cloned stem cells, which under a best-case scenario would represent a demand for 32 million eggs; for “economic and ethical

\textsuperscript{109} C.D. Forsythe, ”Human Cloning and the Constitution” (1998) 32 Val. U. L. Rev. 469 at n.310. However, one should expect the failure rate in reproductive cloning normally to be higher than in therapeutic cloning. With therapeutic cloning, the embryo needs only to survive 4-5 days to produce stem cells, while complete gestation is required for the reproductive cloning.\textsuperscript{110} Downie \textit{et al. supra} note 32.
reasons, this is a practical impossibility,” they conclude. This is taken as a sort of *reduction ad absurdum* of the prospects for therapeutic cloning, and hence as a partial justification for its criminalization.

Notice though that the scarcity of resources needed for a given therapy is seldom, if ever, taken to justify criminal prohibition. Organs for transplant are scarce, and the retrieval of kidneys from live donors is much more invasive and life-threatening than the retrieval of eggs. Certainly the same concerns regarding potential coercion and/or commodification arise with organ transplantation, yet these concerns have not prompted a move to criminalize organ transplantation. Rather, the scarcity of organs for transplant has caused us to allocate available organs on the basis of need, and on the basis of the recipient’s prospects for recovery with the transplanted organ. A similar system of triage could be used in allocating scarce, freely donated eggs for therapeutic cloning.

Likewise, worries about the commodification of transplant organs have not prompted a criminal ban on organ transplantation, but rather more sensibly, a criminal ban on the *sale* of human organs. Concerns about coercion leading to involuntary organ donation have been addressed directly by provisions expressly criminalizing such coercion. It must be said, on a more general level, that these concerns about the scarcity of eggs are predicated upon a very rosy picture of the promise of therapeutic cloning—where *all* Canadians, at some point in their lives, potentially benefit from this technology. If one seriously entertains this view of the promise of therapeutic cloning, then accordingly a *very* compelling justification is in order for its criminal prohibition.

---

111 *Ibid.* at 381-82.
112 See *Criminal Code* subsections 279.01 and 279.04, specifically.
113 Were therapeutic cloning to prove widely beneficial, one might expect a rise in voluntary egg donation. South Korea—a country at the forefront of cloning and stem cell research—reportedly has a high rate of egg donation. See “Canada shut out of stem-cell group,” *The Globe and Mail* (19 October 2005).
It might be argued that egg retrieval for therapeutic cloning poses an especially high risk of coercion, in light of our society’s longstanding history of intrusion into women’s reproductive lives. No analogous concerns hold, generally, for organ transplantation. Thus it could be argued that the prohibition of therapeutic cloning is grounded, partly, in the state’s interest in promotion gender equality. Sina A. Muscati summarize these equality concerns:

Numerous women’s rights issues might also be implicated by therapeutic cloning. Stem cell research might invite the coercion of women to donate extra eggs for SCNT. If the sale of these eggs were allowed, there is a risk that young, impoverished women might be exploited. In fact, various feminist organizations have expressed concern that cloning might reduce the reproductive role of women to that of mere egg-producers; this would distance them from the process of reproduction, one of the most defining aspects of womanhood. Such an effect might violate some of the principles represented by s. 15.114

The question then becomes whether the complete criminalization of therapeutic cloning is warranted on the basis of these speculative concerns— or whether there are alternative schemes available which might less infringe the rights of scientists and patients, while guarding against these threats to women’s equality?

First, as mentioned, worries about commodification would seem more sensibly addressed through laws forbidding the sale of embryos.115 The Assisted Human Reproduction Act regulates, but does not criminalize, surrogacy arrangements, and addresses the worries about the commodification of women’s wombs by regulating the

---

114 S.A. Muscati, “Therapeutic Cloning and the Constitution: A Canadian Perspective” 22 Health L. Canada 7 at 42–43. Similar concerns are expressed by the Royal Commission, in Proceed with Care supra note 10 at 583.
115 It is not immediately clear what harm arises from the commodification of eggs or other gametes. Perhaps the concern is a variant of the earlier concern over dignity: human tissues deserve respect and so must be distinguished from other commodities. Alternatively, the concern may be that, as Muscati (ibid.) explains, young, impoverished women will be somehow exploited as a result of market demand for eggs. I will not explore these concerns further, as I take it that a ban on the sale of eggs and other gametes does not infringe any rights: the Charter does not guarantee freedom of contract, let alone freedom of contract over gametes, and so government does not require a pressing and substantial objective in justifying a prohibition on the sale of eggs. However, as explained, parliament has gone far beyond what is needed to prevent commodification, and has infringed basic rights by preemptively shutting down an entire avenue of scientific research. This does require a carefully reasoned justification.
allowable remuneration. If anything, the allowance of surrogacy arrangements poses a greater risk for the coercion of women. After all, couples are left to seek out surrogate mothers on their own, and of course there will be ongoing contact between the couple and the surrogate, which opens the door to coercion. By contrast, the risk of coercion in egg donation could be minimized by creating a central egg bank, along the lines of blood banks, so that possible beneficiaries—be they researchers or patients—would draw no direct benefit from coercing potential donors. As with blood donation, egg donation for therapeutic cloning can be done anonymously, as there is no reason to be concerned about the genetic profile of the donor; the nucleus, containing the donor’s DNA, is removed during SCNT. Fertilization clinics might nevertheless, as Downie at al. claim, pressure women undergoing IVF treatment to donate extra eggs. But it is unclear what incentive the fertility clinics would have to do this, unless we suppose that fertility clinics will also serve as therapeutic cloning labs. If this is the fear, a less rights-infringing option would be to require an institutional separation between fertility clinics that provide IVF treatments and research bodies engaged in therapeutic cloning.

The Charter value of equality must, like the value of dignity, be situated and conceptualized relative to other Charter values. Our concern for equality does not provide an all-purpose justification for criminalizing any activity that poses a risk of negative differential impact upon women and minorities. The Court has recognized that the right to equality risks occluding other important values, unless it is conceptualized in a way that clearly focuses its scope. To this end, the Court has reasoned that the Charter principle of equality is infringed only when government (a) draws a substantive distinction between two groups, and (b) that distinction is made on prohibited grounds.

116 See Assisted Human Reproduction Act supra note 1 at s.12. It is however within the law for couples to reimburse surrogate mothers for expenses reasonably associated with surrogacy, such as lost wages.
(e.g. on the basis of sex, race or age), and (c) a reasonable person in the claimant’s position would find the distinction so made offensive to his or her dignity.\textsuperscript{117}

The Court’s main concern, in invoking its dignity-based conception of equality, is to clear away trifling rights-claims, where individuals are treated differently by the state for good (or at least inoffensive) reasons. Yet the concept of dignity plays another important role in our understanding of equality, apart from blocking trifling claims: it serves as a fulcrum in balancing equality interests against autonomy interests. If our fundamental concern in promoting equality is to promote dignity, and we recognize that autonomy is also vital to dignity, then we should be careful not to promote equality at the undue expense of autonomy. Among other things, we should be circumspect about paternalistic arguments grounded in the value of equality.

The argument that therapeutic cloning must be criminalized altogether in order to prevent the exploitation of women has a distinctly paternalistic air to it. It fails to take seriously the possibility that many women might freely to choose to donate their eggs for the purpose of therapeutic cloning. Is it so strange to suppose that women would freely opt to donate eggs? In the event that therapeutic cloning shows great promise in curing disease, there may indeed be great demand for eggs, and some women may feel obliged to donate. Under those circumstances, though, this sense of obligation may in fact be well-grounded, and so may arise autonomously.\textsuperscript{118} To deny all women the option of donating eggs for therapeutic cloning, for fear that some will be coerced into doing so, is not to take seriously women’s autonomy. A more balanced approach is the one alluded to above, where steps are taken through regulation to minimize the risk of direct coercion.

\textsuperscript{117} Law v. Canada (Minister of Employment and Immigration [1999] 1 S.C.R. 497.
\textsuperscript{118} As explained in chapter 1, liberalism is often criticized for fixating on negative liberty, and overlooking the positive obligations we have to one another. The criticism is off the mark, I explained, when directed at modern liberal theorists (e.g., Rawls). Perhaps the criticism is grounded in a belief that altruism and autonomy are incompatible. That might explain the worry that a high demand for egg donors could only be answered by coercion.
None of this is meant to deny that societal pressure to donate eggs may come to bear on women, if therapeutic cloning shows great promise. Societal pressures come to bear on women with virtually all of their medical and reproductive decisions: decisions about contraception, abortion, the decision to procreate, judgments about sexual morality, and so on. Normally, though, we express our commitment to equality by demanding that women be left free to make autonomous choices over such matters. When contemplating these other matters, we see the absurdity of criminalizing certain of women’s options, in the name of guarding them from societal coercion.

3.4 Human Safety

Finally, government officials have claimed that therapeutic cloning should be prohibited on grounds of public safety. The harms at stake here are never clearly articulated in government statements justifying the ban, and often patient safety concerns are run together with more abstract threats to ‘Canadian values’. All of this makes it difficult to ascertain what safety risks lawmakers had in mind, which in turn makes it difficult to assess the reasonableness of this justification. But as always, the question is how to proceed in the face of uncertainty. Doubtless, there are health risks involved in experimentation with stem cell therapies, as there are with the development of any groundbreaking therapies. No evidence is put forward to suggest that the injection of stem cells derived by therapeutic cloning poses special health risks—and as we have seen, some experts speculate that stem cells derived from cloning might pose

---

119 See (e.g.) Building Families supra note 13 at s.5(i): “In addition, ”therapeutic cloning” should be banned as it is unsafe and commodifies the embryo.” See also, Setting Boundaries, supra note 12 at 25; Proceed with Care, supra note 10 at 1022.

120 See Proceed with Care, ibid.

121 Stem cell therapies may in fact present especially complex challenges from the point of view of risk assessment. See Duff R. Waring & Trudo Lemmens, “Integrating Values in Risk Analysis of Biomedical Research: The Case for Regulatory and Law Reform” (2004) 54 Univ. of Toronto L.J. 249. It is hard to see why an entire avenue of scientific research should be closed off with criminal prohibitions on these grounds. See generally, Sunnstein “Probability Neglect” supra note 43.
fewer health risks, as the risk of rejection by the patient’s immune system would be minimized.122

Moreover, in the vast preponderance of cases, risk analyses of new therapies are undertaken on a case-by-case basis, by expert regulatory bodies.123 The logic underlying this regulatory approach is inescapable: our willingness to experiment with risky therapies is—and should be—a function of the gravity of the ailment being treated, and of the feasibility of other treatment options. Chemotherapy is by all accounts very unsafe, but for patients afflicted with terminal cancer, for whom there are no other viable treatment options, those risks are often worth taking. The same may hold with the injection of stem cells derived from cloned embryos. For these reasons, blanket prohibitions on emerging medical technologies are impossible to justify on grounds of patient safety.

4. Conclusion

In previous chapters, I have argued at some length that, in public deliberations over matters that engage constitutional essentials, arguments should be framed within a reasonable political conception of justice; Canadians’ shared political conception of justice, such as it is, finds expression in the Charter, I contend. Superficially, it may seem that public discourse over therapeutic cloning, at least among policymakers, has conformed well to this ideal. As we have seen, policymakers have plainly tried to offer justifications for the prohibition of therapeutic cloning that rest upon core Charter values, and have refrained from overt reliance upon sectarian moral and metaphysical claims.

122 See Peter A. Singer supra note 19.
123 Timothy Caulfield, supra n.94 at 460. On the precise methodology employed by these regulatory bodies—known as research ethics boards (REBs)—see Duff R. Waring & Trudo Lemmens, “Integrating Values in Risk Analysis of Biomedical Research: The Case for Regulatory and Law Reform” supra note 121.
Public reasonableness is not achieved merely by dressing up arguments in Charter rhetoric, though. There is a need to grapple with the question of how Charter principles hang together as a whole: how dignity fits with equality, how equality fits with respect for autonomy, and so on. A publicly reasonable argument should aspire, at least, to show proportionate concern for all Charter values. In justifying the criminalization of therapeutic cloning, government has often failed in this regard: often invoking particular Charter values in isolation, without attending to countervailing concerns also rooted in the Charter.
CHAPTER 5: THE CASE OF SAME SEX MARRIAGE

As explained in previous chapters, religious morality at times finds its entrée into political discourse through concerns over the protection of religious freedom. Perhaps this speaks to a tacit acceptance that directly pressing one’s religious views in the public square is, if not improper in the way countenanced by public reason, at least politically inadvisable. An alternative tactic, therefore, is to cast religion as the victim of political change, and to demand, effectively, that the state conform its activities to the dictates of religious morality out of concern for religious freedom and multicultural diversity.1 As discussed below, this approach was used extensively in the debate over same-sex marriage—so much so that the issue was effectively framed in public discourse as a conflict between equality and religious freedom. A main contention of this chapter will be that these perceived threats to religious freedom were almost entirely illusory. Yet, as I will explain, by framing the issue in this way, conservatives were able to pitch their preferred option—civil unions for same-sex couples—as a compromise solution.

1. The Framework of Debate over Same Sex Marriage

Facing a scrum in the halls of parliament in December, 1967, then Justice Minister Pierre Trudeau famously delivered this rationale for his government’s decision to decriminalize homosexual acts between consenting adults: “The view we take here is that there’s no place for the state in the bedrooms of the nation...What’s done in private between adults doesn’t concern the Criminal Code. When it becomes public, this is a

different matter.” The quip has since become part of Canadian liberal lore. Yet with the benefit of hindsight, Trudeau’s statement expresses rather lukewarm acceptance for homosexuals: their sexual identities are to be tolerated because, and only insofar as, they are pursued out of the public eye. Commentary in Canada’s national newspaper the day following Trudeau’s announcement provides a glimpse of how the news was received by its intended beneficiaries. *The Globe and Mail* quotes an anonymous “lesbian of 30,” explaining that decriminalization would have little practical impact: “it’s good to know that it’s finally legal...everybody’s been doing it.” She went on to explain that that the more important goal—one that Trudeau’s privacy-based principle could, by its very logic, not address—was societal acceptance for homosexuals: “It would be very nice to be able to hold hands in public if you wanted to. It would be nice to be able to get married legally...if you wanted to. But I don’t think we’ll ever make the grade there. You can’t win them all.” This was, we now know, unduly pessimistic. Though complete societal acceptance remains elusive, in 2005, Canada became the fourth country in the world to legalize same-sex marriage.

As others have commented, the debate over same-sex marriage is not, in any obvious sense, a debate over basic liberty or privacy, and so Trudeau’s principle of keeping the state out of the bedrooms of the nation has little bearing. By the time the same-sex marriage debate surfaced, homosexual acts between consenting adults had

---

2 Trudeau was seemingly parroting an editorial that ran a week earlier in Canada’s national newspaper, which read in part: “Obviously, the state’s responsibility should be to legislate rules for a well-ordered society. It has no right or duty to creep into the bedrooms of the nation.” See “Unlocking the lock step of law and morality” *The Globe and Mail* (12 December 1967) 6. This privacy-based argument is ultimately traceable to the ‘Wolfendon Report’, issued ten years earlier. U.K., Report of the Committee on Homosexual Offenses and Prostitution, Cmd 247 (London: H.M.S.O., 1957) (Chair: Sir John Wolfenden).


5 *Civil Marriage Act* 2005 S.C., c. 33. Spain legalized same-sex marriage just months before Canada. The Netherlands did so in 2001, and Belgium, in 2003. In many other countries (France, Germany, Portugal, Scandinavia, the Czech Republic, and the United Kingdom), same-sex couples may enter into legally binding unions, though these are not titled marriage, and in some cases the legally obligations that attach differ from those of traditional marriage.

