1. Introduction

Canada recently experienced two intense public controversies in which constitutional and religious orthodoxies clashed on basic questions relating to marriage formation and dissolution. In both instances, religious and social conservatives combined forces against those who embrace equality and religious neutrality in the public sphere as the transformative promise of the Canadian Charter of Rights and Freedoms, 1982.

The first controversy ran parallel to a series of successful constitutional test cases that affirmed claims to same sex equality and led to federal legislation authorizing access to civil marriage for same sex couples in 2005.\(^1\) The result was to dissolve one of the last vestiges of the traditional authority of Canada’s informal Christian establishment to set legal standards for sexual mores, gender roles, and family structure.

The second controversy arose in the wake of a proposal emanating from a group within the minority Muslim community in the province of Ontario to institutionalize matrimonial dispute resolution based on Sharia. The aim was

\(^1\) The Parliament of Canada possesses exclusive legislative jurisdiction over the capacity to enter into civil marriage. Parliament never legislated, but rather relied on an old common law definition of marriage as the union of a man and a woman. The provincial legislatures possess exclusive jurisdiction over the solemnization of marriage. Provincial laws authorize public officials to perform civil marriages, then also authorize clergy to perform a civil marriage, at the couple’s request, in conjunction with a religious marriage. Parliament authorized same-sex civil marriages in the Civil Marriage Act, S.C. 2005.


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to produce arbitration awards enforceable under statute in courts of law. This controversy also precipitated legislation that precluded arbitration for these disputes when based on religious or foreign law, and also endorsed gender equality. In result, the Charter guarantee of gender equality superseded claims to public enforcement of religious and cultural construction of gender roles within the traditional family.

Both controversies precipitated intensive and prolonged public debate. In both instances the Charter came to frame the substantive positions, the progression of argumentation, and the public evaluation of the strength and weaknesses of the many claims, positions, and predictions put forward by the many individuals, groups, and public officials who participated. It also framed, as one would expect, the final legislative resolution in each instance. So too, the Charter frames the contentious aftermath of these debates, in which the losing sides now attempt to reconfigure the rules for public engagement to their greatest advantage in what promises to be a continuing set of confrontations between clashing constitutional and religious orthodoxies.

Analysis of these two debates reveals the great challenge faced by faith-based communities and their social conservative supporters, especially for those whose faith-based precepts and policy preferences formerly enjoyed authoritative status in the public sphere. Majority and minority faith communities alike find it difficult to contend against the conceptual framework established by modern rights-protecting instruments. The conflict is obvious. These instruments privilege constitutional reasoning over the foundational commitments of these communities, i.e., scripture, history, tradition, and faith-based morality. They also support religious pluralism, recognize the diversity of religious and political positions within faith communities, and respect above all individual conscience and equality. While victory against this constitutional framework is futile, faith communities and social conservatives can learn to operate within it. Indeed, the successful transition to rights-based democracy is dependent on the success of that learning process.

Part 2 of this paper offers a brief overview of the framework of the Canadian Charter. Parts 3 and 4 present the basic contours of the same-sex marriage debate across Canada and the Sharia arbitration debate in Ontario. Part 5 concludes by assessing the importance of public engagement in rights-based controversies and highlighting the ways in which Canada’s current conservative government has committed itself to changing the rules of engagement for the future.

2. The Canadian Charter of Rights, 1982

The Canadian Charter of Rights and Freedoms, 1982 enjoys the status of supreme law in Canada. It embodies the international commitment forged in
the wake of World War II to respect innate and equal human dignity within the diverse and pluralist modern constitutional state. Like other modern constitutional instruments, the Charter formally regulates the interface between and among its guarantees; it also mediates between these guarantees and other policy preferences. The result is a coherent structure of rights protection, creating priorities for the various principles and values that vie in the public marketplace and dictating the roles of the various institutions that delineate and enforce these priorities.\(^2\)

The methodology developed and applied by the Canadian judiciary under the Charter derived from other systems of rights protection, including supranational rights-protecting instruments and other national constitutions. This methodology does not, indeed cannot, remain bounded by the walls of the courtroom. It permeates the work of the executive, circumscribes legislative debates, and, as this essay demonstrates, gives structure to public deliberation on Charter claims and Charter-infused policy issues.

While the Charter's guarantees are not absolute, neither are they subject to open-ended limitation. Rather, rights are interpreted purposively according to enduring constitutional principles, and their permissible limitation is predicated upon strictures of formal legality and substantive justification rooted in the same principles.\(^3\) The state carries the onus and burden of justifying infringements on guaranteed rights and freedoms. It must first establish the fact of legal formulation, by statute or common law precept, of the limiting measure in order to ensure fidelity to the rule of law and, where legislation is in issue, democratic legitimacy. It must then prove on a balance of probability that the impugned measure possesses a pre-eminence and constitutionally compliant purpose, can be rationally understood to forward that purpose, and produces beneficial effects that exceed the burden of the infringement.

These stipulations derive from a rights-protecting paradigm of which the Charter is a leading exemplar. This post-World War II paradigm gives legal structure to the view that liberal democracy must not only define and stabilize the exercise of all public power through majoritarian machinery, but also give

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\(^3\) Section 1 of the Charter reads as follows: “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 penultimate draft of the limitation clause, an attempt to forge a compromise between those who supported and those who opposed the Charter’s adoption, contained this formulation: “reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.” Another attempt to minimize the Charter’s transformative effects associated the guarantee and limitation of rights with these affirmations: the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free individuals and free institutions, and the stipulation that freedom is founded upon respect for moral and spiritual values and the rule of law.
legal priority to equal citizenship and respect for inherent human dignity. This remedial and transformative aspiration made possible unprecedented comparative analysis in the creation, development, and renovation of rights-protecting systems. In result, hitherto separate and sovereign legal systems now share substantive purposes and institutional arrangements.4

Courts operate as special guardians of this constitutional paradigm. They do not receive a transfer of political power or prerogatives to this end, however. Legislatures continue to function as responsible and representative policy-makers. The executive acts in compliance with constitutional strictures and the rule of law. All branches of government operate co-operatively within the overarching normative framework, empowered and constrained by the Charter.

Canada’s Charter entrenches the basic principles of rights-based democracy through a complex mesh of provisions that establish a relationship between the individual and the state that is both primary, i.e., undiminished by personal characteristics and the fortuities of history, and direct, i.e., unmediated by given or chosen social affiliations. A number of substantive and structural sections are relevant to the controversies that are the focus of this essay.

Section 2(a) is central to the discussion of same-sex marriage and Sharia-based arbitration of matrimonial disputes. As one of the sections relating to fundamental freedoms, it sets down two guarantees enjoyed by everyone: freedom of religion and conscience. The inclusion of ‘conscience’ extends protection to individual beliefs and convictions unrelated to, or even opposed to, religious precept, obligation, or communal authority. The resulting emphasis is on individual autonomy and equality, not the cultural or faith-based authority of one’s spouse, extended family, or identity community.

