MORAL CLAIMS AND CHARTER MEANING: CRITICAL CONSIDERATIONS ON THE PRIMARY VALUES OF CANADIAN CONSTITUTIONALISM

by

JOHN SOROSKI

B.A., The University of Calgary, 1988
M.A., The University of Calgary, 1996

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY in

THE FACULTY OF GRADUATE STUDIES
DEPARTMENT OF POLITICAL SCIENCE

We accept this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

JULY 2004

© John Soroski, 2004
Abstract

Since its passage, the Canadian Charter of Rights and Freedoms has been the subject of contention. At issue have been claims about the Charter's legitimacy, its larger character and purposes, and the meaning of its rights guarantees in the legal context. The first part of this work offers a critical consideration of the Charter claims associated with three of the most influential schools of constitutional thought in the Canadian context — the “primary values” of positivism, democracy, and community — whose advocates question the value and desirability of the Charter or suggest that its rights guarantees are best understood in constrained terms. The second part of the work suggests the merit of an alternative premise by which to assess the legitimacy and define the meaning of the Charter. The constitutional ideal of “moral agency” suggests that constitutional subjects should be understood as moral beings, and that legitimate constitutional order ought recognize this by providing means to ensure that ongoing obligations imposed by the order are capable of binding persons in their moral capacity. Rights in the strong sense are an important contribution to this end, and the Charter can be understood in this character therefore as a valuable addition to the Canadian constitutional order. At least two sources suggest the authority of the values associated with the ideal of moral agency. The meta-legitimative premises of the primary values themselves imply a recognition of constitutional subjects as moral agents, although the forms of political order their advocates endorse tend to under-realize this value. And an examination of the political practice and philosophy of Pierre Trudeau suggests that the Charter’s prime mover endorsed a theory of constitutional value premised on ideas much akin to those suggested by moral agency. The central role Trudeau played in bringing the Charter into being suggests that a reading of the document as an expression of the values of moral agency is a viable one. The relevance and resonance of Trudeau's constitutional vision in the Canadian context suggests that the ideal of moral agency might be thought to represent a new Canadian “primary value”.
Table of Contents

Abstract ........................................................................................................ ii
Table of Contents ........................................................................................ iii
Acknowledgements ...................................................................................... iv
Preface ............................................................................................................ v

Part I: The *Charter* and the Primary Values

Chapter One: Theories of Constitutional Meaning .................................... 1
   Notes ........................................................................................................ 28
Chapter Two: Positivism and the *Charter* .................................................. 30
   Notes ........................................................................................................ 88
Chapter Three: Democracy and the *Charter* .............................................. 91
   Notes ........................................................................................................ 147
Chapter Four: Culture, Community and the *Charter* ............................... 150
   Notes ........................................................................................................ 209

Part II: The *Charter* and the Values of Moral Agency

Chapter Five: Moral Agency as a Legimative and Constitutional Value ........ 213
   Notes ........................................................................................................ 254
Chapter Six: The Primary Values, Pierre Trudeau, and the Idea of Moral Agency 256
   Notes ........................................................................................................ 293
Chapter Seven: The *Charter* and Moral Agency ........................................ 294
   Notes ........................................................................................................ 337
Chapter Eight: The Problem of Rights and the “Authenticity” of Moral Agency 340
   Notes ........................................................................................................ 353

Bibliography .................................................................................................... 354
Acknowledgements

I wish to thank the members of my review committee, Professors Robin Elliot and Paul Tennant, for their many helpful suggestions and the support they provided during the long process of preparing this work. Particular thanks is due Professor Samuel LaSelva, my thesis supervisor, for his help, encouragement, and insight.

As anyone who has written a doctoral dissertation while raising a family will be certain to recognize, I owe an enormous debt to my family for their love, support, and patience over the last number of years. My debt is a perhaps unusually broad one in this regard, as my wife's parents, Eugene and Deanna Frison, and my own parents, Michael and Ethna Soroski, assisted me during my dissertation work by helping look after our son, Thomas. We are very grateful for the wonderful contribution they made both to raising their grandchild and to making my work on this project possible.

To Thomas I am also grateful, as he was the joy of my life during this difficult work. He always helped his Dad remember to keep his perspective, and to enjoy the fun things in life like skiing and playing video games when the work became especially onerous!

Words alone are not enough to express my gratitude to my wife, Trisa, who supported our family financially during my work on this project, ran our household, and provided all the emotional support anyone could ever ask for from their spouse.
Preface

This work is intended as a contribution to the ongoing debate in Canadian society about the meaning and larger value of the Charter of Rights and Freedoms. As the title Moral Claims and Charter Meaning implies, my suggestion here is that claims about Charter meaning are in an important sense moral in character. Each of the two parts of this work picks up on a different dimension of this argument.

In chapter one, I sketch out a framework of analysis which I believe is helpful in clarifying what is at stake in disputes about the Charter's meaning. I suggest there that more general claims about the Charter's social and legal meanings are built upon at least implicit claims or notions about three more fundamental elements of constitutional meaning. At the most basic level are "theories of legal description", which concern questions about the applicative meaning of specific Charter provisions in the legal context. At an intermediate level are "theories of Charter foundations", which involve questions about the source of the Charter's authority and its larger thrust and character. At the highest level of constitutional contention are "theories of legitimacy and social value", essentially normative claims about the shape and nature of just or legitimate constitutional order. The larger argument I develop through the first part of the work is that debate about Charter meaning involves in an important way questions of morality, because claims made at lower levels of Charter meaning depend at least to some extent on more fundamental claims about higher level and ultimately normative theories of legitimacy and social value.