6 See generally Bruce MacDougall, “The Celebration of Same-Sex Marriage” 32 Ottawa L. Rev. 235.
been fully decriminalized, and many of the tangible government benefits accruing to married couples had been made available to same-sex couples. Instead this is a debate over symbolism. For same-sex couples, it is a matter of the state’s recognizing, even celebrating, sexual identities which some citizens, often for religious reasons, deem immoral, unnatural, decadent, or otherwise undesirable. To others, it is a debate over the state’s recognition of longstanding cultural and religious traditions, and its encouragement of the traditional nuclear family. To say that this is a debate over symbolism is not to trivialize it, as the dignity and self-respect that comes with societal recognition is a valuable thing. And there is more at stake here than hurt feelings: studies indicate, for example, that 50% of gay and bisexual males have at some point contemplated suicide—20% having gone so far as to make an attempt. The hope for some has been that symbolic gestures by the state, expressing societal acceptance of homosexuality, might lessen the feelings of alienation and self-loathing which are thought to underlie these statistics.

There is no denying that religious beliefs have shaped Canadians’ attitudes on this issue, and that religious organizations have led the drive to retain the traditional definition of marriage. As a result the debate over same-sex marriage has prompted a

---

8 See Andrew Parkin, “A Country Evenly Divided on Gay Marriage” (October 2003) Policy Options 40. According to Parkin, 55% of regular churchgoers were opposed same-sex marriage, while opposition was at 28% among those who ‘attach less importance to church attendance.’
9 In Reference re Same-Sex Marriage 3 S.C.R. 698, [hereinafter, Reference], representatives from a range of religious faiths—known collectively as the Interfaith Coalition on Marriage and Family—were granted intervener status. Outside the courtroom, representatives of the Catholic Church were active from the outset, lobbying government to retain the traditional definition of marriage. See (e.g.) “Can Charter trump religion?” The Globe and Mail (1 August 2002) A19; “Catholic leaders urge faithful to vote for parties that back traditional values” Ottawa Citizen (9 January 2006) A4. As it became clearer that the legalization of same-sex marriage might be required under the Charter, officials within the Catholic Church urged then Prime Minister Paul Martin to invoke the s.33 notwithstanding clause to preserve the traditional definition. See “Block gay marriage, Catholics tell Martin; Cardinal wants notwithstanding clause invoked to allow for national discussion” The Globe and Mail (19 January 2005) at A1. As I explain below, religion’s main impact upon this debate came obliquely, as the opposition Conservative Party argued that the legalization of same-sex marriage would imperil religious freedom. It must be observed,
degree of public and scholarly reflection on the separation of church and state in Canada. Both sides in this debate are able to invoke the separation of church and state to buttress their position. Those in favour of same-sex marriage have argued that, in preserving the traditional definition of marriage, the state endorses a religiously-based conception of the family, and implicitly bows to religious prejudices against homosexuality.\(^\text{10}\) Meanwhile those opposed to same-sex marriage invoke the separation of church and state in arguing that the state’s redefinition of marriage constitutes an unwarranted trespass into an area that is properly the domain of the church, and that this poses a threat to religious freedom. Apart from this, there are those who deny altogether that the separation of church and state is part of Canadian constitutional law or tradition. Usually, that denial is part of an argument for retaining the traditional definition of marriage.

Despite all of this, public discourse on this issue has not degenerated into a gloves-off conflict between religious and secular worldviews. Participants in this debate have, for the most part, made an effort to present their views within a framework of generally accepted political principles. Even those who deny that the separation of church and state operates in Canada—such as current Prime Minister Stephen Harper—have made an effort to bracket comprehensive doctrines when speaking out on this issue.\(^\text{11}\) Working within the framework of relevant Charter principles, most have treated this issue more or less as a conflict between the equality rights of same-sex couples and

\(^{10}\) See (e.g.) Bruce MacDougall, “The Separation of Church and State: Destabilizing Traditional Religion-based Legal Norms on Sexuality,” (2003) 36 U.B.C.L. Rev. 1.  
\(^{11}\) Stephen Harper, “Challenges and Moral Guidance: Freedom of religion has come under attack” Ottawa Citizen (12 January 2006) A15: “...the separation of church and state is an American constitutional doctrine, not part of Canada's legal or political tradition...”
the religious freedom of those who oppose same-sex marriage.\textsuperscript{12} In short, debate in Canada has hewn closely to the language of secular rights, despite the protestations of some that the country has no constitutional commitment to the separation of church and state.

On the conservative side, as we will see in greater detail below, the predominant approach has been to acknowledge but downplay the equality rights of same-sex couples, in essence by claiming that marriage is not a fundamental right.\textsuperscript{13} This is then paired with a jealous concern to protect the religious freedom of those who oppose same-sex marriage. It is argued that the abstemious conception of religious freedom which allows the affront of same-sex marriage will lead, down the road, to churches being coerced into solemnizing such unions, religious leaders being charged with discrimination under provincial \emph{Human Rights Acts}, and so on. In all of this, one finds no express condemnation of homosexuality. The arguments are typically muted and one-step-removed: conservatives demand respect for religious views on homosexuality, but they seldom present or openly endorse the content of those views, or present their scriptural origins.

Bracketing scripture, in this case, no doubt worked to the political advantage of religious conservatives, for the Bible’s treatment of homosexuality is very harsh by Canadian standards of public discourse. This is not a case, like debates over the treatment of prenatal life, where religious views are easily blended into a message of

\textsuperscript{12} By comparison, open appeals to religious argument have been more common in U.S. public discourse on this issue. See Miriam Smith, “Framing Same-Sex Marriage in Canada and the U.S.A.: Goodridge, Halpern and the National Boundaries of Political Discourse” (2007) 16 Social Legal Studies 5. Smith argues that Canada’s history of coping with the English-French divide has led to a civic ethos of tolerance and sensitivity to rights. This general aversion to any semblance of intolerance makes it impossible for the Christian Right to make gains in Canada by vaunting intolerant attitudes towards homosexuality. Others have argued, though, that even the U.S. Christian Right has opted in this debate to invoke the interests of children and the value of monogamy, rather than the alleged sinfulness of homosexuality. See Frederick Liu and Stephen Macedo, “The Federal Marriage Amendment and the Strange Evolution of the Conservative Case against Gay Marriage” (2005) 38 PS: Political Science & Politics 211.

\textsuperscript{13} \textit{House of Commons Debates} (16 February 2005) at 3583 (Hon. Stephen Harper).
universal love. Indeed, as parliament amended the Criminal Code’s hate speech provisions in 2004, adding protections for gays and lesbians, some religious leaders were rightly concerned that this would effectively criminalize the public recitation of certain Bible passages, such as this one from Leviticus: “If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them”  

Those in favour of same-sex marriage have also framed their arguments largely by reference to Charter principles. Here the position has been that the equality guarantee requires that same-sex couples have access to civil marriage; that a ‘separate but equal’ quasi-marital institution devised for homosexuals would needlessly stigmatize them; and that present guarantees of religious freedom are, and will remain, sufficiently robust to ensure that religious groups are not punished or coerced for their opposition to homosexuality. On the liberal side too, then, comprehensive doctrines have been largely bracketed. One does not find legislators directly addressing, let alone challenging, religious opposition to homosexuality, nor does one find liberal politicians advancing any deeper philosophical doctrines in justifying their acceptance of homosexuality. They point only to the Charter. In this regard, one should perhaps not view the legalization of same-sex marriage as a resounding symbolic victory for homosexuality. The affirmation of same-sex marriage within the legislature and the courts, at least, was tightly framed as a vindication of the right to equality.  

On the liberal side, as well, the decision to bracket comprehensive doctrines and frame arguments within the Charter—and moreover, the decision to refer the matter to

---

14 See Bill C-415, An Act to amend the Criminal Code (hate propaganda). A special exemption was added, exempting expression on “a religious subject or an opinion based on a belief in a religious text.”

the Supreme Court of Canada for an advisory opinion—was no doubt politically motivated. At election time, Liberal leader Paul Martin was criticized for ‘hiding behind the Charter,’ and there may be some merit to this complaint. Same-sex couples, for one, might have found the affirmation of their equality a more heartfelt expression of the will of the Canadian people, had it come first from the nation’s elected body, rather than its appointed judiciary. That said, Martin’s opponent Stephen Harper could hardly cast the first stone on this front, for as explained, the Conservatives also hid behind the Charter, framing their opposition to same-sex marriage by reference to the guarantee of religious freedom. Hypocrisy aside, from the perspective of public reason, there is of course nothing blameworthy in relying upon a reasoned interpretation of widely shared political principles; indeed there is something blameworthy in failing to do so.

Apart from this rights talk, others have expressed opposition to same-sex marriage without explicit reference to the Charter. Conceding that there is an equality right to same-sex marriage, critics argue that this right should be limited for a host of reasons: to avert a slippery slope to polygamy, to protect children, to prevent the erosion of traditional family values, and so on. I consider arguments of this sort in part 4 of this chapter. What unites these arguments is that none directly invokes, or relies upon interpretations of, Charter rights. Within the framework of the Charter, these are best understood as candidate justifications for the infringement of same-sex couples’ equality rights, and I assess them as such. That is, I explore whether any of these proffered rationales for denying same-sex couples the right to marry will withstand a proportionality analysis. In the Supreme Court’s Reference Re: Same-sex Marriage, the

---

16 It may be of interest to note that in the 2004 election debates, leaders of both the Conservative Party and the NDP (Canada’s national left wing/labour party) leveled this accusation of ‘hiding behind the Charter’ against then Prime Minister Paul Martin. This accusation of ‘hiding behind the Charter’ is, I think, termed misleadingly. All political parties, on this issue at least, have invoked Charter principles in advancing their arguments. One assumes, then, that none of them thinks there is anything wrong or cowardly in standing behind those principles. What they mean to criticize is more aptly termed, ‘hiding behind the Court’.
full range of possible s.1 justifications was not put to the Court. In a way this has left the matter partially unsettled, since, as I say, some of the opposition to same-sex marriage is best conceptualized as falling within s.1.17

2. Equality and the Right to Marry

The *prima facie* argument for allowing same-sex couples to enter civil marriages is straightforward: civil marriage is a good allocated by the state, albeit a symbolic one, and the Charter’s equality guarantee forbids government from discriminating, in its allocation of benefits and burdens, on the basis of people’s sexual orientation.18 It was argued that an alternative institution of civil unions or *Registered Domestic Partnerships* for same-sex couples would provide functionally equal treatment, while preserving the traditional definition of marriage.19 However, the Charter’s equality guarantee is not directed at ensuring functional equality of outcomes for citizens; it is meant above all to protect human dignity against the offenses of prejudice and stereotyping. To create a separate institution for same-sex couples would send the message that they are outsiders, their relationships somehow distinct. In light of longstanding prejudices against homosexuality, that symbolic differentiation would have a stigmatizing effect.20

2.1 The Triviality Objection

It is often supposed that constitutional rights must always involve grave human interests: freedom of political expression, the right to vote, the right of *habeas corpus*, and so on. In the same-sex marriage debate, some have played upon this presupposition,

---


18 Sexual orientation was found to be analogous to race, gender, and other s.15 enumerated grounds, in *Egan v. Canada*, [1995] 2 S.C.R. 513.

19 Registered Domestic Partnerships (RDPs) are the available option for same-sex couples in (e.g.): Denmark (as of 1989), Norway (1993), Sweden (1994), and New Zealand (2004).

20 *Halpern* supra note 17 at para. 107.
insinuating that the right to marry is a comparatively trifling thing, which does not rise
to the level of a human rights concern. Then Opposition Leader Stephen Harper,
speaking before the House of Commons prior to the vote on same-sex marriage, argued
that,

[f]undamental human rights are not a magicians’ hat from which new rabbits can
constantly be pulled out. The basic human rights we hold dear: freedom of
speech, freedom of religion, freedom of association, and equality before the
law...do not depend on Liberal bromides or media spinners for their defense.21

The truth, however, is that within the Canadian constitutional tradition, rights are in a
constant state of growth and change—though the favoured and longstanding metaphor is
of a living tree, not a magician’s hat.22 The living tree metaphor captures the sense (or
hope) that there is some underlying doctrinal unity to the ever-adapting interpretation of
rights; the magician’s hat metaphor suggests, misleadingly, that the emergence of new
rights interpretations is random or capricious. The right to equality before the law is
particularly prone to growth and flux, because the content of that right has to track the
ever-changing content of the law itself.

To support the claim that “marriage is not a human right,” Conservatives pointed
to a 2002 decision of the UN Commission on Human Rights (UNCHR),23 where the
Commission rejected a complaint lodged by same-sex couples in New Zealand. The
couples’ demand of a right to marry had been rejected by the New Zealand Court of
Appeal, in 1998, and they turned to the UNCHR, where their claim was again turned
down.24 If the international laws to which Canada is a signatory do not protect the right

21 House of Commons Debates (16 February 1005) at 3583 (Hon. Stephen Harper).
Zealand.
of same-sex couples to marry, the argument goes, then same-sex marriage is not a matter of human rights.25

This appeal to international law falters, though, first because it rests on the assumption that Canada’s international human rights commitments act as a ceiling on the interpretation of its domestic rights guarantees. The opposite—that international law serves as a floor on domestic rights guarantees—is closer to the truth.26 Second, in the UNCR decision cited, no persuasive reasons were given: the decision simply defers, without any substantive analysis, to the black letter of the Covenant, where marriage is defined by reference to “men and women.”27 In all, the decision has no binding authority, because in interpreting the Charter, Canada can, and often does, surpass its obligations under international law; and nor does the decision contain so much as a pretense of persuasive authority.

It is open to opponents of same-sex marriage to argue for a restricted reading of the Charter’s equality guarantee, stripped down to the bare necessities set out in international law. The Court’s interpretation of the Charter—including its ‘living tree’ interpretative approach-- is not authoritative in public reason. Still, that living tree approach has a strong pedigree in the Canadian polity, and lies at the core of much of our collective thinking about rights; it can not be summarily overlooked.

25 This argument was made by Stephen Harper in the House of Commons, supra note 22 at 3579; see also Margaret Somerville, “What about the children?” in Daniel Cere and Douglas Farrow eds., Divorcing Marriage, supra note 1, 63 at 77.
27 Supra note 23 at para. 8.2:

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.
Moreover, those who claim that access to marriage is too trifling a concern to warrant Charter protection— and who wish to see equality claims restricted to ‘fundamental’ concerns— owe us an explanation as to how the line between fundamental and trivial equality claims is to be drawn. That line is hard to draw, because as explained, even trifling differences in treatment offend our sense of equality when they are rooted in distinctions that offend human dignity. The argument seems very strong that what separates valid equality claims from invalid ones has less to do with tangible benefits and burdens, and more to do with the attitudes that underlie the unequal treatment, and the feelings that those attitudes may engender. This is admittedly a bare sketch of a complicated question, but I mean only provide a general sense of the difficulties involved in dismissing equality claims as trivial in this way.  

It should be noted, finally, that even those who most stridently oppose same-sex marriage on religious grounds have reason to be leery of the triviality objection. Recall the discussion of the Court’s decision in Syndicat Northcrest v. Amselem, in chapter 3, where it was found that sincerity of religious belief was the only requirement in staking a claim under the right to religious freedom. The broader message there, one might suppose, is that the state should avoid second-guessing people’s deeper, identity-borne convictions, and instead take people at their word when they claim that some practice or belief is important to them. One’s choice of a life partner is like a religious belief, in being fundamental to one’s sense of identity, and so it stands to reason that comparable generosity should be extended in accommodating both. The triviality objection to same-sex marriage starts us down a path of diminished empathy and accommodation

---


30 Indeed, sexual orientation was found to qualify as a s.15 ground precisely for its analogousness to religion. See Egan v. Canada, [1995] 2 S.C.R. 513 at 549-50.
that minority religious groups might find objectionable in principle, if not worrisome in fact.