Section 15, the general equality clause, prohibits state discrimination on a number of named grounds. It is linked to Section 2(a) in a number of ways. The strongest connection is the prohibition of state discrimination based on religion. This stipulation dissolves any remaining vestiges in the public sphere of historical disadvantage visited upon individuals and communities rooted in majoritarian endorsement of religious precept or identity. The other listed grounds of prohibited discrimination relate to religious freedom less directly. They incapacitate the state from discrimination based on race, national or ethnic origin, colour, sex, age, and disability. In the past, these grounds often served as markers of inferior status based on religious teachings or derivative social and cultural norms.

The listed grounds of prohibited discrimination do not constitute a closed, fixed list. Although originally drafted in this way, the drafters changed the text to authorize later judicial additions when they decided not to include sexual orientation as an express prohibited ground. The judiciary has added

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a number of analogous grounds, including citizenship, marital status, and sexual orientation. The equality clause bars state discrimination, intentional or unintentional, on both the listed and added grounds. The state is permitted to act affirmatively to alleviate conditions of disadvantage on the same basis.

The Charter’s multiculturalism clause, Section 27, directs interpretation of the whole text consistent with “the preservation and enhancement of the multicultural heritage of Canadians.” Its purpose was to assuage the concerns of religious and identity groups that Section 15’s negation of state discrimination based on gender might undermine their traditions.

Section 28, in turn, qualifies Section 27. This clause stipulates that all Charter guarantees have equal force for both men and women. It thus signals the paramount importance of gender equality to the Charter’s remedial and transformative purposes. Further proof of the high status of gender equality in the Charter’s construction of the Canadian constitutional state is to be found in its opening words: “notwithstanding anything in this Charter [...].”

The Charter’s preamble recognizes the “supremacy of God and the rule of law” as foundational constitutional principles. This preambular formulation is weaker than Sections 15, 27, and 28. Therefore, it cannot undermine the various provisions of the Charter that elevate individual autonomy and equality above religious precept, obligation, or community authority. Furthermore, since this reference to “the supremacy of God” is paired with the “rule of law,” it stands subject to Section 52 of the Constitution Act, 1982, which stipulates the legal supremacy of the Constitution, including the Charter. Accordingly, the reference to the “supremacy of God” does not diminish the endorsement of the rule of law generally or the rule of the Constitution as supreme law.

This outline of the Charter’s substantive terms, as they relate to the controversies to be examined, reflect strong remedial and transformative aspirations. Public hearings created the opportunity to forge a text free of the compromises and deference to legislative supremacy insisted upon by the provinces that opposed the Charter. A wide variety of public interest groups, particularly women’s groups, were successful in securing protection against legislative disregard or disdain for the equal liberty and equality of their members. The engagement of these groups in the drafting process, which attracted the strong support of the general public, shaped all but one feature of the final text, the legislative override clause.

This compromise provision bridged the gap between the Charter’s official proponents, the federal government and two provinces, and the eight provinces that insisted upon a weaker Charter or none at all. The notwithstanding or override clause set out in Section 33 enables the Parliament of Canada and any provincial legislature, acting within jurisdiction, to suppress selected Charter rights, including Sections 2(a) and 15. Formal stipulations constrict its

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invocation: the override instrument must have the form of legislation, specify
the right(s) overridden, and expire after a maximum, renewable period of five
years. The Supreme Court of Canada has added the stipulation that legislation
implementing the override power can only operate prospectively.

The political costs built into these structures have militated against their
use. The general public takes the view that everyone's Charter rights are
only as strong as those of the weakest individuals and groups. Proposals to
invoke the notwithstanding clause therefore precipitate remarkably swift and
emphatic opposition. The clause is not a dead letter, however. Its dormant
force is of paramount importance, because it blunts the counter-majoritarian
critique of judicial review.\footnote{L. Weinrib, \textit{Learning to Live With the Override}, 35 McGill L. J. 541 (1990).}

This dense constitutional structure provided the framework for the debates
delineated in the following two sections of this essay. Of particular importance
is the way in which the various elements fit together.

The weakest provision, as noted, is the preambular statement of the
"supremacy of God." Stronger than the preamble, but less forceful than other
substantive provisions, is the interpretative clause relating to multiculturalism.
Stronger still are the rights embodied in Section 2(a), freedom of religion and
conscience, and Section 15, the general equality provision. Only limits that
are prescribed by law and justified may limit these guarantees. The scope of
the guarantees and the permissibility of their limitation bend to the proviso
in Section 28 requiring gender equality. The notwithstanding clause, Section
33, is the instrument by which negation of a right may be effected when a
government takes the political responsibility for so doing.

The individuals, public interest groups, and even the members of
Parliament and the Ontario legislatures participated in the debates without
detailed knowledge of the Charter's purposes, history, substantive terms,
institutional roles, or judicial interpretation. Nonetheless, the imprint of the
Charter is evident at every stage of these debates – not only in general outline,
but also according to the intricate interplay of provisions just described. This
imprint became the inescapable template for public engagement, legislative
resolution, and political aftermath of these confrontations between religious
and constitutional orthodoxies.

3. The Same-Sex Marriage Controversy

The public debate on same-sex marriage ran parallel to a number of Charter
test cases that ultimately recognized sexual orientation as a prohibited ground
discrimination in Section 15. The Canadian Parliament had decriminalized
consensual sexual acts between adults in 1969, in a package of amendments
designed to take "the state out of the bedroom of the nation." The major challenge, therefore, was not to repudiate the moral condemnation that sodomy laws impose on those who perform certain sexual acts. Rather, it was to overcome the fact that sexual orientation was not listed as an express ground of prohibited state discrimination in Section 15.

In its first major case on the question, the Supreme Court of Canada had no difficulty determining that this personal characteristic, whether immutable or changeable only at an unacceptable personal cost, had attracted sufficient stereotype, prejudice, and disadvantage to meet the standard for recognition as an unwritten prohibited ground of discrimination. Indeed, the Attorney General of Canada conceded the point.

On this basis, the Court invalidated a number of laws. In some instances, the Court granted a direct remedy; in others it left that task to Parliament and the legislatures. Relatively quickly, gays and lesbians stood on the same legal ground as heterosexual individuals and common law couples.

Eligibility for civil marriage remained the outstanding issue. Many gays and lesbians rejected marriage as a dysfunctional and patriarchal institution. Nonetheless, test cases were instituted in three provinces challenging the operative common law definition, which described marriage "in Christendom" as the life-long union of a man and woman to the exclusion of all others. Three provincial appellate courts determined that this definition constituted an unjustifiable infringement of the equality guarantee in Section 15. Two of the courts stayed the effect of their rulings pending final determination by the Supreme Court of Canada, the highest appellate court for both provincial and federal law.

The third court, the Ontario Court of Appeal, expanded the common law definition with immediate effect. The Minister of Justice then unexpectedly decided against appealing and promised to introduce legislation to Parliament to validate the expanded definition across the country. Meanwhile, other provincial appellate courts followed suit, and gay and lesbian couples started to marry, province by province.