In chapters two to four, I make use of this analytical framework in offering a critical exploration of the Charter claims of three influential schools of thought which I argue can be understood as representing the "primary values" of Canadian constitutionalism. Their advocates in general either question the value and desirability of the Charter, or suggest that its rights guarantees are best understood in constrained and limited terms. In chapter two I discuss the primary value of positivism; in chapter three, democracy; and in chapter four, communitarianism. I characterize these schools of constitutional thought as the "primary values" both because they give expression to constitutional values which have historically been and continue to be highly influential in our constitutional thinking in Canada, and because these values are imbued in the Canadian context, I argue, with a certain prescriptive validity which makes the claims their advocates endorse in effect
starting points in debate about the larger purposes and social goals of Canadian constitutional endeavour. Given that positivism, unlike democracy and communitarianism, is identified primarily with descriptive rather than normative theories of law, I note that some constitutional theorists might be likely to suggest that I am mixing apples and oranges by including it in my list of Canadian “values” here. I argue in chapter two, however, that positivist Charter theory does in fact embody an implicit normative dimension, and I think this grouping is not therefore as discordant as it might first appear.

In the second part of this work I address the second dimension of my claim that arguments about Charter meaning are connected in a significant way to the idea of morality. In chapter five, I argue that the moral character of the primary values implies on behalf of their advocates the recognition of an important shared meta-legitimative premise about constitutional value -- an implicit understanding of constitutional subjects as what might be called “moral agents”. Our recognition of the subjects of our constitutional order as moral agents in turn suggests the merit of an alternative theory by which to assess the legitimacy and define the meaning of the Charter. The ideal of moral agency directs us I suggest to the recognition of two important “locally transcendant” constitutional values which might be thought to attach to that status -- the ideals of “inclusive justifiability” and of access to the “goods of moral exploration”. The ideal of inclusive justifiability suggests that constitutional orders intended to bind moral agents should provide means and mechanisms of values identification which seek to ensure that morally significant ongoing obligations in the order are established in reference to evaluative standards capable of being understood as accounting for, applying to and binding all who are to be obliged. The ideal of access to the goods of moral exploration suggests that legitimate constitutional orders should ensure that their inhabitants have access to the resources of moral knowledge necessary in order to discern and act upon their moral duties.

In chapter six, I argue that the ongoing forms of political order esteemed by the primary values recognize and realise these ideals less fully than we might desire if our goal is to ensure the recognition of constitutional subjects as moral agents. This conclusion suggests in turn the potential value and importance of a closer consideration of the political oeuvre of Pierre Trudeau. I suggest that the Charter's prime mover endorsed a theory of constitutional value premised on ideas much akin to those suggested by moral agency.
Trudeau's work might be thought in this regard to represent an important contribution to explaining and justifying the Charter in its strong rights sense.

In chapter seven, I explore the connection between the values of moral agency and a number of the Charter's central provisions. My suggestion is that the Charter can be reasonably understood in terms of these values, and that they might be thought to provide some helpful guidance in the task of defining the applicative meaning of rights such as freedom of expression and equality under the law.

In the final chapter of the work I address an important concern raised by many of the advocates of the primary values. Rights liberalism is often associated by its critics with an ethos of narrow and selfish individualism, and critics suggest therefore that a “strong rights” conception of the Charter commits us to a theory of constitutional value which is alien to Canadian sensibilities. I argue that the vision of rights suggested to us by Pierre Trudeau and the theory of moral agency need not be understood in quite such negative terms. Rights in the Canadian context are more appropriately understood as recognitions of our duties to our fellow citizens than as a rejection of responsibility to others. I conclude by suggesting that the idea of moral agency might therefore be thought to represent a theory of constitutional value with considerable resonance for and relevance to Canadians.

These, then, are the larger arguments of the work. Before turning to them, it is perhaps appropriate to say a few words about the context in which I offer them. I would like to this end to note briefly what might be considered some of the larger scholarly influences -- besides the obvious one of Pierre Trudeau -- which underlie this project. Since the constitutional theory I advance here is essentially liberal in character, it will be of no surprise that I have found inspiration in the theories of philosophers like Immanuel Kant, John Rawls, and Ronald Dworkin. The idea of “moral agency” and the importance I believe it assigns to individuals and to the rational justification of public obligations is clearly Kantian in its larger orientations. And although the political and constitutional theory I offer here is not directly either that of Rawls or Dworkin, the influence of these writers is also likely to be seen in my work. The form of reasoning I offer in aid of the constitutional values of “inclusive justifiability” and access to the “goods of moral exploration” which I advance in chapter five will be recognized I think as bearing a family resemblance to that John Rawls employs in A Theory of Justice. Readers of works in constitutional philosophy will
also perhaps note similarities between the analytical framework I outline in the first chapter of this work and some of the ideas Ronald Dworkin advances in the early pages of Taking Rights Seriously. Dworkin, for example, suggests that a "general theory of law" "must treat a variety of topics" including theories of "legislation" (which incorporate theories of "legitimacy" and "legislative justice"), "adjudication" (incorporating theories of "controversy" and "jurisdiction"), and "compliance" (incorporating theories of "deference" and enforcement). He notes as well that such theories will be "embedded in a more general political and moral philosophy which may in turn depend upon philosophical theories about human nature or the objectivity of morality" (Dworkin, 1977: viii). Although the analytical framework I make use of here suggests a different emphasis and inter-relation of these subjects than Dworkin's does, it does speak to many of the problems which Dworkin identifies as important.

In addition to these "larger realm" political philosophers, my thoughts on constitutional value have also been influenced by a number of Canadian scholars whose work speaks specifically about the Charter. It might perhaps be thought a little unusual that the first of the two Canadian influences I would like to note here is Patrick Monahan, whose theory of Charter value I in fact critique, sometimes in strong terms, in more than one place in this work. Readers will I hope recognize that the amount of critical attention I direct to his work can be taken as a sign of respect for Professor Monahan rather than disregard. The clarity and directness with which Monahan presents his ideas makes his work a great pleasure to read and I have found his straightforward discussion of the role of values in Charter debate very helpful in the development of my own ideas on the subject.