2.2 *The Definitional Argument*

I turn now to an entirely separate line of argument that has been advanced in denying that equality requires same-sex marriage. I label this the *definitional argument*, for the claim here is that marriage, by definition, *just is* the union of a husband and wife, and that there is nothing discriminatory in this, any more than with other gendered definitions, such as ‘father’ or ‘brother’. The tactic here is to close off the equality claim altogether by insisting that the definition of marriage is not fundamentally a matter of political or legal discretion, and therefore can not be challenged as such.\(^{31}\) In a variant of this argument, some have argued that the equality claim advanced by proponents of same-sex marriage has a vicious circularity to it: proponents begin by *assuming* that

\(^{31}\) Here are some examples of definitional arguments drawn from Canadian commentators (citations are listed below). F.C. DeCoste writes:

To make it plain: on pain of either nonsense or self-serving delusion, marriage as an institutional practice is deeply, irretrievably, and oppositely-sexed, just because it is the practice of men and women uniting as husbands and wives. This is its nature precisely because of the nature of the statuses it bestows and not because of any function, procreation especially, that some may wish to associate with them.

In a passage later quoted by Stephen Harper in House of Commons Debates (*supra* note 25), Margaret Somerville writes that marriage is inherently procreative, the implication being that it is inherently heterosexual:

Institutions have both inherent and collateral features. Inherent features define the institution and cannot be changed without destroying the institution. Collateral features can be changed without such impact. We rightly recognized that women must be treated as equal partners with men within marriage. While that changed the power of husbands over their wives, it simply changed a collateral feature of marriage. Recognizing same-sex marriage would change its inherent nature. (emphasis added)

Accusing others of ‘vicious circularity’ for their attempts at redefining marriage, Douglas Farrow writes:

...we need to notice that the main rights argument amounts to a nice piece of subterfuge. Its conclusion is that marriage must be redefined. This distracts us from the fact that marriage has *already* been redefined in the argument’s very first move. That is, a new category—the “close personal adult relationship”—has been invented to provide a framework for our understanding of marriage. Once this framework is accepted, it follows that homosexual unions can be marriage-like and, in that case, should qualify as marriage...This argument is obviously circular, and viciously so.

marriage between same-sex couples is conceptually coherent, which assumption then serves as the basis for the accusation that the state discriminates in refusing to recognize such unions.\textsuperscript{32}

These definitional arguments are difficult to situate within our usual framework of reasoning about rights. For, on the one hand, such arguments do not substantively engage the question of what equality requires. Talk of equality is sidestepped altogether, as attention is focused on the definition of marriage. But nor do these definitional arguments provide any real justification for the established definition of marriage. Those who advance the definitional argument do not, insofar as the argument is definitional, rest their case on any claims about how the traditional marriage serves some important purpose, or upholds some independent right. Thus, the definitional argument is not, strictly speaking, to be understood as a kind of s.1 justification for retaining the traditional definition of marriage at the expense of the equality rights of same-sex couples.

These definitional arguments are, nevertheless, quite often run together with teleological arguments— which is sensible, in a way, because some understanding of the purpose of marriage should no doubt guide us in arriving at its legal definition. It is important, though, that we not inadvertently slip between claims about the accepted linguistic meaning of ‘marriage,’ and claims about the purpose of marriage. These are separate questions and they must be kept separate. We seek a purposive account of marriage precisely for fear that our use of “marriage” in ordinary language may have built into it certain prejudices; for fear, that is, that we may be applying or withholding the label in ways that can not be defended by reference to any reasonable account of the purpose of marriage. To engage in purposive analysis of a term is to renounce any slavish attachment to its ordinary usage.

\textsuperscript{32} DeCoste, \textit{ibid.} at 628; Farrow, \textit{ibid.} at 98-99.
As the courts have noted, attempts to dismiss equality claims on definitional grounds, by reference to established linguistic practice, have a distinctly notorious history in Canadian law. Think, for example, of the infamous ‘Persons Case’ where it was argued that women were not, as a matter of intended meaning at the time of Confederation, ‘qualified persons,’ and hence were ineligible for Senate appointment. Marriage, like the normative concept of ‘qualified person,’ is a social construct, and unjustifiable prejudices sometimes find their way into the very definition of such constructs. It may be that the institution of marriage is only justifiable when understood on terms that exclude same-sex couples— for example, that marriage is best understood as facilitating procreation. But, again, the success or failure of those arguments does not turn on semantics.

Part of the reason we do not settle substantive disagreements by reference to the definition of words is that those very definitions are in a constant state of flux. Marriage between people of different races has at times been forbidden, for example, and we have no difficulty, in hindsight, seeing the flaw with definitional arguments in that context. Some have argued that these previous definitional changes did not strike at the inherent or essential meaning of marriage, while changing the opposite-sex requirement would do so. But that is question-begging unless it is backed by some reasoned account of how one distinguishes inherent features from collateral or contingent ones. Such a reasoned account will not turn on semantics, but on substantive claims about the underlying purpose of marriage. For the moment I only wish to rule out semantic or definitional arguments.

34 See Reference supra note 9 at para. 25.
Finally, the definitional argument is at times formulated as a kind of slippery slope argument. Having redefined marriage to include same-sex couples, the argument goes, the door will then be opened to further redefinition--even to the eventual inclusion of polygamous relationships. This argument is tied to a criticism of liberalism discussed in previous chapters, namely, that liberalism subordinates shared values and traditions to individual preferences. Seana Sugrue offers a perfect illustration of the sort of argument I have in mind:

In claiming for homosexuals the right to marry, the state also claims for itself the ability to declare what constitutes marriage. It endows itself with the prerogative of defining its terms. It transforms marriage from a pre-political obligation into its own creation. At the same time, it replaces marriage as an obligation within conjugal society to marriage as a choice and a means of self-gratification. In this way, it changes the character of marriage not just for same-sex couples, but for everyone. By allowing same-sex marriage, the state decrees that, henceforth, marriage is what the state says it is. Marriage then loses its status as a fundamental institution of civil society, and becomes a right, granted by the state, for the desiring self.  

This is not really an argument about same-sex marriage, so much as a global condemnation of liberalism. It is a familiar refrain from social conservatives that liberalism empowers the state to capriciously alter or abandon established traditions according to the whims of the present generation.

As I shall argue repeatedly in this chapter, this misrepresents political liberalism as a theory, just as it misrepresents constitutionalism liberalism in practice. Sugrue wrongly implies that the demand for same-sex marriage is just one in an endless array of individual preferences which, if liberals have their way, the state will be obliged to accommodate. But no such thing is required by the theory, or allowed in practice. On

---

36 Seana Sugrue, “Soft Despotism and Same-Sex Marriage” in Robert P. George and Jean Bethke Elshtain, *The Meaning of Marriage* (Dallas: Spence Publishing, 2006) 172 at 189. This concern that marriage is being redefined to suit the preferences of adults is often tied to the concern that the interests of children are being overlooked. That is the gist of Sugrue’s argument, and it is echoed in Margaret Somerville, “What about the children?” in Daniel Cere and Douglas Farrow eds., *Divorcing Marriage* supra note 1 at 63. See also Daniel Cere, et al., *The Future of Family Law: Law and the Marriage Crisis in North America* (New York: Institute for American Values, 2005).
the account defended here, at least, public reason is grounded in widely shared political values, not in preference-satisfaction utilitarianism. Indeed, on the account defended here, one is barred from invoking the truth of preference satisfaction utilitarianism as a public justification for same-sex marriage. The expectation in the instant case is only that the legal definition of marriage be made to accord with generally accepted political principles—specifically, the principle that differential treatment on the basis of sexual orientation is wrongful. (Note that conservatives seldom if ever contest this principle.) This in no way grounds any broader expectation that marriage be redefined to suit any and all individual preferences. This feature of political liberalism is reflected in our actual constitutional practice. As a practical matter in the real world of constitutional discourse, complaints about the legal definition of marriage will go nowhere unless one can point to one of the widely-accepted principles contained in the Charter as a starting point. Whether we are forced by some such principle to accommodate polygamists is a separate question, addressed in detail below.

2.3 The Argument from Social Engineering

Some have noted that the institution of marriage has cultural and religious origins which predate the state’s involvement, and this serves a starting point for arguing against same-sex marriage. Marriage’s historical origins in religion are meant, somehow, to count in favour of retaining the traditional, opposite sex, definition in law. This argument may be understood as just another instance of the definitional argument addressed in the previous section, but let us put aside that possibility, having now seen the defects of that approach. In opposing changes to the definition of marriage, one might instead invoke a principle of the separation of church and state, where the emphasis is put on protecting religious institutions from state interference. The idea

---

37 Preference-satisfaction utilitarians may of course be drawn to political liberalism, but the two views are not equivalent. Preference satisfaction utilitarianism is reflected in political liberalism only to the extent that it overlaps with other reasonable comprehensive doctrines.
here is that marriage in some sense belongs to the church, and that the state therefore is barred from meddling with the definition of marriage. For those who accept the underlying premise of this argument—namely, that institutions with religious origins ought to be shielded from social engineering by the state—the issue is often re-framed in historical terms, focusing on whether marriage is at root a secular/legal institution or a religious institution.\(^{38}\)

Notice that this argument does not rest on any specific allegation that the state’s redefinition of marriage infringes religious freedom—claims of that sort will be the subject of part 2 of this chapter. Instead, the argument is more broad-brushed, alleging that in acting to redefine marriage, the state asserts sovereignty over domains that should be left to religious institutions. At most the state may opt to recognize cultural and religious institutions such as marriage, but it has no business interfering to redefine such institutions, even in the name of Charter values, for to do so smacks of social engineering, or so it is alleged in this line of criticism. The argument’s underlying

---

\(^{38}\)F.C. Decoste, of the University of Alberta’s Faculty of Law, has been the leading proponent of this argument from social engineering. See (e.g.) F.C. DeCoste, “Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage” supra note 1; F.C. DeCoste, “The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law” 41 Alberta L. Rev. 619; F.C. Decoste, “What’s the Charter Got to Do With It?” in Daniel Cere and Douglas Farrow, Divorcing Marriage, supra note 1.

There is a tendency to run together this claim about the importance of respect for longstanding institutions with run-of-the-mill complaints about judicial activism. The two claims involve distinct considerations. I do not want engage the allegation of anti-majoritarianism, for a few reasons. First, in Canada, same-sex marriage was to some extent brought about by elected bodies; conservative critics themselves have been the most vocal in claiming that legislators had room to chart a different course. (See Hon. Irwin Cotler, “Marriage in Canada—Evolution of Revolution” (2006) 44 Fam. Ct. Rev. 60 at 62; F.L. Morton, “Can Judicial Supremacy Be Stopped?” Policy Options Oct. 2003 at 25.) Second, the anti-majoritarian argument fails on its own terms, as polls indicate that a narrow majority of Canadians favoured same-sex marriage at the time of its legalization. See for example, the discussion in the November 2002 Department of Justice discussion paper entitled Marriage and the Legal Recognition of Same-sex Unions, (online:<canada.justice.gc.ca/en/dept/pub/mar/index.html>) indicating that 53% of Canadians favoured same-sex marriage in 2002. Third, as explained in previous chapters, my view is that these matters should be decided on the basis of a reasoned interpretation of the Charter principles engaged—whether that interpretation is arrived at by the courts, legislators or citizens. In defending public reason, I do not mean to defend judicial review per se.
premise— that the state should avoid as much as possible any interference with culture and religion— draws upon Enlightenment liberalism, or so it is claimed.  

It is telling that this argument is advanced, by Canadian constitutional scholars no less, without invoking the right to religious freedom. As I have discussed at length in previous chapters, the scope of religious freedom has been defined very generously under the Charter. That opponents of same-sex marriage come to the rescue of religious institutions in this way— raising the banner of liberalism without invoking religious freedom— is, I think, indicative of the underlying weakness of their argument. For it suggests they are all too aware their position can not be defended using more carefully articulated rights claims; they resort instead to broad brushstrokes, relying on this sweeping distinction between the domains of the state and the domains of the church.  

One response to the argument from social engineering is to clarify, as the courts have, that religious institutions remain altogether free to operate as they choose, but insofar as the state is involved in overseeing civil marriage, Charter compliance is non-negotiable. Legislators and the courts have gone to great lengths to distinguish civil marriage from religious marriage, stating unequivocally that changes to the former have no bearing on the latter. This is the standard approach, applied in other areas. In other contexts, it is not supposed that state actions and institutions with historical precursors in the church ought, on that basis, to be free from Charter review. University schooling, for example, emerged in the Western World under the aegis of the Roman Catholic Church. Yet if the state took an active role in overseeing universities, as it has in

39 See DeCoste, “Courting Leviathan” supra note 1 at 1111.
40 Imagine, by way of analogy, that a group accused of criminal obscenity or hate speech were to defend its activities in a similar manner, not invoking their right to freedom of expression, but instead advancing abstract arguments to the effect that the state should not interfere with civil institutions. The roundabout approach would immediately strike us as puzzling.
41 Recall, the legislation itself is titled the Civil Marriages Act (supra n.3). See also Reference re Same-Sex Marriage, 2004 SCC 79 at para. 22.
overseeing marriage—say, specifying classes of individuals who may qualify for university degrees—Charter compliance would be expected as a matter of course.

Under the modern welfare state, government is intricately entwined with civil society, meaning that the line between state and non-state domains is not easily drawn. Of course it remains an option for opponents of same-sex marriage to argue that the state should withdraw from marriage altogether, and those who endorse this approach can, with consistency, claim that the state is overreaching when it redefines marriage to accord with the Charter. But where one supports the state’s involvement in marriage, the accusation of social engineering requires more careful argument. That accusation implies that some unjustified state coercion has taken place, but such accusations must be made by reference to a framework of rights and liberties held by all citizens. Talk of ‘social engineering’ will not suffice. Citizens do not possess a right against social engineering, because that right is too vaguely defined, and could in principle be invoked by any and all citizens, against countless aspects of the modern welfare state.

Polygamists, drug users, prostitutes, and a host of others—for whom, incidentally, social conservatives normally show antipathy—have complaints about the state’s social engineering. Conceived as a right belonging to all citizens, the right to be free from social engineering would not lead us back to traditional values, as social conservatives might hope, but to a night watchman state.

---

43 This was the approach taken (e.g.) by the Ontario provincial government with regard to Sharia law arbitration. Rather than try to reshape Sharia law, and other religious legal codes, to conform with Charter values, the Ontario government opted instead to withdraw state backing for religious tribunals. See “Ontario Premier rejects use of Sharia law” The Globe and Mail (9 November 2005) A1.

44 One of the ironies here is that social conservatives so often argue against same-sex marriage on grounds that the state ought to reinforce the traditional, nuclear family. Social conservatives, more than anyone in this debate, hold up a perfectionist view of the family and urge the state to engage in social engineering towards the promotion of that view. By contrast, advocates of same-sex marriage are often resolutely anti-perfectionist about the family. See (e.g.) Margaret Denike, “Religion, Rights, and Equality: The Dream of Relational Equality” (2007) 22 Hyapatia 71.
One final point: proponents of the argument from social engineering will at times invoke the Supreme Court’s commitment to *contextualism* as a premise in arguing for deference to established tradition. It is claimed, in essence, that longstanding traditions, reflected in societal customs and the common law, provide the context for our legal concepts (here, the concept of marriage), and thus that contextualism requires deference to tradition. This argument plays upon an equivocation in the meaning of ‘context’. When the Court speaks, as it often does, of the need to approach *Charter* claims in context, the intent is not to advocate deference to tradition. In the Court’s usage, contextualism is contrasted with abstraction (or formalism): it denotes the idea that one should consider the particular facts at issue in a given *Charter* claim, weighing them in their real world context, instead of trying to define the scope and weight of rights in their abstract form. A commitment to contextualism so understood has nothing whatsoever to do with deference to tradition.