The government's turnabout reflected its realistic assessment of its dim prospect of ultimate success in the litigation. The provincial appellate courts

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7 This statement was invoked by then-Justice Minister Pierre Elliott Trudeau in public debate on the package, which also decriminalized birth control and provided access to therapeutic abortion. See L. Weinrib, Trudeau and the Canadian Charter of Rights and Freedoms: A Question of Constitutional Maturation, in A. Cohen & J. L. Granatstein (Eds.), Trudeau's Shadow 259-282 (1998).
had rejected its best arguments in defence of the traditional definition based on a wide-ranging record. There was no reason to consider that these rulings departed from relevant Supreme Court precedent.

The decision, as it turned out, precipitated a remarkable impasse. The government already enjoyed the support of the socially liberal voters who supported same-sex marriage. Moreover, the governing Liberal party had minority status in Parliament, its own members were sharply divided on the issue, and the main opposition party was strongly committed to a social conservative agenda. There was concern that the proposed legislation would not pass, or would not pass respectably, if put to a vote.

The government, therefore, turned to the Supreme Court. It sent a set of reference questions for abstract review. The Court agreed that changing the common law definition of civil marriage was permissible under the Constitution, but did not give the government the ruling that it needed — that the Charter invalidated the traditional definition of civil marriage. The Court seemed to take the position that the government had squandered its opportunity to appeal the issue, and therefore should deal with it politically. This situation created room for the public debate to mature.

Public deliberation on the same-sex marriage issue had been running parallel to the litigation and parliamentary proceedings for some time. Members of the Christian faith communities and their clergy urged retention of the traditional definition. In the pre-Charter period this religious grouping enjoyed the status of an informally established church whose faith-based worldview provided the foundation for a wide range of laws and policies. With the adoption of the Charter, those who supported the traditional definition could no longer assume the primacy of their religious framing of the issue.

Their strategy appeared to have four stages. First, they galvanized their core supporters with websites, email campaigns, newspaper advertisements, op-ed articles, and mobilization during religious services. Second, they reached out to broaden their sphere of influence by forging alliances with other religious communities and social conservative fellow travellers. Third, they recognized the need to develop arguments that would appeal to members of the public whose allegiance was to the Charter’s framing of the issue as a matter of equality. Fourth, when these efforts proved unsuccessful, the opponents moved progressively into the Charter framework, so that by the end of the debate, the Charter framed both sides of the debate.

The purest faith-based arguments condemned homosexuality as an abomination based on biblical and other religious sources. While there was no call to return to the criminalization of sodomy, this religious framing seemed consistent with public condemnation and punishment. Within the faith-based paradigm, these precepts were fully authoritative; they could not be challenged or changed by temporal authority.

The implications of this position were wide-ranging. The only permissible sexuality was that of the married heterosexual couple, whose physical union and emotional bond produced children as well as the ideal social construct for human flourishing, the traditional patriarchal family. This social unit provided the foundation of a moral and stable social order. Politicians who did not subscribe to these views in their public statements and voting record on the marriage question faced criticism and denial of status in their faith communities.

It soon became apparent that this framework no longer bound the consciences of all the members of the faith communities that invoked it; moreover, it provoked rather than persuaded others. Accordingly, faith-based claims were restricted to receptive audiences. A different set of arguments was designed to repackage the message so that it would have wider appeal. The basic assertion was more general: the traditional definition of marriage embodied a universally accepted moral code, which provided a historically fixed foundation for western civilization that reflected the laws of nature.

There was a particular logic to this position. At its core stood the idea of the complementarity of the male and female bodies. The exclusive procreative capacity of heterosexual couples dictated the exclusion of gay and lesbian couples from both religious and civil marriage. By extension, opposite sex biological couples made the best parents, raising children who would abide by and pass on the moral teachings of previous generations.

Bubbling under the surface of these claims was the assumption that heterosexuality was normal and beneficial to the person, the couple, and society at large, while homosexuality was abnormal and destructive on all counts. It was the sexual act, however, not the person that attracted opprobrium. One could escape by rejecting an inferior lifestyle choice.

Other arguments attempted in various ways to bridge the gap between the faith-based framework and the constitutional terms of the debate. There were two such claims argued in the course of the litigation, one conceptual and the other textual. Since the state had imported Christian marriage as a religious sacrament into public law, it was argued, it could not then change its essence. A less restrictive argument contended that the word “marriage” in the Constitution Act, 1867 encompassed the fixed historical meaning of the common law formulation, absent formal constitutional amendment. In effect, the conservative approach to the authority of scripture was transferred to the constitutional text.

The popular version of this approach stressed the importance of reserving the word marriage to the institution that formalized the relationship of opposite sex relationships, leaving civil unions with full equivalent benefits for same-sex couples. This argument, when fully articulated, went beyond language and symbolism. The suggestion was that extending the word marriage to same-sex
couples would undermine the institution itself; by extension, it would also deny its important benefits to society at large.

It is important to note, before turning to the larger set of in terrorem arguments, that the acceptance of civil unions with all the benefits of marriage was a huge concession for the religious and cultural opponents of same-sex marriage. Had they offered this possibility early in the debate, before the prospect of success in the litigation materialized, they might have had a deal. In fact, however, this concession was disingenuous. The federal government's jurisdiction over the capacity to marry does not extend to the creation of the legal rights and obligations that constitute civil unions. The provinces possess jurisdiction over that subject matter; it was abundantly clear that they would not band together to create a uniform set of arrangements across the country.

In terrorem arguments proliferated. Some of these claims related to the impact of the expanded access to civil marriage on the conservative faith communities themselves. Concern was expressed that these communities would become alienated from the state because of the wide gulf between public morality and that of the faith community. There was also fear of reduction of benefits and status, leading to intolerance or condemnation. The most vociferous claim was that clergy would be forced to solemnize the civil marriages of same-sex couples.

More general predictions cautioned that the moral order would weaken without the clear lines that heterosexual marriage established between male and female, heterosexual and homosexual, and the patriarchal and non-traditional family. Related warnings focused on the welfare of children. Children would not flourish without two opposite parents to model proper sexual roles. Since one could not accurately predict the dire consequences of this social engineering, the state should not rush into such a dangerous social experiment without further consideration and study.

While these positions enjoyed a degree of intelligibility and cogency within the religious and social conservative frameworks, they appeared unimpeachable, unsupportable, counter-intuitive, and contrary to experience and expert opinion within the constitutional framework.

Some of the arguments were simply overstated. The appeals to history, nature, and universality were easily dismissed as social constructions that reflected the power, size, and coercive authority of certain cultural communities in the past.

Other arguments proved more than intended. The strong claim that marriage was crucial to the well-being of heterosexual couples and their children, and also provided the necessary foundation for social well-being and stability, seemed to support extension, not restriction, of access to marriage. Would not the social affirmation and material benefits of marriage work their magic on same-sex couples and their children? Would society not benefit by the full integration of a historically disadvantaged and stigmatized group of
people? If procreation was to be understood as the sole or primary purpose of marriage, not commitment and companionship, then why did it include those who could not, did not, or could no longer procreate?