My response to the work of the second of the Canadian influences whom I would like to mention here -- Alan Cairns -- is less divided than is the case with Professor Monahan. In a general sense I have found Cairns' thoughts on Canadian constitutionalism both refreshing and compelling. More specifically, I would note that two of the larger ideas I seek to advance in this work have at least some of their inspiration in Cairns' thoughts on the Charter. I have suggested that we might identity the constitutional theory of those antipathetic to the Charter in its strong rights form with three influential "primary values" of Canadian constitutionalism. The idea that the responses of the Canadian scholarly community to the Charter might be characterized as informed by an identifiable set of
dominant philosophical predispositions is in fact one which I think Cairns advanced in his 1989 essay on “Political Science, Ethnicity, and the Canadian Constitution”. Cairns argued there that the coming of the Charter imposed on Canadian political scientists the necessity of, in effect “retooling”, of developing new forms of constitutional expertise which had not been required of them before the enshrinement of a constitutionalized bill of rights. This, Cairns noted, “is not just a matter of technical knowledge, but also of basic values” (Cairns, 1989: 115). Much of Canadian political science had been unenthusiastic about the Charter, Cairns concluded, because the document speaks to dimensions of identity — individual and ethnic — not well recognized within the confines of the discipline’s preoccupations with and valuations of federalism and parliamentary government (Cairns, 1989: 115).

The second important Cairnsian insight I would like to note here follows from the first. The emphasis in the project of 1982 on values potentially in conflict with those traditionally associated with Canadian constitutional endeavour attracted two main early responses to the Charter by its critics. First, as Cairns notes, many Canadian political scientists attributed only minor constitutional significance to the Charter (Cairns, 1989: 134). Cairns’ contention on the other hand — one which I think seems ever more clearly substantiated by contemporary reality — was that the Charter was appropriately understood in larger terms: not as “a minor addition to the Canadian constitutional system”, but as “a profound, wrenching transformation” (Cairns, 1989: 134). The second widely adopted critical response to the Charter came from those who would have been likely to agree with Cairns’ understanding of 1982 as a moment of wrenching transformation. Those of this camp argued that the Constitution Act, 1982’s failure to acknowledge claims associated with more traditionally authoritative Canadian constitutional values implied its regrettability or even its illegitimacy. Cairns’ work implies an early recognition of a theory of the Charter in this regard which I think informed Pierre Trudeau’s constitutional vision. “[T]o live in Vancouver”, Cairns has noted, “. . . is to catch a glimpse of the Canadian future in which duality, founding peoples, the Plains of Abraham, British constitutional traditions, and the cleavages of federalism have diminished credibility as constitutional signposts” (Cairns, 1992: 9). Cairns’ suggestion, and one which underlies my work here, is that the legitimacy of the Charter is not impugned but in fact perhaps enhanced by its status as a discontinuity, by its embodiment of important values which have been under-recognized at the constitutional tables of our past.
Chapter 1: Theories of Constitutional Meaning

I. FINDING MEANING IN THE CHARTER

Few subjects in Canadian life have been as contentious as has the Charter of Rights and Freedoms. Critics and advocates have debated the legitimacy of the Charter, the merit or appropriateness of the values it enshrines, and its place within Canadian society. This contention dates from the stormy beginnings of the Charter in the constitutional negotiations of 1981. The passage of the Constitution Act, 1982 without the approval of the government of Quebec prompted critics of the Charter regime like Gérard Bergeron to suggest that the events of 1981 represented “for all intents and purposes a constitutional coup” (Bergeron, 1983: 65). Guy LaForest has used equally charged language, calling 1982 “the end of a Canadian dream” (LaForest, 1995: 4). LaForest argues that the individualist values of the Charter conflict with the communitarian and collectivist values upon which Canada was built, and that the Charter cannot therefore be understood as providing a compelling vision of social life upon which to build a future for our country. For LaForest, the events of 1982 constitute a “breach of trust” of sufficient magnitude to end any claims the Canadian federation has to the allegiance of Quebecers.

Other scholars have voiced concerns about the potential conflict between judicially defined, constitutionally entrenched, rights and longstanding Canadian valuations of democracy and parliamentary supremacy. Rainer Knopff and F. L. Morton have warned for example that the Charter has given judges an opportunity to “succumb to the seduction of power” by usurping the authority of Canada’s democratically-elected legislatures (Knopff and Morton, 2000: 22). Christopher Manfredi notes similarly what he calls the “paradox of liberal constitutionalism”:

The paradox is that judicial enforcement of rights in the name of liberal constitutionalism may destroy the most important right that citizens in liberal democracies possess, i.e., the right of self-government.

(Manfredi, 2001: 22)

Nor have such concerns been voiced only at constitutional tables or academic circles. Many of the stronger criticisms of the Charter’s potential conflict with the values of democracy can
be found in the popular press, where complaints are heard that the Charter has replaced the power of the people with the power of the courts. The enhanced role of the Supreme Court of Canada brought about by the Charter, critics argue, is “anathema to the democratic process”, and Charter decisions, it is suggested, are based on nothing more than judges’ “biases” and “personal agendas” (Hoy, 1999: A17). Charter critics like Peter Stockland lament that the constitution has fallen into the hands “of a priesthood privileged to change the meaning of words at will” (Stockland, 1999: A19), and he warns that

[t]here are tangible consequences of allowing the language of democracy to fall into select, private hands. One result is loss of freedom. A second is the loss of reason — social insanity.

(Stockland, 1999: A19)

While many criticisms of the changes of 1982 have an apocalyptic flavour, there are also those who contend that the Charter is better understood as something of a dud firework — a constitutional change excitedly anticipated, only to flop, failing sadly to live up to our expectations. Joel Bakan, for example, has suggested that the Charter has not brought with it meaningful change for socially marginalized Canadians, and he expresses doubts that it is likely to do so in the future (Bakan, 1991). Allan Hutchinson expresses his skepticism about the Charter throughout the cleverly titled Waiting for Coraf (Hutchinson, 1995). Like Beckett’s lovable clowns awaiting Godot, Hutchinson suggests, Canadians who expect “Coraf” — the Charter of Rights and Freedoms — to accomplish anything worthwhile are deluding themselves.