2. 4 Public Reason and Societal Tastes

In the previous two sections, I have argued that definitional claims about the meaning of marriage, and historical claims about the origins of marriage, should both carry little or no weight in this debate. But can it really be that such considerations have no bearing in public deliberations? There are other contexts, seemingly, where we are content to point to the (mere?) fact of received moral opinion or longstanding societal/religious custom as justification for state action. Laws against bestiality, necrophilia, and cannibalism are difficult to justify as anything but a reflection of societal tastes (distastes, in those cases). Indeed, those distastes may, like the traditional

---


definition of marriage, have roots in religion.\textsuperscript{47} The question, then, is whether our resort to religious moralism to justify the criminalization of bestiality \textit{etc.} forces us to give weight to religious arguments for the traditional definition of marriage.\textsuperscript{48}

To concede that moralism may justify laws is not to surrender blindly to that moralism, of course. It is possible and indeed necessary to probe moralistic judgments, to see whether they stand up as principled on their own terms; that they are not simply prejudices or rationalizations or such.\textsuperscript{49} In fact one of the arguments offered a moment ago was an attempt to meet the religious moralist on their own terms: can we really accept that state-operated institutions with precursors in the church are shielded from the requirements of public reason—or do we reject this principle when applied to universities? If, contrary to my argument, we can accept that principle, then debate over of marriage’s religious/historical essence may have some bearing in this debate.

As a more general point about public reason, though, we should be clear about why our resort to moralism on the issues of bestiality, necrophilia, and cannibalism is not the thin end of the wedge for allowing legal moralism generally. There is a difference

\textsuperscript{47} For example, Leviticus 18:23 forbids bestiality. Secular ethicists have questioned the taboo surrounding bestiality. Martha Nussbaum argues, on Freudian grounds, that we draw absolute boundaries between human and non-human animals—treatning as taboo any transgression of those boundaries—because we unflinchingly recognize the mortality of non-human animals and can’t bear to recognize our own mortality. She notes how the human emotion of disgust often tracks this human/non-human boundary; for example we are disgusted by all bodily excretions except the one variety unique to humans, tears. Martha Nussbaum, \textit{Hiding from Humanity: Disgust and Shame in the Law} (Princeton: Princeton University Press, 2004). Peter Singer questions the cogency of our opposition to bestiality on utilitarian grounds. It is not obvious that bestiality is harmful to either the human or animal involved. And if bestiality \textit{is} harmful to the animal, the harm seems trivial next to the suffering animals routinely face in the slaughterhouse and on factory farms. Peter Singer, “Heavy Petting” online: <http://www.nerve.com/opinions/singer/heavypetting>.

\textsuperscript{48} See Patrick Devlin, \textit{The Enforcement of Morals} (Oxford: Oxford University Press, 1965). It is of interest that Devlin’s own account of the essential purpose of marriage is compatible with same sex marriage: “The institution of marriage is a good example for my purpose because it bridges the division, if there is one, between politics and morals. Marriage is part of the structure of our society and it is also the basis of a moral code which condemns fornication and adultery.” \textit{Ibid.} at 38. Conservatives who accept this as the function of marriage, and who complain of homosexuals’ supposed failings at monogamy, should welcome same-sex marriage.

between justifying a law and justifying the infringement of a right. The difference is that the requirements of public reason are triggered only when rights are infringed. There is no right to engage in bestiality etc., and so the criminalization of those practices can be justified with non-public reasons.

This argument may appear ad hoc at first blush: it may be objected that on a ‘large and liberal’ reading, the Charter’s generic liberty guarantee (s.7) encompasses bestiality, etc., so that public reason is triggered with these issues. I believe that rejecting this argument is the furthest thing from ad hoc; indeed it goes to the heart of public reason. When we agree to honour a set of rights and freedoms, we commit to lifting certain interests up above the fray of ordinary politics. On the open-ended and non-deterministic account of public reason that I have defended, this is all we commit to. We commit to deliberating cautiously and transparently about the interests captured by those rights; to guarding them as best we can in the light of competing priorities. Public reason can be thought of as triage method for democratic deliberations. Now, to suppose that the right to negative liberty is all-encompassing is to defeat the purpose of public reason so understood. It is to say that all of politics should be lifted above the fray of ordinary politics. If public reason is to serve any function, we have to be willing to say that some liberties are more important than others. Bestiality, necrophilia, and cannibalism do not reflect important liberty interests, and are rightly left to ordinary politics. Or if I am wrong about this and a convincing case can be made that these activities reflect important interests, then it follows that their prohibition can not be justified by societal distaste.\footnote{It may be objected that, in my earlier discussion of same sex couples’ right to marry, I rejected arguments from triviality, while here I am invoking the triviality of liberty interests in bestiality etc. to address a separate concern. But the difference lies in the nature of the right to equal treatment. State actions which are trivial in their concrete effects may offend equality through their symbolic effect, because the harm of unequal treatment resides largely in its psychic impact upon human dignity.}
It must be acknowledged, in the final analysis, than no account of public reason can be all things to all people. There are claims that can not be reconciled with respect for Charter values. Comprehensive doctrines which hold (e.g.) that women are naturally subordinate to men may wither away in a society committed to equality, and modes of family life built around such views may wither away also. Moves by the state to correct the unequal treatment of same sex couples may deal a further blow to traditional conceptions of the family. This cost could only be avoided by supposing that societal traditions, rooted in comprehensive doctrines embraced by some, take precedence over the equal treatment of all. If the Charter values of equality and fundamental personal autonomy are accepted as the basis of public reason, then such arguments must be ruled out as unreasonable.\footnote{See John Rawls, \textit{Political Liberalism} (New York: Columbia University Press, 1993) at 47-88.}

3. Same-sex marriage and the rights of religious believers

As explained, the debate over same-sex marriage is commonly understood as a rivalry between the equality rights of homosexuals, just explored, and the rights of religious believers. There is no \textit{a priori} hierarchy between the right to equality and the right to religious freedom, and so the issue must be approached by considering the particular claims that might be advanced under the rubric of these two rights. One of the challenges we face, in approaching this issue in the manner recommended by public reason, is that we are forced to speculate about the possible impact of same-sex marriage upon religious freedom, and speculations on this front vary dramatically. While some see only isolated and manageable risks, social conservatives see same-sex marriage as posing a wide range of threats to religious freedom. Iain Benson, for example, writes that,

Those who have, as the saying goes, left the closet, and now demand public acceptance and social recognition are perceived by many as seeking to drive those
who will not accept their conduct, into the closet they have left relatively recently.\textsuperscript{52}

Threats to religious freedom must be taken very seriously, but that does not license fear mongering. These threats need to be explained clearly: a clear connection must be shown between the legalization of same-sex marriage and the putative threat to religious freedom. From there it would have to be demonstrated, with regard to the established threats, that religious freedom ought to be protected at the cost of limiting the equality rights of homosexuals.

\textit{3.1 Religious alienation in reaction to same-sex marriage}

Following the Ontario Court of Appeal’s decision in \textit{Halpern},\textsuperscript{53} whereby same-sex marriage was legalized in the province of Ontario, some complained that the change would cause feelings of alienation for members of faiths that object to homosexuality. Daniel Cere, of the Newman Institute for Catholic Studies, explained that Catholics “would have a hard time recognizing a place for themselves in this legally redesigned landscape.”\textsuperscript{54} Voicing similar concerns, the Director of the Centre of Islamic Education in North America explained that “it would become harder for Muslims to participate in Canadian society if that society insisted on acceptance of unions that our religion teaches us are an affront to Allah.”\textsuperscript{55}

We have seen in previous chapters how the \textit{Charter’s} guarantee of religious freedom has been interpreted to require considerable sensitivity to the feelings of religious believers. Forms of state coercion which, in purely functional terms, are readily allowable—such as requiring merchants to close shop on Sundays—are forbidden when motivated by state aims that are alienating to religious believers. In this, there is a certain parallel to the equality rights discussed in the previous section: our concern is not

\textsuperscript{52} Ian T. Benson, “A Civil Argument About Dignity, Beliefs, and Marriage,” \textit{supra} note 1.

\textsuperscript{53} \textit{Halpern supra} note 17.


\textsuperscript{55} \textit{Ibid.}
strictly with the tangible coercive impact, but with the impact upon religious believers’ dignity and feelings of belonging. Opposition to same-sex marriage, of the sort just quoted, can perhaps be understood as invoking this general right to be free from religious alienation. The legalization of same-sex marriage, on this view, is seen as the state’s endorsement of a secular humanist ‘religion,’ and this causes feelings of alienation for the religious believer.

By now it should be clear that such arguments are unsustainable. Simply put, one can not reasonably advance these three claims at once:

1. that it is wrong for the state to endorse any particular comprehensive doctrine;
2. that in upholding the rights of other groups, the state wrongfully endorses their comprehensive doctrines;
3. that the state must uphold the rights of one’s own group.

Those who advance such arguments demand that attention be paid to their own sectarian concerns while condemning the state for tending to the concerns of others. Every sub-group in society could deploy arguments of this form, advanced from the perspective of their own concerns, and there would be no common basis for choosing between them; notably, for present purposes, gays and lesbians could deploy arguments of this form, mutatis mutandis, against religious believers. Accordingly, in the Reference, the Supreme Court rightly gave short-shrift to the general claim that same-sex marriage per se discriminates against religious believers, stating simply that,

The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of Charter rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the Charter was meant to foster. 56

To amplify the point, consider how the Civil Marriages Act contains express protections for religious groups, ensuring their right to publicly condemn homosexuality,

---

56 Reference supra note 9 at para. 46.
and to discriminate against homosexuals in the provision of goods and services related to marriage:

For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same-sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom. 57

As previously mentioned, federal hate speech laws contain similar exemptions for hateful expression that happens to be rooted in religion. 58 There are, one should note, no reciprocal exemptions, in any legislation, shielding those who express hateful attitudes towards, or refuse service to, religious fundamentalists. The point, for present purposes, is that gays and lesbians may well experience a sense of alienation at knowing that the state has provided these one-sided protections for their religious antagonists. The response is to say—as we do in defending same-sex marriage in the face of religious alienation—that in protecting rights in this way, the state does not endorse or denounce any views about homosexuality.

3.2 A Pandora’s Box of Threats to Religious Freedom?

For their part, the opposition Conservative Party worried that the express guarantees of religious freedom contained in the original draft of the Civil Marriages Act, along with the solemn reassurances of Supreme Court, 59 would not provide sufficient protection for religious believers. As then Opposition Leader, Hon. Stephen Harper argued in the House of Commons:

57 Civil Marriages Act supra note 5 at art. 3.1. The effect of this provision is unclear. The intent obviously is to protect churches and religious officials from any state sanction for their refusal to host or officiate same-sex marriage. The clause is so broadly worded, though, that it may be taken also to include civil marriage commissioners.
58 Supra note 14.
59 See generally, Reference supra note 9 at paras. 47-60.
What churches, temples, synagogues and mosques fear today is not immediately the future threat of forced solemnization, but dozens of other threats to religious freedom, some of which have already begun to arrive and some of which will arrive more quickly in the wake of this bill. ⁶⁰

Harper then quoted from an article by Father Raymond De Souza, detailing some of these other perceived threats:

First it will be churches forced to rent out their halls and basements for a same-sex couple’s wedding reception. Then it will be religious charities forced to recognize employees in same-sex relationships as legally married. Then it will be religious schools not being allowed to fire a teacher in a same-sex marriage. Then it will be a hierarchical or synodal church not being allowed to discipline an errant priest or minister who performs a civilly legal but canonically illicit same-sex marriage. All of this can happen short of the worst-case scenario specifically exempted in the federal government’s proposed law. ⁶¹

Conservatives worried that the federal government’s attempts to immunize religious groups against these threats, with the exemptions in the Civil Marriages Act quoted above, would ultimately be in unenforceable. Under the Constitution Act, 1867, the solemnization of marriage falls under provincial jurisdiction, meaning that once same-sex marriage was legalized at the federal level, the matter would be handed over to the provinces to regulate. ⁶² In redefining marriage, the federal government would set in motion a process that it would be powerless to regulate. The alternative, pitched as a compromise position by the Conservatives, was to create “other forms of union, however structured, by appropriate provincial legislation, whether called registered partnerships, domestic partnerships, civil unions or whatever...entitled to the same legal rights, privileges and obligations as marriage.” ⁶³ This approach has been adopted by many

---

⁶⁰ House of Commons Debates (16 February 2005) at 3581
⁶¹ The quotation is from Raymond J. De Souza, "Thinly disguised totalitarianism" (2004) 142 First Things at 9.
⁶² Reference supra note 9 at paras. 35-39.
⁶³ House of Commons Debates (16 February 2005) at 3583.
European countries, but as explained, in Canada it has been impugned as a species of ‘separate but equal’ treatment for gays and lesbians.

Supposing, for the sake of argument, that one’s primary aim as a legislator were to avert these perceived threats to religious freedom, would it follow that one should oppose same-sex marriage? As a matter of law, it is unclear how the choice between same-sex marriage and civil unions has any bearing on these other perceived threats to religious freedom. To illustrate the point, reconsider Father De Souza’s list of concerns, this time with the term ‘civil union’ substituted for ‘marriage,’ and ask whether these concerns disappear as a result of the substitution:

First it will be churches forced to rent out their halls and basements for a same-sex couple’s [civil union] reception. Then it will be religious charities forced to recognize employees in same-sex relationships as legally [bound by civil union]. Then it will be religious schools not being allowed to fire a teacher in a same-sex [civil union]. Then it will be a hierarchical or synodal church not being allowed to discipline an errant priest or minister who performs a civilly legal but canonically illicit same-sex [civil union ceremony].

Religious groups wishing to discriminate against homosexuals may in future face legal challenges of the sort that Father De Souza describes, but there is no reason for thinking that such problems would disappear, or even be mitigated, by denying same-sex couples the right to marry. As I will explain in greater detail below, the salient question in determining whether religious believers can be sanctioned for denying services to homosexuals is whether the service in question is reflective of core religious beliefs. Thus, as the law stands, religious believers will not be sanctioned for preaching anti-homosexual views, but they may be sanctioned for denying, say, printing services to homosexuals. The difference being that screening clientele for printing services is peripheral to one’s religious convictions. It is difficult to say (e.g.) whether religious charities might be compelled to recognize the same sex marriages of their employees.

---

64 See supra note 19.
65 Also, it is unclear whether the federal government is able, within the division of powers set out in s.91 of the Constitution Act, 1867, to create a distinct legal category for same-sex couples.
The point for present purposes is only that the determinative issue would not be whether the couple is *married* or *joined in civil union*. Moreover, if there is reason for thinking that religious groups could discriminate against same-sex couples with greater impunity under a regime of civil unions, this directly belies the Conservatives’ claim that that alternative regime would provide the same “legal rights, privileges and obligations as marriage.”

There is one plausible sense in which the legalization of same-sex marriage may impact these other legal threats facing religious groups. In legalizing same-sex marriage, government may reinforce in public consciousness the idea that discrimination on the basis of sexual orientation is unacceptable. Indeed, this is surely part of the aim for those who promote same-sex marriage. This change in popular consciousness may in turn have a subtle effect upon how these other legal challenges are decided. The more society comes to accept sexual orientation as akin to race or gender, the harder it may be for courts and provincial human rights tribunals to uphold the rights of religious groups to discriminate in a range of other contexts. This is a perfectly realistic concern for religious groups, but the question is whether it qualifies as a *public* reason. Others have referred to arguments of this sort as *attitude altering* slippery slope arguments: arguments of this form allege that seemingly isolated changes will have an effect upon public attitudes, with unforeseen consequences. Such arguments are problematic, from the perspective of public reason, inasmuch as they tacitly presume that no reasoned balance can be struck between (e.g.) equality rights and religious freedom. For those fearful of slippery slopes, every victory for the equality rights of gays and lesbians is seen as a chink in the armor of religious freedom. That paranoia may be reciprocated, with every victory for religious freedom being seen as a threat to the equality rights of gays and lesbians. Given sufficient paranoia over slippery slopes, both sides may come to see

---

rights discourse as an all-out battle to secure their own position by stamping down the rights of others. The objective in establishing an ethos of public reason is precisely to replace reciprocal paranoia with reciprocal trust, by advancing a framework of shared political principles, within which all sides are assured an ability to live as they see fit. I return to this dilemma below, in discussing the argument that same-sex marriage will lead by slippery slope to polygamy.