In the absence of satisfactory explanations or justifications for the faith-based position, the exclusion of gay couples from civil marriage increasingly appeared to be profoundly unjust. As time passed, more and more Canadians became aware that many gay and lesbian couples form and maintain long-term loving commitment to each other, procreate with the aid of reproductive technologies, successfully raise children from previous relationships or by adoption, and seek the stability, benefits, and personal self-fulfilment of marriage. Social science studies confirmed these observations.

The opponents of gay marriage had no choice but to find a place within the Charter framework and make instrumental arguments to preserve their position to the extent possible. Their earlier comments on the Charter had been totally negative, castigating the courts for their recognition of sexual orientation as a prohibited ground of discrimination under Section 15. They considered this ruling totally illegitimate, on the view that the framers had considered and rejected this possibility conclusively. They ignored the fact that the framers had done two things: rejected inclusion of sexual orientation and also opened the list to judicial development.

To preserve their position to the extent possible, they invoked the Charter’s guarantee of freedom of religion to secure assurances that their clergy would be free to refuse to solemnize civil marriages for same-sex couples. This claim was overheated. No clergy had been coerced to solemnize civil marriages for divorced persons when access to divorce had been broadened.

Other claims were more contentious. The opponents of same-sex marriage wanted assurances that public marriage commissioners, whose job it was to perform civil, not religious marriages, would be able to refuse to officiate for same-sex couples. This argument voiced the concern that the Charter, applicable to state action, and the human rights codes, applicable to private relationships, would undermine the full participation of persons of faith in society generally. It mirrored other debates relating to doctors and pharmacists who insisted that they should be able to refuse or impose conditions upon medical advice or care that was inconsistent with their personal religious views on abortion and birth control.

A related argument asserted the right to freedom of association. One frequently expressed concern was that churches would have to rent out their premises for same-sex wedding celebrations. There was also concern that individuals would not be free to refuse to offer services, otherwise regularly offered to the public, to gay and lesbian individuals, same-sex couples, or public interest groups acting in the interest of same-sex equality.

Questions about religious free expression also arose. Parliament had expanded the criminal offence of publicly, wilfully promoting hate against an
identifiable group to include homophobic speech. The opponents of same-sex marriage wanted to ensure a free hand in public debate.

This assortment of claims presupposed entitlement to the continuation of historic special privilege within the public sphere. No one doubted that the private sphere of religious autonomy over the solemnization of religious marriage and use of sacred property would be preserved. It was also clear, however, that the adoption of same-sex marriage would raise questions about the assertion of religious freedoms in the public sphere to the extent that their exercise impinged directly on the equality of gays and lesbians. These claims will be worked out over time in the particular contexts in which they arise.

The entry into the public debate of faith communities and clergy who supported same-sex civil marriage was enormously important. It validated the Charter as a comprehensive, coherent whole, not just provisions selected for advantage. One effect was to undermine the claim that opposition to same-sex marriage was the universal stance of religious faith communities. Another effect was to make clear the distinction between religious and civil marriage.

Individual Jewish clergy came forward to support same-sex civil marriage. They belonged to traditional faith communities, variations of older communities, and new communities. While they supported the permissibility of same-sex civil marriage under law, not all of them indicated that they would solemnize these marriages. Many made clear that they would not perform these marriages by choice; others said that they could not due to the precepts of their faith. Several churches accepted same-sex marriage and looked forward to their legalization. One church, the Metropolitan Community Church of Toronto, participated in the litigation to seek validation of same-sex marriages conducted under its auspices.

These interventions revealed more flexibility, diversity, and pluralism in religious circles than might otherwise have been assumed. The marriage debate ceased to be a conflict between the religious and the secular. Instead, it revealed itself as a dispute between conservative religious groups and their social conservative counterparts, on the one hand, and liberal religious and social groups on the other. It thus became possible to regard the Charter’s guarantee of freedom of religion and conscience as operating in conjunction with, and not necessarily in conflict with, its guarantee of same-sex equality.

The Charter set the terms of the public debate by framing the key issue as the entitlement to equal treatment under the law as guaranteed by Section 15.

12 Sec. 318(2) of the Criminal Code creates the offence of publicly and wilfully promoting hatred of an identifiable group, defined as a section of the public distinguished by colour, race, religion, ethnic origin, or sexual orientation. An exemption is provided for expression of opinion on a religious subject or based on a belief in a religious text. See R.S., 1985, Chap. C-46, Sec. 319; R.S., 1985, Chap. 27 (1st Supp.), Sec. 203; 2004, Chap. 14, Sec. 2. For analysis of the constitutionality of this provision, see L. Weinrib, Hate Promotion in a Free and Democratic Society: R. v. Keegstra, 36 McGill L. J. 1416-1449 (1991), reprinted in S. J. Heyman (Ed.), Hate Speech and the Constitution 382 (1996).
The exclusion of certain conjugal relationships from civil marriage clearly breached the structure that these guarantees gave to the relationship between the individual and the state. The faith-based condemnation of homosexuality could neither defeat nor transform the potency of this guarantee once the debate made it possible for more and more people to take seriously the point of view of the excluded gay or lesbian person, as Charter rights analysis prescribes.

As time passed, the question of same-sex equality became contextualized, with the focus on the rights of one’s uncle, teacher, business associate, neighbour, friend, and child, rather than on some demonized ‘other.’ A parliamentary committee held hearings across the country, inviting community leaders and experts in various academic fields to present their views. At the end of the formal proceedings each day, members of the public were invited to participate, each taking two minutes. One by one, they spoke about the stigma and frustration precipitated by the denial of public affirmation of their intimate relationships and families. These submissions were authentic, passionate, and compelling.

Similarly, the Charter’s analytic methodology for permissible limitations on rights shaped the public debate. It is not extravagant to say that the shift in onus and the strictures of proportionality argument proved decisive to the success of the proponents of same-sex marriage. The question posed in classrooms, living rooms, and television studios became “why does the law exclude same-sex marriage?” rather than “why do those homosexuals think that they should be able to marry like normal people do?”

The many media interviews with the lawyers and commentators on behalf of public interest groups supporting same-sex marriage provided a rational foundation for public deliberation. Over time, the weaknesses of the opponents’ appeals to morality, history, biology, and social ordering became apparent. For the constitutionally literate, these weaknesses mapped onto the rational connection, minimal impairment, and benefit-over-burden tests that the Charter set for permissible limits on rights.

A series of appellate court rulings made same-sex marriage legal in most provinces, and then federal legislation enacted by Parliament in June 2005, in a vote of 158 to 133, made it available across the country. The new dispensation was not fully secure, however, until 8 December 2006, despite the fact that over 3,000 marriages had taken place. On that date, the new Conservative national government fulfilled its election promise to offer a free vote in Parliament on whether to reopen the debate.