But reviews of the Charter have not been all bad. To the views of critics like Hutchinson and Bakan who suggest that the Charter has been inutile and disappointing, we might contrast more positive responses offered by a number of constitutional thinkers. Alan Cairns has argued, for example, that the Charter represents a “profound change” to the Canadian constitutional order, bringing with it the necessity of recognizing the important alterations the events of 1982 have wrought in Canadian attitudes about constitutional matters (Cairns 1992: 190). Lynn Smith has noted such effects at the legislative level, and she argues that the Charter has been responsible for “a kind of synergy between social and legal change” (Smith, 1994: 67). Gilles Letourneau notes that by 1992 twenty two Criminal Code provisions and seven previously widely used police practices have been struck down in
the name of the *Charter* (Letourneau, 1992: 146), suggesting that claims about the *Charter*’s lack of effect may be somewhat misplaced. These views are perhaps emblematized by Thomas Berger’s stirring assertion that the *Charter* offers to previously under-recognized Canadians “a place to stand, ground to defend, and a means for others to come to their aid” (Berger, 1984: 96).

The diversity of opinion evident in these arguments about the *Charter*’s social meanings is mirrored in similar contention over the question of the legal meaning of the document’s provisions in their application to specific constitutional cases. As any constitutional document must, the *Charter* speaks in broad and abstract terms — of, for example, “a free and democratic society”, “fundamental justice”, “equality before and under the law” and the like. There is deep and fundamental disagreement among Canadian jurists about what such phrases mean and about how courts might properly give them content. Perhaps the paradigmatic illustration of these difficulties is found in the 1988 case of *R. v. Morgentaler* [1988] 1 S. C. R. 30, in which the Supreme Court of Canada was called upon to consider whether federal laws restricting access to abortion contravened the *Charter*’s guarantee of “life, liberty and security” in s. 7. Four different judgments were handed down by the seven justices who decided *Morgentaler*, each embodying a different approach to the task of defining s. 7 and a different theory of just what the *Charter* might be thought to say about abortion.

In his judgment, for example, Justice Beetz relied for the most part on a strictly textual exegesis of s. 7. Justice McIntyre referred to traditional sources of legal wisdom, canvassing “the language, structure and history of the constitutional text . . ., constitutional tradition, and . . . the history, traditions, and underlying philosophies of our society” (*Morgentaler*: 140). Chief Justice Dickson’s reasoning went further beyond such sources, but remained within largely proceduralist confines. Justice Wilson, on the other hand, went beyond both Beetz and Dickson, engaging in a far reaching consideration of rights theory itself, citing values such the “worth of life” and “essential human dignity” in her analysis of s. 7. Ultimately, she concluded that s. 7’s meaning is to be found not primarily in text or tradition, but in a recognition of the *Charter* as proclaiming the importance of “personal autonomy in decision-making” (*Morgentaler*: 173).
Unsurprisingly, these different approaches suggested different conclusions about the extent to which the Charter might be thought to constitutionalize access to abortion. Beetz’s decision can be read as suggesting that abortion is restrictable but not to the extent that women can be impelled by law to carry forward a pregnancy which endangers their health, implying thereby what has been called a “therapeutic standard” for access to abortion (R. v. Morgentaler (1988): 82). Dickson’s judgment implies a somewhat broader standard. He notes the importance of acknowledging women’s individual “priorities and aspirations” in abortion law (Morgentaler: 56), but his lengthy consideration of the specific defects of the impugned law at issue in Morgentaler suggests that he may have been prepared to recognize more limited versions of the therapeutic standard. Justice Wilson goes beyond either Beetz or Dickson, rejecting therapeutic limitations and finding that “s. 7 of the Charter gives a woman the right to decide for herself whether or not to terminate her pregnancy” (Morgentaler: 172, emphasis added). Wilson categorically rejects, at least within the early stages of pregnancy, any role for anyone other than the pregnant woman herself in the decision to proceed or not with an abortion (Morgentaler: 172). At the other end of the spectrum lies Justice McIntyre’s dissent upholding the law, a decision which seems to imply that the Charter offers no guarantee of any sort that would constitutionalize access to abortion.

What the debate in Morgentaler makes most clear, then, is not the definitive legal meaning of the right to life, liberty, and security of the person in Canada, but the extent to which such meanings, like those associated with larger questions of the Charter’s social meaning and value, are contested. A consideration of the debate surrounding the Charter prompts two observations which inform this work and set the direction I take here in offering my own commentary on questions of Charter meaning. First, one might suggest that the more protracted and irresolvable are disputes in social life about contested points of view, the more likely it is that what is in contention is not a narrow range of possible facts, but the much less constrained territory of imaginable values. In turn, if what is in contention here are disputed values, then there is some potential merit in examining more closely, and perhaps critically, the deeper values associated with differing claims about the Charter. This work, then, is largely about the role of values in the sorts of Charter debate I have just discussed.
The work is divided into two main parts. In the first part, I offer a critical consideration of what I think might appropriately be called the larger "vocabulary" of Canadian constitutionalism. I argue that much of our thinking on the Charter has been dominated by three schools of thought which have seen constitutional questions through the lenses of what might be called our "primary values". In chapter two, I discuss positivistically-oriented responses to the Charter; in chapter three, democratic theories of Charter value; and in chapter four, perhaps the most "primary" of our primary values, community. While I wish to offer some further elaboration on these ideas in this chapter, I note here that our primary values are largely associable either with a condemnation of the Charter project, or with endorsements of a reading of its rights guarantees in constrained rather than expansive terms.

While the first part of this work is critically oriented, the second is more constructive in its contribution to Charter debate. I argue there that the Charter can and should be read as an expression of a constitutional theory which places a strong emphasis on an understanding of individual persons as moral beings or "moral agents". This conception of persons suggests that the ongoing obligations of political order should be established in a way which recognizes and accounts for individuals in moral terms. It also suggests, contrary to our primary values, an expansive rather than constrained approach to the question of rights and an understanding of the Charter as a positive rather than regrettable addition to the Canadian constitutional order. I identify two sources of constitutional value which might be thought to direct us to a recognition of this conception of the Charter. The first is the political practice and constitutional philosophy of the Canadian perhaps most associated with the passage of the Charter, Pierre Trudeau. The Charter criticisms of our primary values are not infrequently expressed as critique of the "Trudeau Charter", and it is perhaps unsurprising then that my defence of the strong rights conception of the document relies in part on a defence of Trudeau's constitutional vision. The second source of constitutional value which might be thought to direct us to a recognition of the moral agency theory of the Charter will likely be seen as more unusual, however. I argue that the form and nature of the constitutional claims of the primary values themselves suggest on behalf of their advocates an implicit recognition of constitutional subjects as moral agents. In effect, then, my suggestion is that the constitutional value of moral agency might therefore be thought to
have some claim to recognition even by advocates of critical or constrained theories of Charter meaning like those embodied in our primary values themselves.