3.3 Religious Freedom and the Right to Refuse Solemnization

I have just argued that the connection between same-sex marriage and these other assorted threats to religious liberty is tenuous, but that is not to say that religious freedom faces no threats whatsoever. Now that same-sex couples are able to marry, they will require the services of marriage officials, and some of those officials may wish to refuse on religious grounds. In thinking about this issue, it makes sense to differentiate between civil marriage commissioners—who are employees of provincial governments—and religious officials, who are private actors (though they are empowered by the state to solemnize marriages). 68

Consider civil marriage commissioners, employed by provincial governments, first. Should their refusal to officiate same-sex marriages be accommodated, in the way that (e.g.) the religious beliefs of Sikhs are accommodated by the RCMP dress code? To date, the provinces have taken differing positions on this: some have amended their provincial Marriage Acts, granting marriage commissioners the right to refuse; other provinces have indicated that commissioners have no right to refuse, forcing commissioners to solemnize same-sex marriages or quit their jobs; others allow refusal...
provided a substitute commissioner is available. Those who invoked religious freedom as grounds for opposing same-sex marriage will point to those provinces where commissioners are now required to officiate as partial confirmation of their fears. It may well be the case that some government employees are now compelled to act against their religious beliefs as a condition of their employment. Should this cause regret about the legalization of same-sex marriage?

There is an obvious sense in which this matter differs from standard cases of religious accommodation in government workplaces. In allowing Sikh RCMP officers to wear turbans, or accommodating Saturday worshippers in work scheduling, government does not send any symbolic message to users of government services. By allowing civil marriage commissioners to turn away same-sex couples, though, it might be argued that government indirectly supports discrimination. The standard view is that government employees can not discriminate on the job. Indeed, it is hard to see how one might prevent discrimination by government while allowing discrimination by government employees. It is unthinkable that government employees might be permitted to refuse service to citizens on the basis of gender, race or ethnicity; or even that they would be allowed to refuse service to homosexuals in any context other than marriage. To carve out an exception to this general rule, allowing civil marriage commissioners to turn away same-sex couples, sends an unmistakable message.

It might be argued that marriage solemnization is in a distinct category: among all government services, it trenches most deeply onto religious terrain. Employees at Revenue Canada who object to filing tax returns for same-sex couples have a tenuous claim under the right to religious freedom—because tax collection has only the most tenuous connection to religion—but the solemnization of marriage is a special case.

---

69 Bruce MacDougall, “Refusing to Officiate at Same-sex Civil Marriages” supra note 67 at 354-55.
70 Ibid.
One difficulty with this view is that it contradicts the government’s contention, throughout this debate, that civil marriage and religious marriage are distinct institutions. This denial of the distinction between civil and religious marriage is problematic, for it invites civil marriage commissioners to look upon themselves as religious officials. If we are open to having them act on their religious views in the performance of their duties relating to solemnization, we should be open to their turning away members of rival faiths, individuals who are previously divorced, and so on.\(^{72}\)

There has been no demand that civil marriage commissioners be allowed to act out their religious views on the job in any of these other ways, and this makes the hand wringing over same-sex civil marriage somewhat suspicious.\(^{73}\) Concern over the religious freedom of civil marriage commissioners seems to have emerged all too conveniently as a foil for same-sex marriage.

Turn now to the question of religious officials who solemnize marriage outside of government. Is there reason to fear that, with the advent of same-sex marriage, these private actors might be compelled to solemnize such unions against their religious convictions? To date, there have not been any cases of same-sex couples challenging the right of religious officials to turn them away. This is understandable, because same-sex couples wanting a religious ceremony will naturally turn to congregations where they are welcomed, rather than twisting arms at congregations that turn them away. These practical considerations alone should raise serious doubts about the threat posed to religious freedom.

Religious conservatives can, and frequently do, point to a handful of court cases where the equality claims of gays and lesbians have won out over religious freedom. Three cases in particular are mentioned regularly as evidence of the impending threat to religious freedom. In *Brillinger v. Brockie*, Brillinger tried to have stationary printed for

\(^{72}\) Bruce MacDougall, “Refusing to Officiate Civil Marriages” *supra* note 67 at 355.

\(^{73}\) *Ibid* at 358.
the Canadian Lesbian and Gay Archive, only to be turned away by Brockie, a local printer. When the matter was raised before the Ontario Board of Inquiry—the body charged with assessing private sector human rights claims—Brockie explained that he had refused the printing job out of religious opposition to homosexuality. The Board held that it was reasonable to infringe upon Brockie’s religious freedom for the sake of preventing discrimination in this case. The reasoning was that merely printing stationery for a gay and lesbian positive organization did not strike at the core of Brockie’s religious convictions.74

In Hall v. Powers,75 a gay student turned to the courts seeking an injunction, after administrators at his Catholic high school denied him permission to bring his boyfriend to prom. In reasoning similar to Brillinger v. Brockie, it was found that the school’s decision had little or no basis in Catholic doctrine; to allow such a tenuous invocation of religious freedom would undermine the equality rights of gays and lesbians:

If individuals in Canada were permitted to simply assert that their religious beliefs require them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and lesbians in Canada because everyone who wished to discriminate against them could make that assertion. 76

The court granted an injunction against the school, requiring that the student and his date be allowed to attend, on grounds that Catholic theology does not forbid same-sex dancing.77

In Trinity Western University,78 the British Columbia College of Teachers denied Trinity’s application to be accredited as a teacher’s college, on grounds that the school’s

---

76 Ibid. at para. 31.
77 It is unclear whether the reasoning Brillinger v. Brockie and Hall v. Powers can be squared with the newer test for religious freedom, set out in Syndicat Northcrest v. Amselem, [2004] 24 SCC 47. Recall, in the latter case, the Court found that the test in establishing a religious freedom claim is sincerity of religious belief—as opposed to theological correctness. There are difficulties, obviously, in applying such a subjective test to corporate body such as a Catholic high school, for the question then becomes: whose sincere beliefs? It remains to be seen how the Court will address these difficulties.
code of conduct, which all students are made to sign, contained religious condemnations of homosexuality. The College of Teachers was concerned that, were *Trinity* accredited, its graduates might bring their intolerant attitudes into the classroom. The Supreme Court ultimately allowed that the University could be accredited, but only on the supposition that its graduates would keep their opposition to homosexuality in check in the classroom. Though technically a victory for religious freedom, the decision is often taken to indicate the tenuousness of religious freedom in these contexts; *only* belief, not expression or action, is protected.

In arguing against same-sex marriage, religious conservatives will often point to these three cases as indicative of the threat posed to religious freedom by the equality claims of gays and lesbians. If printers are forced to print materials against their religious objections, and Catholic schools are made to allow gay couples at their prom events, why not fear that religious officials will be made to solemnize same-sex marriages?

However, the connection between these earlier cases and the issue of solemnization appears quite tenuous, on a moment’s reflection. Solemnization involves the actual performance of religious rites, and so the courts can scarcely reason, in a manner analogous to these previous cases, that marriage officiation is peripheral to the practice of religion, or unsupported by church doctrine.\(^79\) On the contrary, the solemnization of marriages seems to be paradigmatic of the sort of activities protected by the right to religious freedom. In many provinces, in fact, religious organizations are specifically exempted from human rights legislation—as a result, for example, the Catholic Church is able to deny women access to clergy positions. Similarly, and as mentioned previously, religious viewpoints have been exempted from hate speech laws. In my own review of this topic in scholarly journals and the popular press, I have not come upon a single voice calling for religious officials to be sanctioned for refusing

\(^{78}\) *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772.

\(^{79}\) See *Reference supra* note 9 at paras. 55-58.
solemnization to same-sex couples. All of this to say that respect for religious freedom in the performance of religious rites shows no signs of faltering. The threat to religious freedom here therefore seems to me very remote.

To sum up, then, the range of threats posed by same-sex marriage to religious freedom has been overstated in a variety of ways. The only direct threat arises with the issue of solemnization. But even there, on closer examination, the threats seem untenable or remote. The threat to civil marriage commissioners is not a threat to religious freedom because those government employees have no right, to begin with, to turn away couples out of religious conviction. No threat is posed to religious officials because, in matters involving the performance of religious rites, religious freedom is jealously guarded, without exception.

3.4 Registered Domestic Partnerships: A Reasonable Compromise?

As I have explained throughout this section, religious opponents of same-sex marriage, and their representatives in the Conservative Party, have relied upon the Charter’s guarantee of religious freedom as the starting point for introducing religious viewpoints into this debate. In so doing, they tacitly adopt the account of the separation of church and state I have advocated in Chapter 3: the view that religious views deserve generous accommodation under the heading of religious freedom, but that such viewpoints can not legitimately serve as the justification for laws of general application. It was open to Conservatives to claim, simply and straightforwardly, that religious views on marriage should be enshrined as Canadian law. Recognizing that such an approach would be widely dismissed as unreasonable, Conservatives opted instead to state their case as a demand for religious freedom and accommodation. This is a framework of debate that proponents of public reason happily accept. My objective throughout this section has been to show that the fears over religious freedom expressed in this debate have been unfounded.
Though both sides seem content to frame this debate using the language of rights, it may nevertheless seem hard-nosed to carefully parse these perceived threats to religious freedom, asking whether any are sustainable. Whether their fears have any justification in law, religious believers are uncomfortable with deep changes to the institution of marriage. Why not take account of these concerns, out of plain sensitivity? For example, why not pursue the option of Registered Domestic Partnerships, as a compromise solution, in the way that the Conservatives proposed?\footnote{Arguing along these lines, for example, Margaret Somerville ("What about the children?" supra note 25 at 69-70) writes that: Respect for others’ religious beliefs in a multicultural society can raise complex issues. Some people object to same-sex marriage on the basis of their religious beliefs. Those beliefs are often profound, and the people who hold them see a complex interplay in marriage between its voluntary formation, religious sanction, social legitimation, and natural origin. Even if we do not agree with these beliefs, indeed even more so if we do not, we need to understand what they are in order to understand the impact on the people who hold them of legally recognizing same-sex marriage...To the extent that we can avoid transgressing people’s religious beliefs, even though we do not agree with them, we should not transgress them, out of respect for the people who hold them, not out of respect for the beliefs themselves. See also Iain T. Benson, “A Civil Argument About Dignity, Beliefs, and Marriage” supra note 1.} This option apparently had such an air of reasonableness to it that it appealed to a great many Canadians, and even to many elected officials within the Liberal party.

The point, though, is that to settle this matter by reference to the widely accepted principles of the Charter, as was done, is to arrive at a principled compromise. The legalization of same-sex marriage can not plausibly be described as an unequivocal endorsement of homosexuality, nor can it be described as a rebuke of opposing religious viewpoints. Neither side has had their worldview thoroughly vindicated in this debate. Careful consideration was given to the arguments offered by same-sex couples as well as to the objections raised under the banner of religious freedom; the outcome was legislation allowing same-sex marriage, but also affirming the primacy of religious freedom.

Finally, one should note that it was only after same-sex couples had succeeded in winning numerous court victories, thereby forcing legislators’ hands, that some members
in the House of Commons began pleading for compromise solutions. Given this sequence of events, the suggestion that same-sex couples, or those defending their claim in the legislature, have stubbornly refused compromise solutions should be taken with a grain of salt. Same-sex couples have been made to prove their case every step of the way.

4. Justifications for infringing the equality rights of same-sex couples

Many who oppose same-sex marriage do so without challenging the equality-based arguments in its favour, and without reliance on any competing claims under the rubric of religious freedom. They concede that same-sex couples have a prima facie right to marry, but argue that this right should be infringed on the basis of some independent consideration(s): for the sake of children, or to avert a slippery slope to polygamy, for example. To argue in this way is perfectly compatible with the spirit of public reason under the Charter. Yet once it is conceded that the right to equality provides a prima facie case for same-sex marriage, a certain threshold has to be met in arguing for the limitation of that right.

To start, the considerations justifying infringement must be non-sectarian. It will not suffice to argue, for example, that the right should be infringed because many Canadians would prefer the traditional definition of marriage. This amounts to saying that the majority is justified in doing whatever it pleases; it denies the very existence of a legitimate rights claim. And beyond the requirement of non-sectarianism, there is of course a proportionality requirement: at some point it becomes unreasonable to advocate the infringement of a right in order to avert very minor or remote risks; likewise it is unreasonable to advocate widespread rights violations when there is available a more direct way of addressing the perceived problem. These standards of reasonableness are a mainstay in s.1 jurisprudence, but their logic is not legalistic in the sense of being formalistic or esoteric. Everyone can appreciate that, if rights are not to
be trumps, they must at least have some influence in shaping the direction of discourse. Once it is established that rights are engaged, we demand that justifications of infringement be non-sectarian and proportionate because these rights represent points of normative agreement in a society where people disagree deeply over a great many things. The value of these rights, as touchstones for shared deliberation, is undermined if we allow that they can be overruled for the sake of comparatively trivial or sectarian ends.

4.1 A Slippery Slope to Polygamy?

It is commonly argued that the legalization of same-sex marriage will start us down a slippery slope to the legalization of polygamous marriage. To begin, let me comment generally on the place of slippery slope arguments within public reason. The logical structure of slippery slope arguments (SSAs) is essentially this:

1. If action A is taken, it will later lead to B
2. B is a bad thing
3. Therefore, we must refrain from A

SSAs are controversial, because the causal connection claimed at stage 1 is invariably speculative. It is claimed, for example, that in allowing active voluntary euthanasia, we risk slipping toward eugenics; or that in allowing abortion on demand, we risk slipping toward infanticide. Faced with such arguments, those who favour liberal euthanasia or abortion laws will reply that we are capable of drawing the necessary lines, and avoiding any tumble down the slippery slope.

---

81 See (e.g.) Margaret Somerville, “If same-sex marriage, why not polygamy?” The Globe and Mail (8 November 2007). As the same sex marriage issue made headlines, the governing Liberal party was itself busily researching the issue of polygamy. See “Same-sex bill sparked urgent call for polygamy data, document shows” The Globe and Mail (28 February 2005).
Slippery Slope arguments are widely used—often by liberals—and they do not, in their logic alone, constitute an invalid argument form.\textsuperscript{82} The reasonableness of any particular SSA will in most cases depend on the plausibility of the causal or logical claim asserted at stage 1 above (i.e., the plausibility of the claim that A will lead to B).\textsuperscript{83} That said, there is reason to be leery of SSAs, from the perspective of public reason. When SSAs are offered as a justification for limiting rights, the underlying presupposition is that rights may be limited on the basis of speculative considerations. Where upholding a right may lead to some harm, slippery slope arguments commonly urge us to err on the side of caution, limiting the right to avert the harm. The proportionality test, discussed a moment ago, urges us in the opposite direction. It urges us to uphold rights as best we can in the face of the fears and uncertainties that motivate slippery slope arguments.

One might be tempted to dismiss this as little more than a difference in orientation. Proponents of SSAs differ only in their averseness to risk; their positions are not qualitatively different from the position taken by those who would uphold rights in the face of uncertainty, and so proponents of SSAs can not be said to have stepped outside the bounds of public reason. Yet once it is conceded that rights are \textit{not} trumps—a concession made openly by the Charter—our standards of justification for the limitation of those rights are really all that remains of our commitment to them. To abandon the commitment to proportionality, without replacing it with some substitute test, is to void rights of their remaining value. Others have argued that, as matter of moral reasoning, proponents of slippery slope arguments should bear the burden of


\textsuperscript{83} John Corvino, “Homosexuality and the PIB argument” (2005) 115 \textit{Ethics} 501 at 504. Some slippery slope arguments will fail at stage 2. That is, they will correctly assert that A leads to B, but falsely assume that B is a bad thing. Thus the slippery slope argument at issue here might be falsified by showing that polygamy accords with Charter values. I will not pursue that line of argument here.
proof. My point is that this allocation of the burden of proof is also a basic and indispensable feature of our reasoning about rights. All of this to say that SSAs must be regarded as a suspect class within public reason. With these general considerations in mind, I now want to examine more closely the causal mechanisms by which it is feared that same-sex marriage might lead to polygamous marriage.