This electoral promise had solidified the support of the government’s religious and socially conservative political base during the last election, but the vote on reopening the question has likely undermined the government’s long-term political prospects. The minority government now faces three other
parties that support same-sex marriage and needs to expand its support among socially liberal voters to win a majority next time. In particular, it must gain seats in Quebec, where support for same-sex marriage is high. Meanwhile, public support for same-sex marriage continues to rise.14

The resolution proposing the introduction of legislation reinstating the traditional definition was soundly defeated in Parliament, in a vote of 175 to 123. The Prime Minister made no effort to support the resolution. When it failed after an anaemic debate, he indicated that he has no intention to reopen the debate. The Minister of Justice agreed. The social conservative agenda remains in place, however. The final section of this paper will briefly canvass the plan to further those objectives by less direct means, through changes to the process for appointment of judges and the funding available for Charter litigation and public advocacy supporting the transition to rights-based democracy.

4. The Sharia Law Arbitration Controversy

The second controversy embodying clashing religious and constitutional orthodoxies also pertains to the traditional patriarchal family. The same-sex marriage debate marked the removal of one of the most important vestiges of religious framing in the public sphere, by ending the majority religion's longstanding construction of capacity to enter into civil marriage. The Sharia arbitration debate ended in rejection of a new proposal for state enforcement of a minority religion's distinctive arrangements for marriage dissolution. Both debates were driven by the Charter's equality clause, testing its effect upon traditional mores as well as upon other provisions relating to religious freedom and multiculturalism.

The controversy over Sharia-based arbitration originated in a proposal to use Ontario's Arbitration Act, 1991 as the legal framework for settling personal disputes relating to inheritance and family matters within the Muslim community. The statute was not designed for this purpose, but did not preclude it.

14 The government approached the vote awkwardly. The prevailing legal opinion in the country is that the Charter requires extension of the definition of marriage to include gay and lesbian couples. The point remained in contention because the Supreme Court of Canada, as noted, did not rule on this point when asked to do so. If the government actually wants to return to the traditional definition and thinks that it has the political support to do so, it should take the route that would test that proposition. That would require use of the notwithstanding clause. The government is well aware, however, that the taint of using this power, and thus making clear that it is taking away a Charter right, would undermine any prospect of success. Without taking full political responsibility, the government's position on same-sex marriage appears disingenuous, at best.
The Islamic Institute of Civil Justice in 2003 announced the creation of a 'Sharia court' system. The plan was to bind all 'good' members of the Muslim community to use its services. The Sharia court would operate according to the strictures of the Arbitration Act, 1991, so that its rulings would take the form of awards subject to enforcement by Ontario courts. The effect, and presumably the purpose of the proposal, was to establish two converging modes of coercion, one communal and the other legal.

Opposition to the Institute’s proposal emanated from within the Canadian Muslim community and extended far beyond it. It included representatives of a number of religious faiths and established organizations, as well as individuals, experts, and organizations dedicated to gender equality and the separation of religion and state. It spawned new groups and opinion leaders as well. The debate in its late stages included leading feminist voices as well as female members of the Ontario legislature. Protests took place across Canada and in a number of European cities.

The strong objection to the proposal focused on one element: judicial enforcement of obligations rooted in a particular community’s rules for marriage and divorce. Informal Sharia dispute settlement might have been controversial, but would not have raised the same range of constitutional and legal questions.

Judicial enforcement raised important principles, including separation of church and state, the rule of law, gender equality, spousal rights and duties, familial responsibility, individual autonomy, and the best interests of children. These constitutional and quasi-constitutional principles came to dominate the public debate and determined its resolution.

Without this public dimension, the debate might have deteriorated into an acrimonious, unintelligible battle between opposing comprehensive visions, one religious and the other constitutional and rights-based. Many who did not take this constitutional framework into account considered elements of the debate arbitrary, biased, and unfair.

The Islamic Institute of Civil Justice’s initial proposal appeared sensitive to the applicable public norms. Participation was to be voluntary. There would be agreement between the parties as to the process and the particular arbitrator, who would apply ‘Canadianized Sharia law.’ Administrative and/or procedural safeguards would apply. The process would minimize the cost, complexity, and delay of court proceedings. Since other faith communities provided dispute resolution under the Act, objection to Sharia-based arbitration would amount to discrimination based on religion.

16 There was some basis for concern that Sharia-based arbitration was put forward as the first of a number of arrangements that would give Canadian Muslims self-governance, i.e., as “the beginnings of a Muslim Civil Justice System in Canada.” See Boyd, id., at 54-55.
Opposition to the proposal challenged these characterizations of the project. There was concern that this local initiative was part of an international plan to establish local governance for Muslim communities within non-Muslim countries. Similar proposals had failed elsewhere. A related concern noted the possibility that the proposal might produce *de facto* segregation of the Muslim community, which would strengthen the hand of traditionalists against those who advocated moderation and modernization of Sharia.

Many liberal Muslim men and women insisted that they did not come to Canada to live under Sharia. They rejected any increased community authority over their lives. It followed that they strongly rejected the idea of public enforcement of faith-based strictures. These arguments were particularly forceful since they were the views of those who had experienced the operation of Sharia in their own lives and the lives of friends and relatives in Canada and elsewhere.

The proponents' initial assurances of fidelity to the shared norms of Canadian society proved unsustainable. There were a number of schools of Sharia as well as many different operative legal systems relying upon Sharia. Even if one school or system among the many could be labelled as consistent with the basic tenets of federal and provincial family law, there was no assurance that the tribunals could or would apply it, or apply it properly. This was a troubling realization, since the Arbitration Act, 1991 provided for streamlined enforcement of agreements, without independent oversight of the arbitrators’ qualifications, fact finding, or substantive rulings.

The opponents raised a series of specific concerns relating to individual autonomy and gender equality. Concern focused on consent at first. Would women enter into these arbitrations voluntarily, free of pressure exerted by or upon their spouses, families, and communities? Those familiar with the community noted that a woman’s preference to have her claims processed under Ontario family law might raise allegations of disloyalty to her immediate and extended family as well as her community. These ramifications would produce great vulnerability at an already stressful time. Moreover, they might undermine the standing of her extended family within the community, in Canada, and elsewhere. In the extreme, her preference might be considered an act of blasphemy or apostasy, a very serious charge that might lead to harm both at home in Canada and upon return to one’s community of origin.

Further questions related to the timing and revocation of consent to arbitrate. The commitment to arbitration based on Sharia might be made in very general terms without reference to the specific dispute or the alternative dispute settlement arrangements available in the public sphere. It might constitute an irrevocable part of the original marriage contract, formalized by a young woman on her wedding day, for example. She would be bound despite the lack of independent advice as to the alternative modes of dispute resolution offered under provincial family law or comparison of the substantive entitlements on
the breakdown of marriage set down by Sharia and Canadian law. The Islamic Institute contemplated general commitments to arbitration, which could not be repudiated 'for convenience.'

The operation of the proposed arbitration tribunals lacked specifics. Who would do the arbitration? What training and approach to Sharia would individual arbitrators espouse? Where would they be educated? Would their education include training in Ontario and Canadian family law? What monetary or temporal saving would there be if compliance with Ontario law or constitutional strictures depended on costly and complicated appeals to the courts? No satisfactory answers to these questions materialized.