II. ELEMENTS OF CONSTITUTIONAL MEANING

Before turning to my more specific discussion of the "vocabulary" of our primary values, it will be helpful I think to discuss what might perhaps be called, correspondingly, a constitutional "grammar". Throughout this work, I rely on a framework of analysis regarding claims about Charter meaning which I have found helpful in my own thinking on this subject and which I use therefore to organize my discussion of constitutional values here. As my own introductory discussion suggests, claims about constitutional meaning and value are often divided into two large categories: that of the socio-political realm, and that which is more legally oriented. Claims, for example, that the Charter is illegitimate, undemocratic, or "un-Canadian" are social and political in their focus. On the other hand, claims like those seen in Morgentaler that something like the Charter's guarantee of life, liberty and security of the person does or does not confer upon women a "right to choose" regarding abortion are seen as "legal" in nature. There is of course some utility in these categories -- not the least of which being their correspondence to the traditional division of labour between political scientists and legal scholars on constitutional questions. My suggestion here, however, is that a somewhat more complex set of analytical categories might provide a clearer picture of what is at stake in Charter debate. Claim about Charter meaning I argue can be understood as depending to a large extent on prior (although not always explicit) claims about three inter-related and more fundamental levels of constitutional meaning; what might be called theories of (a) legitimacy and social value, (b) constitutional foundations, and (c) legal description. This analytical framework will, I hope, enable a clearer consideration of what is at stake in debates about Charter meaning. By looking at Charter debates at these levels, I argue, we will be better able to bring to light and examine critically the values claims upon which they depend.

Stated simply, my propositions are as follows. Arguments about the social meaning of the Charter like those I canvassed above -- arguments for and against notions that the Charter regime lacks legitimacy, is premised on un compelling or "un-Canadian" values, or has been a disappointment or failure -- are evaluative in character: they are claims about the value and meaning of our constitutional order from normative perspectives. As such, they
imply two things on behalf of their authors. A "benchmark" of evaluation against which to measure our constitutional regime, and a characterization of that regime along the dimensions their benchmark sets out as important. I denominate the former as theories of legitimacy and social value; the latter, as theories of Charter foundations.

Theories of legitimacy suggest a conception of what constitutes a legitimate or compelling constitutional order. When they suggest, as many such theories do, that what constitutes legitimacy can be determined by a consideration of such things as human nature (our wants, needs, capacities and limitations), appropriate or desirable social priorities (the defining goals and purposes of social life), and the good or ideal state, then they have a broader character as implicit theories of social value as well as legitimacy.

Where theories of legitimacy and social value speak about such questions in the hypothetical and ideal, theories of Charter foundations are claims about the constitutional order as it actually is. They suggest a picture of the nature and source of constitutional authority in Canada and a characterization of the sorts of claims that could reasonably be made on its behalf to authoritatively order our society. In more elaborated versions, they are claims as well about the attributes and indicators of legitimacy the Charter regime acknowledges or implies as definitive, and the conceptions of human nature, social priorities and the good or ideal state the Charter embodies or directs us toward.

What I am suggesting then is that we can understand a given claim about the social meaning of the Charter to imply an argument for a theory of legitimacy (one which often points as well to a theory of social value), for a theory of Charter foundations, and for the conclusion that these two elements of constitutional meaning are or are not compatible. Those who see these two elements as incompatible are led to the conclusion that the Charter regime is illegitimate or lamentable; those who see them as mutually agreeable are led to conclude that the Charter does constitute a defensible constitutional order.

As an illustration of this conceptual claim, we might consider Guy LaForest's argument that the Charter is a "Lockean breach of trust" and hence illegitimate because the Constitution Act, 1982 did not receive the consent of Quebecers. LaForest's position implies within the analytical parameters I have suggested here arguments both that Locke's legitimative theory which mandates the consent of the governed is a definitive standard against which to measure our constitutional regime, and that the Charter can be understood
to derive its applicative force from some other source, that its foundations are not in the consent of the governed. (His implication in *The End of a Canadian Dream*, for example, is that those foundations are the fiat of Pierre Trudeau). Either or both these positions are subject to critique and potential rebuttal in the light of contrary claims. To LaForest’s implication that constitutional legitimacy depends on the consent of the governed might be counterposed, for example, a contrary theory embodied in Pierre Trudeau’s claim that the passage of the *Charter* was

... in keeping with the purest liberalism, according to which all members of a civil society enjoy certain fundamental, inalienable rights and cannot be deprived of them by any collectivity....

(Trudeau, 1990: 363 - 4)

Trudeau’s view here suggests that constitutional legitimacy resides not in the consent of the governed, but in the quality of freedom enshrined by the constitutional order. He and LaForest are not therefore in disagreement about the foundational values of the *Charter* — both appear to characterize it as speaking for an individualistic liberalism — but about the nature of constitutional legitimacy.

Another Trudeau argument illustrates the second sort of possible disagreement about the *Charter*’s social meaning, one which arises when theorists agree about what constitutes a legitimate constitutional order but disagree in their characterization of the foundations of the constitutional order in question. Trudeau contended that the *Charter* should in fact be understood as having been given the consent of Quebecers because a majority of their elected representatives in the Quebec National Assembly and in the House of Commons counted aggregatively did approve of the new constitution (Trudeau, 1996c: 265). This characterization of the events of 1982 implies therefore an agreement (at least *arguendo*) with LaForest’s Lockeian consent theory of legitimacy but disagreement over whether such consent was in fact obtained, that is, disagreement over a characterization of the actual source of the *Charter*’s foundational authority. These are the sorts of differences which I argue to underlie disagreements about the *Charter*’s social and normative meaning.