4.2 The Moral/Jurisprudential Slippery Slope

It has been argued that the moral and legal arguments for same-sex marriage provide an equally good case for polygamous marriage, and that by allowing the former, we may be compelled as a matter of moral consistency or legal precedent to allow the other. Those who advance this argument, one assumes, see this playing itself out in the courts, with polygamists launching Charter challenges, and relying on the same-sex marriage rulings as precedent. One might instead hypothesize that the legalization of same-sex marriage will somehow prompt legislators to rethink laws surrounding polygamy, liberalizing them to preempt Charter challenges. Given the unpopularity of polygamy with voters, the polygamist’s chances of winning are better at the courthouse than the legislature, though they will surely face long odds at either venue. The cause of the slippery slope here, in any event, is the supposed inability of either legislators or judges to draw a line between same-sex and polygamous marriage.

The textbook reply is that slippery slope arguments of this sort underestimate our ability to draw reasoned distinctions. Same-sex marriage and polygamy are distinct issues, and if there are good reasons for disallowing polygamous marriage, we—as

84 See Corvino ibid. at 510. See also Andrew Lister, “The Deliberative Ethics of the Slippery Slope” (lecture presented at the 2006 CPSA, York University, July 3) at 35, online: <http://www.cpsa-acsp.ca/papers-2006/Lister-Andrew.pdf>.
85 The Charter’s s.33 override might in principle further allay fears over jurisprudential slippery slopes; however, s.33 appears to have fallen into disuse, owing to its unpopularity with voters.
86 A 2005 Poll found that roughly one-eighth of Canadians favour the legalization of polygamy. See “Same-Sex: Public Embraces Gay Rights, Opposes Gay Marriage, Advocates National Referendum” COMPAS Inc. (February 2, 2005), online: <http://www.compas.ca/data/050202-SameSex-EPC.pdf>. The poll also reported that about a third of Canadians believed same sex marriage would lead to the legalization of polygamy.
citizens, or through our elected legislators and appointed judiciary--will come upon those reasons in our deliberations, thereby avoiding any tumble down slope. And there is much to differentiate the two issues at hand--so much so that it is unclear whether the precedent of same-sex marriage will have any value at all in arguing for polygamous marriage. One major distinction here, overlooked by those who advance this slippery slope argument, is that the issue of polygamous marriage falls naturally within the right to religious freedom, and not the right to equality invoked in the case of same-sex marriage. Provincial prosecutors have for years refrained from trying known polygamists in Bountiful, British Columbia, precisely for fear that the relevant Criminal Code provisions would not withstand challenge under the Charter’s generous protection of religious freedom.\textsuperscript{87} Those fundamentalist Mormon polygamists have, by all accounts, the most viable claim in this regard, because their religion positively requires polygamy,\textsuperscript{88} while polygamy is merely allowed under (e.g.) Islam.\textsuperscript{89}

Indeed, the courts’ findings on same-sex marriage seem, if anything, to undermine the religious freedom case for polygamy. In \textit{Halpern v. Canada}\textsuperscript{90}--the case that precipitated immediate changes to the law in Ontario--the court considered arguments from a progressive Toronto church, to the effect that the opposite-sex

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{87} “No to Polygamy” \textit{The Globe and Mail} (3 August 2007); “Ending a Half Century of Exploitation” \textit{The Economist} (8 July 8 2004).
\item \textsuperscript{88} So-called ‘mainstream’ Mormons contest that their faith requires polygamy, and indeed disagreement on precisely this issue is what differentiates mainstream Mormons from the so-called ‘fundamentalists’ who inhabit Bountiful, British Columbia. Fundamentalist Mormons relocated to Canada and Mexico in the latter part of the nineteenth century, to escape legal prosecution. See Lori Beaman, “Church, State, and the Legal Interpretation of Polygamy in Canada” (2004) \textit{8 Nova Religio} 20 at 23. The Mormon scriptures themselves seem rather plainly to support the fundamentalists. Joseph Smith, the prophet of Mormonism, was himself a polygamist. Indeed, the Mormon \textit{Doctrine and Covenants} address Smith’s wife by name, commanding her to forbear Joseph’s polygamous ways. (\textit{Doctrine and Covenants}, Section 132, verses 51-52). The scriptural support for polygamy may be of little bearing in fundamentalist Mormon’s Charter claims, since sincerity of religious belief is the only test in establishing a s.2(a) claim, following \textit{Syndicat Northcrest v. Amselem} supra note 77.
\item \textsuperscript{89} Martha Bailey \textit{et al.}, “Polygamy in Canada: Legal and Social Implications for Women and Children” part 4 at 39, online: <http://www.swt-cfc.gc.ca/pubs/pubspt/0662420683/200511_0662420683-4_8_e.html>.
\item \textsuperscript{90} \textit{Halpern supra} note 17.
\end{itemize}
\end{footnotesize}
definition of marriage interfered with their religious freedom to solemnize same-sex marriages. Responding to this argument, the court explained that,

Marriage is a legal institution, as well as a religious and a social institution. This case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage...We disagree with MCCT's argument that, because the same-sex religious marriage ceremonies it performs are not recognized for civil purposes, it is constrained from performing these religious ceremonies or coerced into performing opposite-sex marriage ceremonies only. 91

This view that civil and religious marriage are fundamentally separate, and that the one need not mirror the other, was confirmed by the Supreme Court in the Reference, and written into the Civil Marriages Act. The message has been unequivocal, then, that religious freedom can not be invoked to alter the legal definition of marriage. Far from creating a slippery slope, the same sex marriage decisions are positively an obstacle for Charter challenges by polygamists.

Not only are entirely different rights at stake as between polygamy and same-sex marriage, but entirely distinct considerations bear on the limitation of those rights. With polygamous marriage, there are concerns over the equality rights of women; concerns about the well-being of children raised in polygamous families; concerns about the costs involved in extending spousal benefits to multiple spouses, and so on. It is beyond the scope of our present discussion to consider the merits of these concerns. The point is that it is these considerations which will—and should—largely determine whether polygamous marriage is legalized, and on these considerations same-sex marriage has no bearing. 92

---

91 Ibid. at paras. 53 and 56.
92 Perhaps what is feared is precisely that the issue of polygamy will reach the s.1 stage, where it will be difficult for government to establish that polygamy poses any 'pressing and substantial' risks. Certainly, the evidence regarding the harmfulness of polygamy is mixed. For a review of the evidence, see: Martha Bailey et al., supra note 89. So construed, the worry is not that polygamy is obviously harmful, but the opposite: that our fears about it may be incapable of reasoned defense. If indeed polygamous marriage engages religious freedom, this refusal to
4.3 The Political Momentum Slippery Slope

There is a distinct variety of slippery slope argument, where the concern is not over the slipperiness of moral/legal distinctions, but instead focuses, in a more realist vein, upon the political dynamics that underlie rights discourse. The concern, on such views, is that if same-sex marriage is legalized, this will somehow embolden proponents of polygamy in such a way that the legalization of polygamous marriage becomes a live possibility. Such arguments are realist just in the sense that they do not address the moral and legal arguments pertaining to same-sex marriage and polygamy. This passage from American conservative Stanley Kurtz illustrates the kind of argument I have in mind:

The bottom of this slope is visible from where we stand. Advocacy of legalized polygamy is growing. A network of grass-roots organizations seeking legal recognition for group marriage already exists. The cause of legalized group marriage is championed by a powerful faction of family law specialists. Influential legal bodies in both the United States and Canada have presented radical programs of marital reform. Some of these quasi-governmental proposals go so far as to suggest the abolition of marriage.

Obviously, it will be difficult to respond to arguments of this sort using the standard arguments of public reason—for the realist has their eyes trained on underlying power balances, rather than on the content of rights discourse. It is no use pointing out that polygamy and same-sex marriage engage distinct rights, or that distinct state interests come into play as we contemplate the limitation of those rights.

Some have tried to counter the realist slippery slope argument on its own terms, arguing that the political dynamics surrounding polygamy are on a separate trajectory from the dynamics surrounding same-sex marriage. Thus, for example, Robert Leckey tries to assuage these fears by arguing that none of the necessary societal preconditions consider the evidence is surely unreasonable. As explained, though, there is no reason to suppose that the state’s denial of polygamous marriage offends religious freedom; at least, the same-sex marriage cases positively disconfirm that claim.

---

93 This term is borrowed from Eugene Volokh, “Mechanisms of the Slippery Slope” supra note 66.
are in place for polygamous marriage, and nor will they be in the foreseeable future: “not until you see a polygamists’ Pride Parade marching down Yonge Street or René Lévesque Boulevard will things really be changing.”

It is certainly worthwhile to point out the vast difference in momentum behind polygamy as compared to same-sex marriage. One wonders though whether this line of response concedes too much, by tacitly allowing that fears over polygamy have some bearing upon the equality rights of same-sex couples. Are we to believe that the realist slippery slope argument would be reasonable if polygamists were parading in the streets?

It is safe to say that social conservatives would reject arguments of this form, were they ever to be deployed in justifying limits on the rights and freedoms that social conservatives hold dear. By all accounts there also exists a network of grassroots religious organizations, working to oppose legal reforms in the areas of family law and health law. Their sway in the media and the House of Commons has been amply demonstrated in the same-sex marriage debate. To my knowledge, the existence and viability of these religious political forces-- and the threat that their agenda may pose to women’s reproductive freedom or to the interests of gays and lesbians-- has never been advanced as a reason for limiting religious freedom.

The point can be made in more general terms. These realist approaches to law and political change are nothing new. It is often claimed, on a variety of bases and from a variety of political perspectives, that rights discourse is merely an epiphenomenon of underlying political, cultural and class struggles. Such realist views are obviously at some variance with the idea of public reason. Public reason, as a normative theory of

---

95 Leckey, “Following Same-sex Marriage” supra note 35 at 35; see also Robert Leckey “Private Law as Constitutional Context for Same-Sex Marriage” (2007) 2 Journal of Comparative Law 172. Leckey’s general contention is that factors outside of the Charter—notably in family law-- laid the groundwork for a successful Charter challenge of the traditional definition of marriage. See also Andrew Lister, “The Deliberative Ethics of Slippery Slope” at supra note 84 at 22. For a breakdown of the factors leading to the lack of political momentum in support of polygamous marriage, see Volokh, supra note 82 at 1175-1177.
public discourse, has little to say about the descriptive truth of such realist views—other than to hope they are descriptively inaccurate.\textsuperscript{96} Public reason simply posits that in a pluralistic society, the only viable alternative to outright conflict is reasoned discourse within a framework of shared political values. Realist dismissals of rights discourse, whatever their descriptive appeal, are odious from the perspective of public reason. Such dismissals are radical conversation stoppers: “radical” because they not only shut down reasoned debate on the issue at hand, they also trivialize the only avenue of reasoned debate on all matters of deep controversy. To enter into debate on the realist’s terms is already to abandon public reason. It is to concede that in debating citizens’ rights, one can reasonably approach matters as a large scale tactical dilemma, where one’s aim is to decisively thwart rival comprehensive doctrines. It is reasonable to want to promote one’s own comprehensive doctrine, and see it flourish and gain adherents in society, but it is not reasonable to deny the rights of others as a tactic in pursuance of that goal. Yet that is precisely the logic at work in Political Momentum slippery slope arguments.

4.4 What about the children?

McGill University’s Margaret Somerville, while accepting the validity of the equality argument, offers a unique secular argument against same-sex marriage, which rests upon the right of children to know and be raised by their biological parents.\textsuperscript{97} Somerville’s views on this matter have raised considerable controversy, notably a storm of protest when Ryerson College, in Toronto, bestowed upon her an honorary doctorate. Students were scandalized by the administration’s decision to honour a prominent opponent of same-sex marriage, and in the lead-up to the convocation ceremony,

\textsuperscript{96} To repeat a quote from John Rawls offered in chapter 1: “[a]s an ideal conception of citizenship... [public reason] presents how things might be, taking people as a just and well-ordered society would encourage them to be. It describes what is possible and can be, yet may never be...” John Rawls, \textit{Political Liberalism} (New York: Columbia University Press, 1993) at 213.

Somerville was vilified as a homophobe.\textsuperscript{98} Though I will criticize her views on this matter, it should be said that these accusations were unfair and inimical to open debate. Somerville has been clear in her support for the equality rights of gays and lesbians, and has stated that moral and religious opposition to homosexuality can not provide a reasonable basis for opposition to same-sex marriage.\textsuperscript{99} That said, Somerville’s arguments against same-sex marriage have a strained and \textit{ad hoc} quality to them, or so I will argue, and this may explain why some have wrongly surmised that she has an anti-gay agenda.

According to Somerville, marriage has, for millennia, symbolized “the inherently procreative relationship between a man and a woman.”\textsuperscript{100} In allowing same-sex marriage, we jettison the notion that natural procreation is an inherent or constitutive aspect of marriage. We are led, instead, to conceptualize marriage as ‘the lawful union of two persons to the exclusion of all others.’\textsuperscript{101} This conceptual shift will impact the right of children to know their biological parents in two distinct ways, Somerville argues. First, the institution of marriage will no longer uniquely symbolize, protect, and celebrate biological procreation, and this will subtly impact the aforementioned rights of children. Second, same-sex couples, once allowed to marry, will press further for a right to procreate using banned reproductive technologies. This will necessitate gametes from a third party, and in some cases, that donor will remain anonymous to the child. On the basis of these considerations, Somerville purports to establish that allowing same-sex marriage amounts to “a societal declaration that children don’t have any basic right to

\textsuperscript{99} Somerville contends that religious and moral opposition to homosexuality should not be a factor in the same-sex marriage debate because such views are intolerant and irreconcilable with the principle of equality. However, she rejects public reason’s broader claim that religious arguments have no place in debates over constitutional essentials and matters of basic justice. See “Social-Ethical Values Issues in the Political Public Square: Principle vs. Packages” \textit{supra} note 97 at 735.
\textsuperscript{100} Margaret Somerville, “What about the children?” \textit{supra} note 25 at 63.
\textsuperscript{101} \textit{Civil Marriages Act} \textit{supra} note 5 at art. 2.
know who their biological parents are and that they don’t need both a mother and a father.”

A preliminary objection here is that our society freely allows the violation of a child’s right to know and be raised by their biological parents, as we allow anonymous surrogacy and adoption arrangements. Somerville’s reply is that in *allowing* such arrangements, the state does not actively violate rights—it merely respects people’s privacy. But in legalizing same-sex marriage, the state actively intervenes to create “an institution which by its very nature deprives children of their right to a mother and father.” The distinction at work here, it seems, is the distinction between *doing* and *allowing*: it is one thing for the state to *allow* violations of a child’s right to know their parents, and another thing for the state to *actively* redefine marriage in a way that encourages violations of children’s rights.

As explained, Somerville suggests two causal mechanisms here, leading to the violation of children’s rights. First, there is the claim that marriage has traditionally reinforced the societal norm that biological parents should know and care for their offspring. In severing the tie between marriage and procreation—as one must decisively do in allowing same-sex marriage, Somerville contends—we jeopardize this norm, and imperil the right of children to know and be raised by their biological parents. For this to be plausible, one literally has to imagine that couples will become less committed to raising their children, through the awareness that the legal definition of marriage no

---

103 Ibid.
104 It may be objected that the distinction between doing and allowing is a false one. Certainly, a number of applied ethicists have questioned the distinction, convincingly. Yet perhaps Somerville is correct in claiming that the distinction applies sensibly to the state. A basic premise of public reason is that the state’s *allowing* (e.g.) abortion, out of respect for individual autonomy, is not tantamount to its *actively endorsing* abortion. Whether it makes sense to speak of making changes to the definition of marriage as a case of government’s doing or allowing is unclear to me. The more salient difficulty with Somerville’s position, as I will explain, is that the impact of same-sex marriage upon these putative rights of children is so faint and indirect as to be scarcely perceptible. Because I believe this to be the heart of the problem with Somerville’s argument, I will not press this distinction between doing and allowing.
longer centers on natural procreation. That parents’ primordial drive to know and care for their children might be impacted in this way, by a change to the legal definition of marriage, seems quite implausible. One wonders how many Canadians are even cognizant that the traditional definition of marriage is meant to encourage biological parenting (supposing Somerville is correct about its symbolic function\textsuperscript{105}). To the extent that couples are oblivious to it, it hardly seems a loss to have that unperceived symbolism undermined for the sake of affirming the equality of same-sex couples. It is hard to feel the pull of Somerville’s argument because it at once construes the nuclear family as a natural and millennia’s-old institution, while at the same time predicting that it will unravel in the face of this very faint challenge.