Reliance on Sharia precepts in the context of marriage breakdown might put in jeopardy particular entitlements or general approaches secured by and under provincial and federal statute. While these benefits did not derive from the Charter directly and were subject to waiver, they were strongly associated with the Charter's guarantees of personal autonomy and gender equality, as well as the related concern for the best interests of children. They embodied important elements of public policy designed, in part, to dismantle the authoritarian structure of the patriarchal family.

Two elements of public policy were particularly relevant. Ontario and federal statute established that a man who withheld permission for his wife to remarry could not institute or defend an action to settle disputes related to the break-down of the relationship. Also, when Ontario law imposed mandatory mediation on civil disputes, it exempted family law disputes from this process because of concern that there might be an imbalance of power or some other unacceptable dynamic between the parties, such as a history of domestic violence.

While Sharia varies over time and from place to place, it does not recognize women's liberty and equality. Its basic framework for marriage and its dissolution recognizes men as the primary actors within the immediate and extended patriarchal family. To carry out this role, males enjoy a larger inheritance entitlement than females and take on a quasi-parental responsibility and authority over their unmarried and/or divorced female siblings and relatives.

These male privileges and responsibilities apply to divorce as well. Men possess the authority to effectuate a religious divorce informally and unilaterally and on grounds that are not contained in Canadian law, e.g., because there was no male heir or on an unproven allegation of infidelity. Women are bound by this informal pronouncement of divorce. Their access to divorce involves more formality and is based on narrower grounds, however. On this basis, a man has the power to refuse to provide a divorce to his wife even when the marriage has ended. Refusal of a divorce bars the woman from re-marriage but does not inhibit the man in the same way because polygamy is permitted.
Under Sharia, men enjoy exclusive rights to custody of children, even young children. Women enjoy much lower entitlements to property and support after the breakdown of a marriage or the husband's death. Women are free of any duty to support themselves or their children.

The structure and traditions of Muslim communities temper these rules through the terms of the marriage contract as well as the responsibility of the extended family and community for a woman's well-being when a marriage fails. However, a woman's access to this support might require her to leave Canada. Moreover, because these entitlements would not necessarily enter into the arbitration award, they would not likely be subject to enforcement.

One detailed account of a Sharia-based settlement drew considerable attention by giving substance to these general rules.17 A Canadian woman, at age 22, had agreed to an arranged marriage to a man from her homeland, as was the custom in her family and community. She married him in their home country, sponsored his application for permanent residence in Canada, and set up a home with him in Canada. They soon had a child. The marriage failed quickly, due to constant arguments. He was violent on occasion and tried to distance her from her family. After less than a year, he returned to his homeland where he was able to remarry immediately since polygamy is permitted to Muslim males.

To settle the unresolved issues precipitated by his departure, the abandoned wife turned to the Ontario legal system. She sought and obtained a separation agreement that split the value of the family home and left her husband with the assets that were his before the marriage. She was granted custody of their son and an award of a few hundred dollars a month for his support. Her husband had visitation rights every other weekend. After a year of separation, she instituted divorce proceedings and obtained a no-fault divorce of the civil marriage. She was able to take the initiative to secure these arrangements at a reasonable cost with the services of a lawyer.

This was not the end of the story, however. She could not remarry within her community without a religious divorce, for which her ex-husband's consent was necessary. He demanded a large sum of money and all her jewellery. Having no leverage, she paid him $5,000, which she had to borrow, gave up all claims to child support and alimony, and renounced legal action in the future. In return, she obtained the religious divorce and was able to retain custody of her son, who would otherwise have had to leave Canada to live with his father at age eight. She did not participate in the proceedings that determined this settlement under Sharia law. The negotiations with the imam were conducted through her male relatives.

This example demonstrated the wide contrast between the procedural and substantive approaches to matrimonial dispute resolution under Sharia

and Ontario law. While the Arbitration Act, 1991 provides some rules for the process of deliberation, it does not impose on the arbitrator the duty to be alert to any imbalance of power between the parties, for example, based on the male control over the divorce. Nor is there an obligation to consider the weight of evidence by men and women equally, or to consider patterns of violence as important factors in the determination of the appropriate award.

The Ontario government hoped to forge a compromise arrangement that the public would support. To this end, it created a forum for deliberating upon various issues that had crystallized during the acrimonious debate.

The government commissioned an investigative report by Marian Boyd, a former attorney general of Ontario. On the basis of a large number of submissions, the Report canvassed the issues and the relevant legal standards, concentrating on the question of appropriate safeguards to be incorporated into the Arbitration Act, 1991 for family dispute resolution.

As its starting point, the Report determined that the lack of evidence of harm in the informal application of Sharia constituted a significant indication that the system was working satisfactorily. Many critics disputed this deduction, noting the closed nature of the informal proceedings and the reluctance of those deleteriously affected to tell their stories for fear of disapproval within their communities. In any event, close reading of the Report discloses numerous examples and possibilities of disadvantage.

The Report also took the position that the Charter would not apply to Sharia arbitration under the Arbitration Act, 1991 because the deliberations would be regarded as negotiations between two private parties. The opposite conclusion seemed more plausible, however. The negotiation would be conducted under a binding agreement to abide by the strictures of the statute, which created a framework of rights and obligations between the parties that were judicially enforceable. The judge’s powers were statutory. On this assessment of the legal arrangements, the Charter would apply.

Since the Report proceeded on the assumption that there was no evidence of harm to women and that the Charter’s gender equality protections did not apply, the main concern was to improve the fairness of the process.

For example, one recommendation stipulated that the agreement to arbitrate be in writing, signed, and witnessed. Another required formalization of this agreement at the time of the dispute, when the issues in contention were known. These changes made possible two more requirements. One related to the specific focus of the arbitration – that the agreement lists the contentious issues. The other related to the terms and significance of the arbitration, e.g., the coercive force of the award, the form of law to be applied, and a statement of the parties’ understanding of the religious principles to be used. To ensure that these stipulations served their purposes, the Report recommended that the parties have independent legal advice as to the process and alternatives and that the arbitrators make available a set of principles for the arbitration.
The Report also suggested more transparency. It recommended that government establish and conduct public education programs on family law, the court system, and religious law. The arbitrators would report to the Attorney General annually on their cases as well as any complaints. The courts would be empowered to set aside arbitration awards considered to be contrary to the best interest of the children affected and where the parties did not have independent advice or sufficient understanding of the proceedings and their consequences.

These proposals did not dispel the substantive concerns of those who believed that Sharia-based arbitration would withhold hard-won entitlements under provincial and federal law that supported the liberty and equality of women in the context of the breakdown of an intimate relationship. The Report took the view that faith-based arbitration was no different in this respect than the private ordering that formed the basis of many if not most settlements of these issues. Since public policy allowed individual waiver of many entitlements, there was no reason that faith-based dispute resolution could not entail similar waivers.

The critics of Sharia arbitration were not assuaged. They continued to object to any system that denied full gender equality in both procedural and substantive terms. The proponents of Sharia arbitration did not, perhaps could not, effectively meet this objection. They undermined their position by tending to label the objecting individuals and women’s groups, including those within the community, as ill informed and biased. One proponent said that Muslim women should not be considered experts in Sharia just because they had been ill treated by it.