Where arguments like these in support of claims about the social meaning of the *Charter* are as I have said evaluative in character, disputes about the legal meaning of the *Charter*, on the other hand, are more descriptive and definitional. They are claims about
how to define and apply constitutional provisions given the constitutional text and order we do in fact have. The adjudicative task is, however, complicated by two facts. First, constitutional text, certainly Charter text, is significantly indeterminate of meaning. It is so in two senses; it speaks in terms of considerable abstraction, for example, of "freedom of conscience", "fundamental justice", and "equality", and its abstract terms are themselves subject to the attribution of significantly different meanings depending on the intellectual, philosophical, or ideological perspective of the definer: they are "essentially contestable concepts" to use W. B. Gallie's phrase. But while philosophers who dwell within the ivory towers can live happily with the possibility that a given concept can have a multiplicity of meaning, those who sit upon the ebony bench are not in a position to tolerate this level of uncertainty: the second complicating fact which defines constitutional adjudication is the reality that the purpose of the legal system is to offer a means of resolving disputes and settling claims with some finality. The constitutional adjudicator, then, must attempt to create determinate legal outputs from often indeterminate constitutional provisions.

In its most basic characterization, the attribution of applicative meaning to Charter provisions in the course of constitutional litigation is an act of choosing between the manifold possibilities immanent in the text. But the choice is of a special kind, not like that, for example, of choosing from a menu in a restaurant. The constitutional adjudicator is not choosing for himself, but for all, and the basis of his choice cannot therefore be merely his personal preferences. His choice must be justifiable (at least in his own eyes) as the most appropriate, as having a better claim to authority than do the alternatives. Choices of this sort therefore suggest two prerequisites. First, some conception is needed of what constitutes an authoritative guide to constitutional meaning and an idea of how and to what ends the constitutional regime directs legal decisions. To the extent that claims about the legal meaning of the Charter are understood as non-arbitrary, some reference beyond the judge himself is needed to direct and justify legal decision-making. Secondly, some idea is also needed of how to proceed from the more general idea of authority suggested by the first prerequisite to the more specific readings of the constitutional text required for judicial decision-making in specific cases.

The first of these requisites will sound familiar. I am suggesting that claims about the legal meaning of the Charter require as do claims about its social meaning a characterization
of the nature and source of constitutional authority, what I have called a theory of Charter foundations. In their contribution to debate about the social meaning of the Charter regime, theories of Charter foundations make possible characterizations of the nature of the regime vis-a-vis society in the larger sense; in the legal context, they provide a source of guidance for legal interpretations of the document which impact more specifically upon Charter claimants and governmental action.

The second element of constitutional meaning which I argue to underlie opinions about the legal sense of the document is what might be called a theory of legal description. Such theories suggest the appropriate techniques, strategies, and approaches to employ in drawing constitutional meaning from a given understanding of Charter foundations. They imply among other things a conception of the nature of legal reasoning, and of the proper orientation of the judicial decision-maker to Charter questions on the activist-deferential dimension. What I am suggesting here then is that a given claim about the Charter's legal meaning can be understood to imply an argument for a theory of Charter foundations which is looked to for general guidance and for a theory of legal description which offers a means of deducing from that general guidance the specific direction required to give applicative meaning to the Charter in the context of a specific legal claim. Disagreements about legal meaning imply disagreement over what foundational theory to attribute to the Charter and what theory of legal description to rely upon in construing meaning from a given authority.

For illustration of this point, we might consider the Morgentaler decision I earlier discussed. While all of the judgments in that case can be understood as suggesting different views on the elements of constitutional meaning to which they speak, the greatest and therefore perhaps most illustrative contrast is between the decisions of Justices Wilson and McIntyre. Wilson's references in the construction of s. 7 are, for example, to such things as "human dignity and self-respect" and "personal autonomy in decision-making". We can take her, in this judgment at least, to be suggesting therefore that she thinks the Charter regime is most appropriately understood as creating a legal order whose foundations are in these sort of values. The judicial task in this view is therefore the assessment of laws against the standards of human dignity and personal autonomy which the Charter enshrines. This in turn suggests that the appropriate approach to legal description of s. 7 in the context of abortion is the consideration in a philosophical sense of the implications of the abortion
law in reference to these values. Wilson ponders whether the law comports with a valuation of human dignity, what it says about the autonomy of women (Morgentaler: 173), and whether it treats them as means to other social goals or as ends in themselves (Morgentaler: 173).

McIntyre, on the other hand, looks to "the language, structure and history of the constitutional text..., constitutional tradition, and... the history, traditions, and underlying philosophies of our society" in his attempts to give meaning to s. 7. This suggests a significantly different understanding of the nature and source of Charter authority than which Wilson relies upon. McIntyre's judgment suggests that constitutional authority is more properly understood as located in the status quo and that the legal order is best envisioned as something like a linked and unbroken chain. In this view, the Charter is seen as a consolidation and restatement of social values which have long underlied our society. McIntyre's theory of legal description follows from these precepts. Where Wilson theorizes about the nature of human dignity and the implications restrictions on access to abortion have for personal autonomy, McIntyre consults the historical record for guidance as to society's evolving attitudes toward abortion and the records of Parliament for evidence of the authorial intent behind the Charter. The dissenting justice looks for example to Blackstone's Commentaries on the Laws of England (1770; abortion was a misdemeanour after "quickening"), Lord Ellenborough's Act (U.K.) (1803; abortion became a capital offence after quickening), The Infant Life (Preservation) Act (U.K.) (1929), the passage of s. 251 of the Criminal Code of Canada in 1969, and the testimony of then Justice Minister Chrétien before the Special Joint Committee on the Constitution of Canada in 1981 on the coming Charter (Chrétien told the committee that he did not understand the then prospective Charter as authorizing substantial review of legislative decisions on abortion).

Given their differences in foundational conceptions of the Charter and approaches to legal description, it can be of little surprise that Wilson and McIntyre reach very different conclusions about the meaning of s. 7 in Morgentaler. As one might expect, a conception of the Charter as an extended reference to the values of personal autonomy and a philosophical approach to determining what those values are leads to a much different understanding of its provisions than does a view of it as being grounded in existent social values which are deduced from consideration of the aggregative character of law in the jurisdiction over the last two hundred years. These are the sorts of differences which I argue to underlie
disagreements about the Charter's legal meaning. In brief, then, these are the elements of constitutional meaning which I suggest bear closer examination in consideration of divergent claims about the Charter's social and legal meanings. To these basic points might be added some elaboration which I offer in the sections below.