As mentioned, Somerville also expresses concern that the legal recognition of same-sex marriage will lead to the legalization of (what she deems to be) unethical reproductive technologies:

If it is discrimination to exclude same-sex couples from marriage, then surely it would be an even more serious instance of discrimination to prohibit them from reproducing in the only way possible for them as couples. If so, could some of the prohibitions in the new Assisted Human Reproduction Act, which recently received royal assent, be challenged constitutionally on discrimination grounds?...Could homosexual couples argue that it is discrimination to prohibit them from creating children between them by using reprogenic technologies in whatever way they saw fit?\textsuperscript{106}

This argument faces the same difficulty as the Conservative Party’s position, discussed earlier. Like the Conservative Party, Somerville does not contest the very existence of equality rights for same-sex couples, and she too endorses civil unions as a compromise solution. As explained above, once this alone is conceded, the horse is out of stable with this assortment of distinct equality claims. Whatever the legal feasibility of arguing that same-sex couples have an equality right to access banned reproductive technologies,

\textsuperscript{105} Social conservatives apparently disagree amongst themselves over the purpose of marriage. See Patrick Devlin, The Enforcement of Morals supra note 57.

\textsuperscript{106} Margaret Somerville, “What about the children?” supra note 25 at 68. See also Seana Sugrue, in “Soft Despotism and Same-Sex Marriage” supra note 36 at 184.
such arguments do not become any less feasible by dint of our opting for civil unions rather than same-sex marriage. The point made above, regarding slippery slope arguments, bears repetition here: our commitment to the proportionality test demands that we carefully scrutinize arguments of the form, “If we legalize A, then we will be compelled to legalize B.” If A is an acknowledged right, then we must insist upon convincing arguments for the connection between A and B. In a hypothetical scenario where same-sex couples demand access to presently-banned reproductive technologies, we must realistically imagine that such couples would rely upon the precedent set by same-sex marriage. Or, in the scenario Somerville wishes to bring about, we are to imagine the courts rejecting a same-sex couples’ demand for access to reproductive technologies, citing the fact that such couples have no right to marry, ergo no right to procreate. I have great difficulty envisioning either scenario playing out in reality, which suggests to me that the two issues are simply unrelated.

A somewhat tangential point is worth examining before moving on from Somerville’s argument. In her writings on both same-sex marriage and new reproductive technologies, Somerville leans heavily upon this claim that children “have a basic right to know and be brought up by their biological parents.” While this may seem a plausible right on its face, Somerville’s interpretation of it is, I think, quite controversial. My concern is that she uses this right, in a variety of contexts, as a stand-in for the much more contestable view that the state has as overriding obligation to promote the traditional family.

The legal support for this right is article 7 of the UN Convention on the Rights of the Child. The relevant passage of that Convention reads as follows:

Article 7

107 Margaret Somerville, “What about the children?” supra note 25 at 64.
1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.\textsuperscript{108}

Now, one would assume that the objective of this article is to prevent states from unwarrantedly interfering with the child-parent relationship. Canada’s infamous residential school system, which forcibly removed aboriginal children from their families, exemplifies the terrible injustice that one assumes article 7 is meant to address. As we have seen, s.7 of the Canadian Charter has also been interpreted as barring certain types of state interference in the parent-child relationship: parents have a right to make medical decisions for their children,\textsuperscript{109} a right to decide how their children will be educated,\textsuperscript{110} and so on.

As we move away from these cases to the cases Somerville has in mind, the concern in invoking childrens’ rights is less and less with preventing state interference in the family, and more and more with the state’s actively fostering a particular type of family. By allowing same-sex marriage, for example, the state does not interfere with biological families; at worst the state equivocates in its symbolic support for such families. This idea that the state is obliged to actively foster the traditional family, as a matter of basic justice and human rights, is hard to accept. For one thing, it is not reflected anywhere else in our laws. Within family law, for example, the ‘best interests of the child’ test is not understood to prioritize the unity of biological families;\textsuperscript{111} such matters are judged on a case-by-case basis, and not on the basis of generalizations about the superiority of biological families. Canada allows anonymous surrogacy arrangements and anonymous adoption, again suggesting that the right of children to know and be raised by their biological parents is in no way paramount.

\textsuperscript{111} Syl Apps Secure Treatment Centre v. B.D. [2007] SCC 38 at para. 46.
Somerville’s interpretation is also counterintuitive inasmuch as it countenances rights being held by hypothetical people: the would-be ‘genetic orphans,’ who might be born to same-sex couples using presently-banned reproductive technologies, have a right, according to Somerville, to see the traditional definition of marriage preserved. This idea that a person can be wronged by acts leading to their very existence is obviously fraught with paradoxes, which is why courts generally disallow tort claims for so-called ‘wrongful life’. All of this to say that Somerville’s invocation of this right is eccentric, both from the perspective of the law, and from the perspective of ordinary reasoning about rights. One should not be misled by the talk of ‘basic rights’ into thinking that Somerville’s arguments here are predicated on any existing legal doctrines, let alone on any consensus point of political morality.

4.5 The “New” Natural Law View

In academic discourse on this issue, much ink has been spilled debating “new natural law” views on homosexuality and traditional marriage. New natural lawyers typically argue that traditional marriage—one man, one woman—enables the achievement of an intrinsic “marital good.” The marital good at issue is the “two-in-one flesh union” of a man and a women—a complete meeting of body and mind, of which only opposite sex couples are purportedly capable. The “marital good” is an irreducible

---


combination of friendship and procreation, and so homosexual couples are biologically incapable of achieving it. As Robert George puts it,

The one-flesh unity of spouses is possible because human (like other mammalian) males and females, by mating, unite organically—they form a single reproductive principle.¹¹⁴

The word ‘intrinsic’ is used advisedly here: the natural lawyer rejects the idea, popularized during the Enlightenment, that the goodness of a particular act or lifestyle is merely a matter of its conduciveness to happiness or desire satisfaction. Instead, goodness is achieved by conformity to natural laws—here, the natural law which prescribes monogamous, heterosexual relations, directed towards procreation. Relations which depart from this ideal are rejected as worthless and lacking integrity, because they are not directed towards the marital good, and hence amount to nothing more than the instrumental use of one’s sexual organs.

The new natural law stance on same-sex marriage is, in effect, a sophisticated rendering of the familiar argument that procreation is, and ought to remain, a constitutive feature of marriage. Predictably, critics of this view point to cases of heterosexual marriage where there is no potential for natural procreation—the case of sterile, heterosexual married couples, for example. Answering the sterile couples problem, Robert George explains that,

...the plain fact is that the genitals of men and woman are reproductive all of the time—even during periods of sterility. Acts that fulfill the behavioral conditions of procreation are reproductive in type even where the nonbehavioral conditions of procreation do not happen to obtain. Insofar as the point or object of sexual intercourse is marital union, the partners achieve the desired unity (become “two-in-one-flesh”) precisely insofar as they mate, or if you will, perform the type of act—the only type of act—upon which the gift of a child may supervene—what traditional law and philosophy have always referred to interchangeably as “the act of generation” and “the conjugal act.”¹¹⁵

This argument exemplifies the general shortcoming of natural law arguments, from the perspective of public reason. Natural lawyers all too often make recourse to purely stipulative claims, like George’s claim here that sex among sterile couples is ‘reproductive in type’. The problem, from the perspective of public reason, is that for many citizens, George’s explanation here will raise more questions than it answers. How did George come to know that sex between sterile couples is ‘reproductive in type’? What would even count as evidence in adjudicating between those who see intercourse between sterile couples as non-procreative versus those who see it as ‘reproductive in type’? If the intrinsic ‘marital good’ can be achieved— even in the face of brute biological shortcomings— just by meeting certain ‘behavioral conditions,’ why aren’t same-sex couples able to achieve the marital good by mimicking the requisite behaviours? The answer, of course, is that the goods posited by natural law theorists are, and are bound to remain, mysterious to those who do not see their intrinsic goodness. There is nothing wrong, morally or epistemically, in believing things that others find mysterious. But where the infringement of a right is at issue, the justification should not rest on highly contestable moral/metaphysical claims of this sort.

A favored tactic among natural lawyers is to claim that *everyone* takes recourse in inexplicable beliefs about the intrinsic goodness or badness of certain activities. As discussed earlier, practically everyone supports legal prohibitions on bestiality and necrophilia, and yet it is difficult to justify the criminalization of those activities, beyond saying that they are simply and irreducibly bad. If a carefully reasoned, harm-based justification is needed to justify state opposition to homosexuality, then, by parity of reasoning, a comparable justification will be required in the case of bestiality and necrophilia. The worry is that our search for such a justification may be unavailing. As John Finnis puts it,

The plain fact is that those who propound a homosexual ideology
have no principled moral case to offer against (prudent and moderate) promiscuity, indeed the getting of orgasmic sexual pleasure in whatever friendly touch or welcoming orifice (human or otherwise) one may opportunely find it.\textsuperscript{116}

One assumes that by ‘homosexual ideology,’ Finnis has in mind some form of hedonist utilitarianism. As explained previously, arguments of this form falter when advanced in the context of Canadian constitutional debates. For the political conception of justice reflected in the \textit{Charter} is decidedly not the comprehensive doctrine of hedonist utilitarianism. Thus in upholding the \textit{Charter} equality rights of same-sex couples, we do not embrace any wider hedonist agenda. Practitioners of bestiality or necrophilia will have no recourse within the \textit{Charter}, so long as it is understood that engaging in those practices is not fundamental to one’s liberty or autonomy. Notice, in passing, that the seeming implication of Finnis’ equation of homosexuality with bestiality is that both should be criminalized.\textsuperscript{117} For the majority of Canadians, this alone might serve as a \textit{reductio ad absurdum} of Finnis’ position.

Of course these new natural lawyers will not be put off by these arguments, for they typically denounce the very idea of public reason.\textsuperscript{118} They will deny that same-sex couples have a \textit{prima facie} right to marry, or they will claim that there is nothing unreasonable in justifying the infringement of that right by reference to mysterious, pseudo-religious claims (i.e., claims about the intrinsic goodness of ‘two-in-one flesh unions’ and so forth.) I happily note that none of the prominent opponents of same-sex marriage, in Canadian public discourse, have opted to follow the new natural lawyers in rejecting public reason \textit{tout court}. As we have seen, in resisting the idea of public reason,

\begin{footnotes}
\item[116] Cited in Corvino, \textit{supra} note 83 at 515.
\item[117] Perhaps Finnis holds a view, similar to Trudeau’s in the late 1960s, that homosexuality should remain legal strictly to avoid the invasions of privacy that policing would require. Notice though that such privacy concerns will argue for the legalization of bestiality as well.
\end{footnotes}
Canadian conservative commentators will at most specify that the separation of church and state is not a principle of Canadian constitutional law, before moving on to state their case strictly in the language of secular rights. Canadian Conservatives have been all too happy to avail themselves of rights discourse in advancing their position, variously invoking the rights of religious believers, the Charter’s commitment to multiculturalism, and the rights of children. Thus their actual discursive practice belies any protest that public reason is unworkable, unduly restrictive, or biased against conservative viewpoints.

5. Conclusion

The reader will have noticed that very many of the arguments against same-sex marriage canvassed throughout this chapter are, effectively, slippery slope arguments of one form or another. This is unsurprising. Conservatives look upon the tradition of marriage in much the same way that an environmentalist looks upon the ecosystem: as carefully evolved for purposes we do not fully appreciate, and with which we should be reluctant to interfere. One can readily understand the affinity between conservative and religious worldviews. The religious believer, too, will often be inclined to respect traditions—not on the Burkean grounds that longstanding traditions have carefully adapted over time, but instead on grounds that longstanding traditions reflect the divine order of things.

My intent has not been to deny that there is any wisdom to these conservative and religious outlooks. My point has simply been that, in situations where basic rights are at stake, it is not enough to rely upon the general wisdom of conservatism as a justification for the limitation of rights. The purported harms of departing from tradition must instead be convincingly demonstrated in such cases. To contend otherwise, I have argued, is to assign rights no priority, rendering them meaningless.
Throughout this chapter I have tried to demonstrate that conservatives’ dire predictions about the fallout of same-sex marriage are, without exception, very tenuous.

Throughout this chapter, the s.1 proportionality test has been repeatedly invoked as a foil to conservative viewpoints, and it may seem therefore that when the proportionality test is added as a fixture of public reason, the deck is stacked against conservative comprehensive doctrines. This claim of bias is misleading, though, because it overlooks how liberal comprehensive doctrines face commensurate obstacles. As explained throughout this chapter, many arguments that might be advanced under comprehensive doctrines allied with liberalism—(e.g.) arguments that might be advanced by preference-satisfaction utilitarians— are blocked from advancement under the Charter. The system as whole is not biased against liberalism or conservatism. It imposes obstacles to liberal comprehensive doctrines at the infringement stage, and obstacles to conservative comprehensive doctrines at the proportionality stage. In the same-sex marriage debate, much of the conservative opposition is predicated upon overlooking the obstacles facing the advancement of liberal comprehensive doctrines—overlooking, that is, the hurdles that same-sex couples have faced in establishing their equality claim. To mix metaphors: by ignoring these hurdles, conservatives create the illusion of a slippery slope.

Part of the appeal of public reason is that, by committing to a shared framework of political principles, and trusting that our fellow citizens are committed to that framework as well, we are able to put to rest fears of society spiraling out of control. The atheist may contentedly allow a wide scope of religious freedom, without fearing that society will spiral into theocracy, because she recognizes that she too has rights within the operative framework of political justice. By the same logic, where public reason is operative, religious believers need not fear the rise of domineering utilitarian, atheist, or ‘homosexual’ agendas.
The pity in many of these arguments advanced by social conservatives is that they sow fears which are demonstrably unwarranted, and thereby encourage people to approach the isolated issue of same-sex marriage as a testing ground for the survival of their comprehensive doctrines. The alternative is to see the legalization of same sex marriage, and the protection of religious freedom, both as affirmations of a single framework of public reason.
CHAPTER 6: CONCLUSION

This dissertation began, as treatises on public reason often do, with a recitation and endorsement of modern liberalism’s fundamental tenet: that the exercise of state power must be justified to all, on terms they can reasonably be expected to accept. Viewed in a certain light, it is striking what an insubstantial tenet that is. One almost has to be steeped in liberal theory to grasp how it asserts anything at all. It is unclear whether liberalism’s arrival at this tenet reflects its advancement or its retreat, over the past century.

The progression of Rawls’s thought, from his earlier A Theory of Justice to Political Liberalism, is indicative of liberalism’s increasing reluctance to assert itself boldly. Theory of Justice, the earlier work, held up justice as fairness as the true theory of political justice; Rawls’ aim was to displace the then-dominant view, utilitarianism. By the time of Political Liberalism, twenty years later, Rawls was no longer insisting upon the theory’s truth, so much as insisting that the contest between constructivist theories be kept on. Gone are the days when liberalism rested on clear-cut, non-negotiable principles. Even on their trademark issues such as the right to free expression, liberals have softened, with some conceding (e.g.) that censorship of hate speech or pornography may be justified.

Perhaps this does not signal the retreat of liberalism so much as its pervasiveness. Liberalism’s basic commitments have become so well-entrenched as to be integrated into the very meaning of reasonableness. Hence the so-called deliberative turn in liberal thought: many liberals feel comfortable in assuming that free and open deliberations will, in their natural flow, converge upon liberal values. A common criticism of Rawls’s political liberalism, and the constructivist methodology that underlies it, is that it has an in-built conservatism to it—stipulating, as it does, that new theory be rooted in well-
established political values. Constructivism seems, to some, more a recipe for rationalizing the status quo than for establishing a more just society. Yet the constructivist methodology may itself signal that liberalism has arrived; it is said, after all, that success breeds conservatism. This embrace of constructivism is, one assumes, contingent upon the present widespread acceptance of liberalism’s fundamental principles. There is no need to convince citizens to give up their religious morality and embrace (e.g.) Kantian ethics, as a strategy for establishing a stable liberal polity. For citizens have already embraced liberalism, and found ways to reconcile liberal politics with their comprehensive doctrines. The more viable strategy is to continue fusing diverse worldviews with an acceptance of liberalism in the political sphere.