These exchanges made it apparent that patriarchal gender roles prevailed within the community. Community leaders dismissed serious concerns by members of their own community, giving the impression that they did not think it necessary to engage on the merits with those whose lives would be most affected by the proposal. They appeared to regard their female critics as the subjects and objects of Sharia, unsuited to participating in its formulation, interpretation, and application.

Critics from outside the community were treated differently. They were charged with looking at the arbitration proposal through the lens of long-standing negative stereotypes against Muslims or through the distorting lens of the 9/11 terrorist attacks. One commentator accused the opposition of scare tactics, hysteria, and dishonesty.

Over time, some of the proposal’s proponents recognized the strength of the Charter-infused critique and tried to counter it in similar terms. They asserted their entitlement to create Sharia tribunals as an exercise of the community’s religious freedom, specifically guaranteed under the Charter,
drawing support from the preambular reference to the “supremacy of God” and the provision mandating interpretation supportive of the multicultural heritage of Canadians.

These positions did not engage the crucial issue in the debate, however. There was no doubt that the community could set up informal Sharia-based dispute resolution without state interference. To the extent that the proponents did not acknowledge that arbitration under statute would include particularly strong public enforcement mechanisms, their arguments did not forward their cause in public opinion.

This instrumental Charter argument had particular contours. The aim was to retain important issues of women’s and children’s well-being within the private sphere of the traditional family and faith-based community, leaving the community as the entity that interacted with the state under the Charter in the public sphere.

The proponents also invoked the Charter’s guarantee of equality and support for multiculturalism. They pointed out that other faith communities offered religious arbitration without attracting criticism. This claim to equal treatment was formal, applicable to state action as between religious communities. It did not address the substantive equality issues in play, which related to gender equality and to the protection of children. Upon examination, it turned out that some of the communities listed either did not offer arbitration for family disputes or did so only in a handful of cases per year.

The controversy continued to intensify until a few decisive interventions delineated the Charter framing of the debate so clearly that it precipitated a decisive government response.

A number of prominent feminists wrote a public letter to Premier McGuinty. They called on the government to maintain one system of law for everyone governed by Ontario law, for which elected officials would remain politically accountable. The claim that freedom of religion afforded a right to faith-based dispute resolution under the Arbitration Act, 1991 contradicted this principle. State enforcement of Sharia-based awards relating to the family would breach the separation of religion and state; in addition, it would undermine Ontario’s commitment to anti-racism and multiculturalism. For these reasons, faith-based arbitration would lead to divisiveness, insularity, resistance to change, and human rights abuses. The well-being of women and children would suffer since they are least able to protect their own interests within identity communities and are most removed from public recourse.

The Ontario Liberal Women’s caucus, a group composed of the female members of the Ontario Legislature in the ruling Liberal Party, entered the public debate at this decisive juncture. Their unanimous opposition to Sharia-based arbitration was described in the press as “ferocious.”

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19 I. Urquhart, McGuinty faced rebellion in his caucus: Why premier chose to act, Toronto
Cocco, head of the caucus, noted that some women would find themselves on an “unequal footing” in defending their interests under Sharia, while “Ontario law is about equality.”

After a prolonged and acrimonious debate, the Premier of Ontario announced legislation precluding faith-based arbitration as well as arbitration based on foreign law. He stated his reasons in these words: “There will be no Sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians.” To do otherwise would “threaten our common ground.”

The Ontario government’s decision to abandon its efforts to forge a compromise based on administrative and procedural safeguards was abrupt in its timing and mode of delivery. It was not surprising, however, given the momentum of the debate. A total of eighty-seven human rights groups stood against faith-based arbitration for family matters. The two opposition parties, including Marion Boyd’s New Democratic Party, opposed faith-based arbitration. Leading feminists, as well as the government’s women’s caucus, had cogently denounced the proposal. Demonstrations in and outside Canada against the proposal promised to raise the profile of the controversy and intensify its rancour. There was strong repudiation of the arbitration proposal within the Muslim community, particularly from women’s groups and individual women.

Those who opposed Sharia-based arbitrations considered their victory complete. Their participation in the debate had highlighted the vulnerabilities of women and children within the Muslim community. These interventions had demonstrated the wide gulf between the rules applicable to marriage breakdown under Sharia, on the one hand, and Ontario and Canadian law, policy, and constitutional principles, on the other. They had also demonstrated that no change to the administration or procedure under the Arbitration Act, 1991 could adequately bridge that gulf.

In this context, the government could not leave the status quo in place. First, it required that Canadian or Ontario law apply to the arbitration of all dispute resolution relating to the family, precluding all faith-based arbitration. Second, it has made other legal changes that increase the fairness of family dispute arbitration by addressing questions of power imbalance and family

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20 Howlett, id.


23 The Premier’s announcement was made in a Sunday telephone conversation with a journalist. One may surmise that he was pre-empting further intensification of the opposition.
violence. It also made commitments to future policy development, including public education initiatives within communities where patriarchal family arrangements are common.

Those sectors of the Muslim community that sought to establish arbitration tribunals were strongly disappointed. There was repetition of the accusations of ignorance, stereotype, and prejudice. Muslim women, it was claimed, had been caricatured as vulnerable, helpless, and disempowered.

Of particular interest, however, were a distinctive set of assertions alleging that the government had abandoned its responsibilities to the community by failing to heed calls to protect Muslim women from informal Sharia-based dispute resolution, which lacked competent personnel, transparency, and accountability and also did not respect women’s equality.

The latter claims demonstrated the complexity of the debate as well as the degree to which it came to map onto the Charter’s legal structure, principles, and guarantees. The original proposal for Sharia arbitration emanated from conservative elements within the Muslim community hoping to consolidate community authority over the traditional family by adding judicial enforcement. It was not designed to correct procedural or substantive unfairness in the operation of informal Sharia-based dispute resolution in family matters. In this critique, however, one can discern that the Sharia arbitration debate forged a direct bond between Muslim women and the provincial government. That bond made possible claims invoking the government’s responsibility to make improvements in the operation of Sharia in their lives completely separate from the questions relating to the Sharia arbitration proposal.

The Sharia arbitration debate was instructive in demonstrating how strongly the general public felt about the position of women within the Muslim community. The concern that the public’s views reflected stereotypes and prejudice was unwarranted. A poll released on 14 November 2006 indicated that a strong majority of Canadians, 75 percent, welcome the Muslim community and value its positive contribution to Canadian society. When asked whether Canada should accommodate traditional practices in respect to the rights of women or whether minority communities should adapt to Canadian approaches, only 13 percent said yes to the first question while 81 percent said yes to the second.

The resolution of the Sharia arbitration debate pivoted on the fact that there were voices from the Muslim community, male and female, that delineated the disadvantageous impact that the Islamic Institute’s proposal would have on their lives and registered their protest to any public enforcement. The government had to hear these voices in order to fully appreciate the legal and constitutional interests at stake.