Theories of Legitimacy and Social Value

I have suggested that the evaluative benchmarks to which claims about the Charter's social meaning must speak can be understood as theories of legitimacy simpliciter, in which case they look to issues of legitimacy in relatively narrow terms, or as theories of legitimacy and social value, in which case they address a broader range of legitimative questions. Some exemplification of these alternatives might clarify what I have in mind here. What is at issue in disputes that centre around this element of constitutional meaning are questions about the prerequisites of legitimate government and the nature and form of the good or ideal regime. Since these have been questions central to political philosophy in the wider sense for the whole of its recorded history, we might turn to examples drawn from that record. When I speak of legitimacy in the narrow sense, I have in mind the sort of view implied in Machiavelli's The Prince and The Discourses of Livy; Aristotle's Politics on the other hand suggests the contrary example of legitimacy understood more broadly as necessitating reference to a theory of social value as well as to more basic legitimative concerns.5

In Machiavelli's eyes, the attention of one who is establishing a governmental order is most appropriately directed not at metaphysical or philosophical considerations of human purposes and well-being, but at more factual and strategic analyses of what needs to be done to ensure the continuation of princely rule or, to put it in more contemporary parlance, regime stability. In this view, legitimacy is something to be created through the accommodation and manipulation of social demands. Both legislative actions and the organization of social institutions are to be directed toward these ends.

This perspective is evident in Machiavelli's recommendation of the lessons of Cesare Borgia to would be princes. Borgia, Machiavelli tells us, pacified the peoples of Romagna by purging the much disliked petty barons who had previously reigned in the region and replacing them with his delegate Remirro deOrco, whom he instructed to deal harshly with local lawbreakers (The Prince: ch. VII). When the people grew tired of the
severity of deOrco’s regime, Borgia “had him placed one morning in the piazza at Cesena in two pieces, with a piece of wood and a bloody knife beside him”. “The ferocity of this spectacle”, Machiavelli relates, “both satisfied and stupefied the people”. In both the case of the local barons and deOrco, the actions Machiavelli’s princely paragon takes are directed not at higher principles of justice or the well-being of the governed, but simply at gaining their loyalty and obedience.

And just as what might be called the “legislative actions” of the prince are to be directed at legitimacy understood narrowly, so too are the social institutions of the state to be created with this end in mind. Machiavelli for example lauds the “laws of accusation” of the Roman Republic, which gave any citizen the right to bring charges against anyone they claimed had acted “in any way against free government”, for example, not as a remedy for corruption, but because “[n]othing makes a republic so stable and solid as to give her such an organization that the laws provide a way for the venting of the humours that agitate her (Discourses: ch. I). As Anthony Parel aptly notes,

[In the final analysis, the Machiavellian innovator endeavours to satisfy the humour of whoever happens to be the strongest group of society at a given time. It does not matter who this may be — whether the grandi, the “people”, or the army. For so long as he has the most powerful group on his side, his innovations will be successful . . . . Machiavelli lays to rest once and for all the classical theory that a good prince is morally obliged to satisfy the needs of the community as a whole, or the common good.

(Parel, 1992: 119)

Legitimacy in the narrow sense, then, is something which can be understood to be obtained when a regime has the support of enough of the population to maintain the social order it establishes. Of course, the use of Machiavelli as descriptive nomenclature brings with it the danger of implying that one is suggesting that what has been described bears some stigma. That is not my intention here. We need not understand legitimacy in the narrow sense as requiring quite the bloody-minded approach to the governmental order as did the author of The Prince. It is also possible to see legitimacy in the narrow sense as requiring not so much the manipulation or quietening of powerful social forces but the accommodation of their constitutional demands. In this view, legitimacy is a matter of tailoring the constitutional order to the necessities of local circumstance, and success in that
end can be understood to be achieved when constitutional stability is achieved.

We might, for example, characterize the Meech and Charlottetown constitutional accords brokered by Prime Minister Mulroney in the late 1980s and early 90s as just this sort of attempted accommodation. We might also take the criticisms of those who were opposed to those efforts as the rejection on their part of this conception of constitutional legitimacy. When Pierre Trudeau, for example, sarcastically suggested of Mulroney that "[i]n a single master stroke, this clever negotiator has thus managed to approve the call for Special Status (Jean Lesage and Claude Ryan), the call for Two Nations (Robert Stanfield), the call for a Canadian Board of Directors made up of 11 first ministers (Allan Blakeney and Marcel Faribeault), and the call for a Community of Communities (Joe Clark)" (Trudeau, 1996b: 233), he is in essence suggesting that Mulroney's sole focus at the constitutional table was the accommodation of the claims of the powerful without concern for the broader well-being of all Canadians. Yet Trudeau himself has also spoken of legitimacy in narrow and thus Machiavellian terms as I have described them. In his discussion in *Federalism and the French-Canadians* of bilingualism, for example, he suggested that

[i]f French Canadians are able to claim partnership with English Canadians, and if their culture is established on a coast-to-coast basis, it is mainly because of the balance of linguistic forces within the country. . . . In terms of *realpolitik*, French and English are equal in Canada because each of these linguistic groups has the power to break the country. And this power cannot yet be claimed by the Iroquois, the Eskimos, or the Ukrainians.

(Trudeau, 1968b: 31)

Trudeau's claims here on behalf of bilingualism then are not to its enhancement of human well-being or to the values of being able to think and speak in more than one language, but to the necessity of an accommodation of forces with the "power to break the country". Both of Canada's recent prime ministerial constitutional authors, then, can be characterized as looking to legitimacy at least at times in the same terms as does Machiavelli.