In a sense we now occupy the space that Mill pointed to on the horizon, from his vantage point in the Victorian age. It is now widely accepted, as an article of commonsense, that an activity’s harmlessness provides a strong, if not conclusive, reason for allowing it. The very fact that the Supreme Court of Canada—in addressing a recent challenge to marijuana prohibition—was forced to invoke bestiality and cannibalism, as examples of valid yet victimless crimes, is indicative of how we are feeling out the edges of the harm principle, from the inside.

Even those who self-identify as opponents of liberalism are now compelled, in a way, to reason like liberals. Where conservatives such as Lord Devlin, writing in the late 1950s, could predicate their arguments on appeals to societal tradition, conservatives today struggle to justify their positions by reference to identifiable, secular harms. Thus

---

3. In fairness, it should be noted that Rawls argues—albeit on constructivist grounds—for a radical reconsideration of our accepted political values entail. Our present belief that goods can not fairly be allocated on the basis of race is exploited to conclude that goods can not fairly be allocated by the market. Justice as Fairness is agnostic on the question of public versus private ownership of the means of production, for example. All of this to say that novel and indeed near-revolutionary ideas are possible with political constructivism.
in the debate over same sex marriage, they resort to tenuous arguments about the risks that same sex marriage poses to religious freedom, or to the rights of children; they raise fears about slippery slopes; or they invoke concepts like ‘one flesh unity’—mystical notions, thinly-veiled in naturalistic language. The one somewhat mystical term in the lexicon of secular liberalism—human dignity—is now made to do heroic work in a variety of debates, particularly in the area of bioethics. ‘Dignity’ has an ineffability to it, and in public discourse people have come to rely on the term as a projection screen for their views on what is valuable in human life. In discussing therapeutic cloning in chapter 4, I argued that we should guard against this, and that ‘dignity,’ when used in public reasoning, should be understood strictly as the byproduct of autonomy and equality—not as a freestanding good, least of all one achieved by coercion or inequality.

Liberalism’s deep entrenchment in our society puts its critics in a difficult position. On the one hand, there is this ongoing attempt to characterize liberalism as a ‘secular religion’. The aim is to suggest that politics is—irreducibly—a contest between religions, so that there is nothing offside in pressing (e.g.) one’s Christian dogmas. But the accusation is difficult to substantiate, because liberalism has effectively retreated from any absolutist dogmas of its own, and faded into our background notions of reasonableness. This challenge for religious conservatives is complicated by the fact that liberalism’s lexicon of rights and freedoms has become the language of politics—meaning that those who regard liberalism as a competing religion are forced to adopt its terms as they stake out positions on particular issues. This was evident in the debate over same sex marriage, as conservatives founded their opposition on the right to religious freedom, and a handful other rights-based arguments. My arguments in chapter 3 capitalized on this internal conflict facing social and religious conservatives. Recall, there I argued that generous protections for religious freedom—of the sort assumed by social conservatives
insist upon in the same sex marriage debate—imply a general acceptance of liberal standards of public reason.

Liberalism’s success in becoming the default currency of political discourse creates worries for liberals themselves. Having jettisoned any absolutist convictions on the way, liberals may now feel their philosophy is at risk of drifting away on the currents of public opinion. If liberalism just is a kind of reasonableness, how will we know it when we see it? More importantly, how will we know when we are drifting from it? This may explain why some liberals have wanted to retain a near-absolute stance on the right to free expression, notwithstanding the fact that their underlying concerns over autonomy and equal concern do not warrant such absolutism. Liberalism has to be reified in some substantive and unwavering commitment. But on the other hand the liberal’s ecumenicist impulse requires that the unwavering commitment—whatever it is to be—must be one that all citizens can reasonably be accepted to accept. If it can not plausibly be an unwavering commitment to negative liberty, then let it be an unwavering commitment to autonomy; if autonomy is too contentious a value, then a commitment to reasoning within the original position; if the original position is too contentious, then let us at least commit to the ‘family of reasonable political conceptions of justice.’ What is the next possible step in this retreat? Perhaps we are back to square one: an unwavering commitment to justifying the social order on terms that all citizens can reasonably be expected to accept.

My sense is that this search for a more substantive yet transcendent axiom, on which liberalism might plant its flag, is not particularly important to everyday political deliberations. Devices like the original position, and its two associated principles, are useful in explaining the logic of liberalism in a removed, abstract sense; for explaining--

---

to those who demand a deeper explanation—why we have a *Charter of Rights* that prioritizes fundamental rights and freedoms. But the philosopher’s abstract explanations do not and should not figure centrally in day-to-day deliberations *within* liberal societies. For one thing, real world disagreements do not often turn on *whether* freedom, equality and other liberal values matter; for the most part, no one is taken seriously who openly denies that they do. Disagreement focuses on how to understand the scope of these values, and how they are to be traded off against each other, and against the general good. There is no theoretical algorithm for answering questions of this latter sort.

My contention has been that the *practice* of good liberal reasoning is better reflected in the deliberations of the Supreme Court of Canada. To be a liberal, participating as a citizen in real world deliberations, is not to have cocksure theoretical solutions to questions of basic justice. It is to be alert to the overriding importance of free expression and fundamental autonomy, the wrongness of inequality, and so on, and committed to reasoning cautiously, with transparent and accessible arguments, when these and the other fundamental interests protected by the *Charter* are at stake.4 Liberalism, in this pragmatic sense, is deeply entrenched in our political culture. To be reasonable is to be liberal in this sense. This is why, as we have seen, even critics borrow the terminology, if not the spirit, of liberalism.

It is in this that my view differs from Rawls’s. If those of us who embrace philosophical liberalism wanted to instill or reinforce an ethos of public reason, we would do better to emphasize the logic at work in Supreme Court jurisprudence—the logic of contextual balancing, particularly—than to emphasize the idea of the original position (or any other grand theory). I have tried to illustrate this in chapters 4 and 5, by showing how the logic of contextual balancing might have framed deliberations over

---

therapeutic cloning and same sex marriage. Nowhere did I invoke the heuristic of the original position, or any other grand, overarching liberal heuristic. I mainly pressed conservatives on the question of proportionality: insisting (e.g.) that they make good on their avowed commitment to respecting the equality rights of same sex couples, and challenging their various exaggerations of the risks posed to religious freedom, the rights children to know their biological parents, and so on. A society committed to a contest of ideas carried out on these terms would be a good, liberal society.

My further contention is that contextual balancing does have considerable power to discipline deliberations. Indeed, my suspicion—though I do not know how it could be proven—is that the requirement that one demonstrate a careful balancing of Charter principles has a stronger disciplining effect than the requirement that one reason on the basis of some grand overarching criterion, such as the original position. I hope to have shown, at least, how many of the arguments advanced in debates over same sex marriage and therapeutic cloning would have been disciplined under my account of public reason. Think back to the arguments considered in chapters 4 and 5, and ask whether deliberations on those topics would have been more effectively disciplined by an insistence that all sides state their ultimate criterion of political justice (e.g., justice as fairness or some alternative). Supposing, very implausibly, that all sides chose justice as fairness as their ultimate criterion, the disciplining effect of that would be, I believe, minimal. Arguments rooted in particular religions would be bracketed, of course, because deliberators in the original position are ignorant of their religious views. But from there it would be a question (e.g.) of weighing the equality rights of same sex couples against concerns about religious freedom. Which concerns are weightier, from the perspective of the original position? I have contended that the perceived threats to religious freedom in this instance were mostly illusory, and if I am right about that, then presumably people situated in the original position would be inclined to agree. The
point is that justice as fairness is doing very little work here. Deliberations are pushed forward not by abstract claims about the scope or priority of one right relative to another, but rather by contemplating the effects of same sex marriage in the context of the real world.

At the risk of sounding anti-intellectual, it must be said that in a society where many citizens are not afforded the luxury of a university education, we should be reluctant to claim that philosophical abstraction is a requirement of public reason—a requirement, that is, of legitimate participation in constitutional debates.

Epistemologists will sometimes speculate as to whether one must be aware of the necessary and sufficient conditions for knowledge--whatever those conditions are-- as a precondition of having knowledge. An off-putting consequence of supposing that they do is that those of us untrained in epistemology will then be said to lack knowledge. Philosophically demanding accounts of public reason are off-putting in much the same way-- but more so, because in the political sphere we hold, on some level, that all citizens can and should participate as equals.5 Rawls of course is imagining an ideal, well-ordered society, where conceptions such as justice as fairness are known to all, in the way that democracy is familiar to everyone in our present society. The question is

---


The proponents of "theory" and "philosophy" have a very easy task if they want to make their case. Simply make known to me what was and remains a "secret" to me: I’ll be happy to look. I’ve asked many times before, and still await an answer, which should be easy to provide: simply give some examples of a body of theory, well tested and verified, that applies to the kinds of problems and issues that...I, and many others (in fact, most of the world’s population, I think, outside of narrow and remarkably self-contained intellectual circles) are or should be concerned with....To put it differently, show that the principles of the "theory" or "philosophy" that we are told to study and apply lead by valid argument to conclusions that we and others had not already reached on other (and better) grounds; these "others" include people lacking formal education, who typically seem to have no problem reaching these conclusions through mutual interactions that avoid the "theoretical" obscurities entirely...

whether his idealized conception is in any way scalable to our decidedly non-ideal society, or whether the exigencies of the real world should send us back to the drawing board.

At the end of chapter 1, I posited that liberals’ proclivity for grand theory may be driven by a felt need to rationalize strong judicial review. Liberals on some level accept that strong judicial review is an aberration in a democratic society, and so they are keen to show how the courts are, or could ideally be, an arena of higher principle. The key to selling this story, then, is to articulate those higher principles.

A more believable story is that the courts provide an arena, not of higher principle, but of more patient, focused, and systematic deliberation. There is, or need be, no qualitative difference between the court’s reasoning and the reasoning of citizens and elected bodies. An underlying supposition running through this dissertation has been that there should be a kind of transparency, or continuity, to our favoured decision-process: if we favour a refined decision-process for the Courts, then we should want to see that decision-process, or some close variant of it, exhibited in parliamentary debates, and so on down to the level of the citizenry. This supposition is controversial. We have seen in chapter 1 and then again in chapter 3 how it is often supposed that elected bodies or the courts should ‘filter’ the freewheeling deliberations of citizens. The irony of this filtration view is that it is regularly presented as an anti-élite, pro-democratic stance. My challenge to those who hold this view is to explain what is being filtered and why. The answer to that question will be an account of public reason. The next question is why citizens should not be encouraged to internalize the rules that ultimately filter their democratic inputs. One wonders whether a subtle élitism in fact underlies the filtration view.

Judicial review is an aberration. The justification for it, if it is justified, lies in our shared commitment to the values and principles set out in Charter, but not in any supposition that those principles have an agreed upon, determinate meaning. There is
no reason in principle why citizens or elected bodies could not participate in the
deliberative work done by the courts. To their credit, courts are able to shine a light on
particular issues that may escape the attention of the general citizenry; they possess
expertise in how rights have been workably (or unworkably) interpreted in the past; they
provide a forum for citizens to challenge government directly, and demand more careful
justifications.6

The alternative to brute coercion is conversation. Conversation can only begin,
and continue, if certain standards of civility are observed. An elementary standard of
civility, rightly emphasized in the liberal tradition, is that one's arguments should be
predicated on beliefs and values that one's interlocutors will not automatically reject.
The value of a Charter is that it provides a handful of dependable starting points for
conversation on matters of basic justice. The survival of all that is good in liberalism, in
my view, depends on its avoiding the path too often taken by fanatical movements: the
path of unwarranted certainties, and abstruse theories which only a specialized class is
deigned capable of grasping. Resisting this path is a challenge for any political ideology,
as the evidence of history amply attests. My aim has been to sketch an understanding of
liberalism, and public deliberation, which in its theoretical modesty, and openness to
democratic participation, recognizes the blight of false certainty.

---

6 Insofar as citizens and elected bodies have attended carefully to minority rights, their
majoritarian decisions should take precedence over the Courts', on plain democratic grounds.
The case for judicial review should be predicated on an assumption that the Court will defer in
such instances. Cf. Sujit Choudhry, “So What I the Real Legacy of Oakes? Two Decades of
Proportionality Analysis under the Canadian Charter’s Section 1” (2006), 34 Sup. Ct. L. Rev. 501.


Cameron, Jamie, “Cross Cultural Reflections: Teaching the Charter to Americans” (1990) 28 Osgoode Hall L.J. 613.


Cameron, Jamie, “From the MVR to Chaoulli v. Quebec: The Road Not Taken and the Future of Section 7” (2006) 34 Sup.Ct.L.Rev. 105


Campbell, Courtney S., “Resistance and Meaning; Religious Communities and Human Cloning” 32 Val.U.L.Rev 607.


Cere, Daniel and Farrow, Douglas eds., Divorcing Marriage (McGill University Press, 2004).


DeSouza, Raymond J., “Thinly disguised totalitarianism” First Things 142 (April 2004) 9


Eberle, Christopher, Religious Convictions in Liberal Politics (Cambridge University Press, 2002).


Ferguson, James R., “Scientific Inquiry and the First Amendment” (1979) 64 Cornell L. Rev. 639


———. Rawls, (London: Routledge, 2007)


———. “Religion in the Public Square: The Place of Religious Conviction in Political Debate by Robert Audi; Nicholas Wolterstorff” 108 The Philosophical Review 293.


———. “Intolerance and Discrimination” 1 I. Con. 2.

———. “Religion in the Public Sphere” (2006) 14 European Journal of Philosophy 1


Harvison Young, Alison, “Let’s Try Again...This Time With Feeling: Bill C-6 and New Reproductive Technologies” 38 U.B.C. Law Review 123.


———. ‘Section 1 Revisited’ (1991) 1 N.J.C.L. 1.


Jackman, Martha, “Protecting Rights and Promoting Democracy: Judicial Review under s.1 of the Charter” (1996) 34 Osgoode Hall L.J. 661


Korobkin, Donald R., “Political Justification and the Law” 94 Colum. L. Rev. 1898


Laborde, Cécile, “The Culture(s) of the Republic: Nationalism and Multiculturalism in French Republican Thought” (2001) 29 Political Theory 716


Leib, Ethan J., “Can Direct Democracy Be Made Deliberative” 54 Buffalo L. Rev. 903.


Lister, Andrew. “The Deliberative Ethics of the Slippery Slope” (Toronto: unpublished lecture presented at the 2006 CPSA, York University, July 3) [copy on file with author].


Lusztig, Michael and Wilson, Michael J., “Moral Issues and Partisan Change in Canada” (2005) 86 Social Science Quarterly 126.


Macklem, Timothy “Faith as a Secular Value” 45 McGill L.J. 1 at 17.


McClennen, Edward F. “Prudence and Constitutional Rights” 151 U.Pa.L.Rev. 917


Patrick, Jeremy, “Church, State and Charter: Canada’s Hidden Establishment Clause” 14 Tulsa J. Comp. & Int’l L.


———. “Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause” (2001) 42 Wm. and Mary L. Rev. 663.


Sapir, Gidon & Statman, Daniel, “Why freedom of religion does not include freedom from religion” (2005) 24 Law and Philosophy 467


Smith, Miriam, “Framing Same-Sex Marriage in Canada and the U.S.A.: Goodridge, Halpern and the National Boundaries of Political Discourse” 16 Social Legal Studies


Trakman, Leon, & Gatien, Sean, “Rights and Responsibilities” (Toronto: University of Toronto Press, 1999)