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24 The poll was conducted by Environics Research with a sampling error of plus or minus 2.2 percentage points, 19 times out of 20. The polling data may be accessed at http://www.trueaufoundation.ca.
This engagement of individuals and public interest groups was strongly reminiscent of the engagement of women’s groups in the political engagement that culminated in the adoption and drafting of the Charter. In the concluding section of this paper, the reason for this similarity will become apparent as well as cause for concern as to its continuity.

5. Epilogue and Conclusion

The same-sex marriage and Sharia arbitration debates offer insight into some of the less obvious features of modern constitutionalism. The modern constitutional state provides rights protection in order to create a public sphere in which each member of society is free and equal, displacing earlier paradigms that offered a text-bound, historically fixed, majoritarian moral structure for the exercise of public authority. In the transition to rights-based democracy, it is usually the particular guarantees, judicial review, and questions of institutional legitimacy that take the spotlight.

This essay suggests that public debate also plays an important role in securing this transition by developing the patterns of thought prerequisite to the freedom and equality of each member of the constitutional state. Rights-based democracy is not solely the product of judicial review or the prize to be won in electoral politics. Its precepts must be internalized by all citizens and all of their political representatives.

The two public debates analyzed in this essay provide examples of public engagement that succeeded in delimiting the issues of same-sex marriage and Sharia arbitration as Charter issues and, more particularly, as equality issues. Once the Charter’s equality guarantee came to frame these issues, the authoritative stance of the religious communities dissipated. Their leaders had to strive to maintain the allegiance of their own members, appeal to non-religious social conservatives, and at the same time compete for public support in the open marketplace of ideas. This multilevel engagement resulted in a tangle of weak, inconsistent, and demonstrably false claims. Attempts to straddle the religious, conservative, and Charter frameworks failed.

In contrast, the position of the public interest groups and opinion leaders working within the Charter framework grew clearer, more cogent, and better supported as time passed. Once both sides had moved into the Charter framework, it was obvious that the faith-based Charter claims were self-serving, while their counterparts’ approach was comprehensive and respectful of the Charter’s complex mesh of substantive principles and institutional roles. Moreover, their arguments had the advantage of reflecting the well-ordered mode of argumentation that courts apply to rights claims.

This mode of argumentation may constitute the best promise of the success of the transition to rights-based democracy. It legitimates judicial review of
rights claims as a non-political exercise. It also ensures fidelity to the rule of law, democratic legitimacy, and the separation of powers in the exercise of public authority. Furthermore, it ensures fidelity to the principles that inform the guaranteed rights and freedoms, either in their protection or their justified limitation.

Public deliberation that applies this mode of analysis reveals that the foundations of some faith-based claims are inconsistent with the basic principles of freedom, equality, and respect for innate, equal human dignity. It also tests the constitutional implications of a range of arguments formulated to forward faith-based commitments on grounds designed to appeal to the general public.

Public engagement along these lines leaves to the political sphere the determination of many questions that might otherwise work their way into litigation, raising the counter-majoritarian critique. Moreover, it produces the situation where elected representatives learn to understand their role as supporting the constitutional structure, rather than ignoring, evading, or repudiating it for political advantage.

The agenda of the current Conservative minority government in Canada demonstrates this dynamic. In the aftermath of its failure in December 2006 to reopen the debate on same-sex marriage, and fired by other policy initiatives stymied by the Charter, government has moved in a number of ways that do not require legislation to change the rules that govern the transition to rights-based democracy in the future.

Ostensibly as a cost-cutting measure, it has cancelled the Court Challenges Program (CCP). This was a long-standing, low-cost federal program operating at arm’s length from government that funded selected Charter test cases, including equality cases. The CCP also funded activities to increase public awareness of equality rights. The program provided the necessary monetary support for a large number of Charter cases in which individuals and public interest groups pressed governments to fulfil their constitutional obligations.

Former Liberal governments had considered it appropriate for government to fund these cases, brought to enforce the government’s constitutional obligations. In this way, they committed public funds to the transformational purposes of the Charter. While confidentiality concerns preclude any public listing of the individuals and groups that benefited from this funding, we know that they include women, aboriginal groups, gays and lesbians, people of colour, religious groups, and the disabled. Annual funding amounted to about $6 million. This modest sum built the expertise and experience in legal and political advocacy that was so evident in the two debates under discussion.

The current Conservative government has also cut back the base funding of Status of Women Canada (SWC) by 40 percent, i.e., $5 million. SWC is also a low-cost, long-standing program that supported women’s groups to organize and build expertise and a knowledge base. It also funds research projects,
public advocacy, and government lobbying. This organization survives, but must now apply its much reduced funding to specific projects with specific goals. In addition, it has lost two important components of its longstanding mandate: to work to support the full political participation by women in Canadian society and to realize their full equal status.

The funding from this program made possible the effective participation of women in support of the Charter's adoption and its strong protections for women's equality. It also supported public advocacy that battled against the Sharia arbitration both within and beyond the Muslim community. Former Liberal governments considered this advocacy necessary to the full realization of equality for Canadian women.

Not satisfied with merely changing the political playing field, the current government has announced changes to the process for appointment of senior judges. These changes will introduce an anti-Charter tilt to the appointment process, by adding a representative to the committees that consider nominees' qualifications whose designated responsibility would be to ensure a commitment to the government's law and order agenda.

On the bright side, the government has abandoned plans to legislate a Defence of Religions Act, designed to insulate acts based on religious belief from the hate speech law and the provincial human rights codes.

In the lead up to the next election, the Liberal Party has labelled itself the 'Party of the Charter' and taken a strong stance against the government's various assaults on the Charter. It seems very likely that, if elected, a Liberal government would re-instate the programs that support public engagement in deliberations on Charter-infused public policy. It is regrettable that the two largest political parties on the national stage consider it appropriate to identify as pro- and anti-Charter. More regrettable is the fact that one party has taken a strong anti-Charter stand, resurrecting the position repudiated by the Canadian public during the deliberations on the adoption of the Charter.

Canada has likely not seen the last major clash between religious and constitutional orthodoxies. The two controversies examined in this essay illuminate the transformative promise of the Charter as a framework for policy formation in Canada. The same-sex marriage debate signalled the end of the authority of Canada's informal Christian establishment by demonstrating that pure faith-based understandings of sexuality, marriage, and family cannot compete in the marketplace of ideas against the Charter's prohibition of discrimination based on rooted personal characteristics. The Sharia arbitration debate signalled that each and every woman in Canada can resist attempts by her faith and/or identity community to co-opt public coercive authority to its own purposes. Moreover, it demonstrated that Canadian multiculturalism does not privilege allegiance to faith and/or faith community over the relationship that the Charter establishes between the individual and the state.
These are important lessons. They may have enduring significance in exemplifying political engagement under the Charter. Citizens consider themselves not merely free and equal, but committed to a constitutional framework that ensures the freedom and equality of all members of Canadian society, including those least able to assert their own rights and freedoms in the courts or in the marketplace of ideas. These lessons deepen our understanding of democratic engagement within the modern constitutional state by moving beyond its majoritarian calculus to consider its commitment to fundamental constitutional principles.
CENSORIAL SENSITIVITIES: 
FREE SPEECH AND RELIGION IN 
A FUNDAMENTALIST WORLD 

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