To these narrow conceptions of legitimacy we can contrast the broader notion emblematized by Aristotle's *Politics*. The questions Aristotle considers in this work are paradigmatic of an understanding of legitimacy in the broad sense, as a matter of social value. *The Politics*, for example, sets out a view of human nature. Aristotle argues that "man
is an animal intended to live in a polis" (Politics: bk. I, ch. I, § 9), and that “when perfected”, he “… is the best of animals”. But at the same time, he notes that if men are “isolated from law and justice”, they are the worst of all animals (Politics: bk I, ch. II § 16). This in turn suggests the primary role of the state; the establishment of a just order within which men can live. "Justice", Aristotle says, “belongs to the polis; for justice, which is the determination of what is just, is an ordering of the political association” (Politics: bk I, ch. II § 16). The Aristotelian view of the ideal state is one in which the “highest good” and the “best and happiest life” is sought; he suggests to this end that “the goods of the soul” have primacy (Politics: bk VII, ch. 1). The most desirable social order, then, is one in which the life of goodness is made possible, an end which requires equipping the citizen with the necessary requisites. Physical well-being is one such requisite, but the first and foremost is the education of citizens so that they may live a virtuous life in the polity (Politics: bk VII, ch. XIV). In the Aristotelian view, an understanding of the proper order of the state requires a conception of human nature and the ways in which the state might appropriately respond to the requirements that nature suggests of it. His view is one which looks not just to the possible, but to the good or ideal state. It is a view which addresses the questions of “legitimacy” broadly and in reference to a theory of social value which makes claims about the nature and purposes of man and the role of the state.

To my characterization of narrow theories of legitimacy as Machiavellian I added the codicil that we need not necessarily understand them therefore as negative in connotation. This description of the broader Aristotelian conception of the state through reference to a theory of social value might be concluded with the note that it it need not necessarily be thought of as entirely positive. While there is of course great appeal in the notion that the requisites of legitimate government are to be found in reference to notions of human good and the ideal, some difficulties that potentially arise in reliance on legitimacy understood as a matter of social value might be noted. First, since theories of social value speak to a great deal of human territory, they suggest much with which issue might be taken. It is of course open to us to disagree with Aristotle’s or anyone else’s views on human nature, the best and happiest life, and the role of the state. The more elaborate is a legitimative conception, the more likely it is to be seen as unsatisfying by at least some of those who must live within a regime ordered by its lights. What is more, many might argue that theories of social value
are culturally-dependent artifacts, that conceptions of human nature and the good differ from place to place and time to time. To the extent that this is so, it is unlikely that any such theory will be seen as compelling by all in a country as diverse as Canada. Secondly, as Machiavelli himself might have pointed out, any state based on a conception of human nature and well-being which ignores entirely the claims of the powerful is unlikely to endure long enough to achieve the ends it so nobly sets out for itself. What constitutes a legitimate or compelling governmental order must acknowledge and respond in some way to what I have called the “necessities of circumstance” as well as to the aspirational desires of the philosopher. Aristotle himself advocated “prudentia” in the statesman, and any conception of legitimacy as solely about the advancement of social value is likely to fall short of that ideal. These are some considerations which we might keep in mind when thinking about the legitimative prescriptions implied by those who engage in debate about the Charter. Is legitimacy, we might ask, a question primarily of response to social forces or does it suggest the necessity of considering a larger picture in which notions of human well-being as well as regime stability are considered?

Theories of Charter Foundations

Two points need to be made in elaboration of my argument that claims about the social and legal meaning of the constitutional order must speak to a theory of its foundations. The first point I wish to make relates to my suggestion that such theories require some picture of the Charter regime as it actually is or of claims that could reasonably be made on its behalf. What I intend to suggest by these strictures is that to be useful as contributions to claims about Charter meaning, characterizations of the source and nature of its authority must have some degree of “fit” with the constitutional order. A useful characterization of the social meaning of the Charter, for example, depends on an acknowledgement of its reality, for its social meaning is a function of its operation in the world, a response to the social order it actually creates.

Claims about the legal meaning of the Charter also suggest the necessity of elaborating a theory of its foundations in a non-phenomenalistic way. This is, of course, one of the foundational precepts of a legal system which gives its allegiance to the doctrine of the rule of law. “One law for all” suggests that different claimants or defendants can expect
the law to have the same meaning for them in their case as it does for someone else in a different case when there are no relevant differences in their situations. When a Supreme Court justice holds in favour of a particular reading of the Charter, for example, his implication is that that interpretation should have been reached by and should in future be reached by the courts below him, and that therefore his foundational presuppositions should be ones available to anyone sitting in constitutional judgment. Similarly, when a justice of the Court of Queen’s Bench interprets the Charter, he can be understood to be suggesting that his reading is one with which he thinks superior courts would agree. In both these cases, this suggests that the judicial endeavour is at least the attempt to construct legal meaning by reference to guidance which all involved ideally understand in the same way. This can only be achieved if we understand claims about the legal meaning of the Charter as proceeding from a common starting point, some reference to the constitutional text and order which at least aspires to objectivity.

Having said this, however, it might be noted that the idea of fit takes different form in different theories. To it we might therefore add a further concept applicable to the characterization of constitutional foundations: the possibility, to borrow again from W. B. Gallie, of “openness”. In his description of essentially contested concepts, Gallie suggested as one of their characteristics openness, by which he meant that one could not reasonably claim on their behalf a final and indisputable meaning (Gallie, 1956: 172). Charter foundations are not seen by all constitutional commentators as being as indisputably locatable as are, say, the foundations of skyscrapers. Many theories of Charter meaning imply an understanding of the nature and source of Charter authority as being to some extent open to more than one possibility. Such theories do not contend that any reading of the constitutional order is open to us. None that I know of suggest that the Charter can be understood as an expression of the principles of the Islamic Sharia or of Karl Marx, for example. What they suggest rather is that our constitutional regime is amenable to more than one characterization and we therefore can reasonably deliberate about which among the relatively limited number of likely possibilities ought be accepted as most authoritative. The indeterminacy of our constitutional text and the contested nature of Charter authority make such views eminently plausible in the Canadian context.

They have an articulate advocate in Canadian constitutional scholar Patrick
Monahan, whose constitutional philosophy both acknowledges the necessity of fit and embraces the possibility of openness. In *Politics and the Constitution*, for example, Monahan argues that the Charter is best understood as having as its foundational values "democracy" and "community". This reading is justifiable he suggests because it "satisfies a threshold test of 'fit' with the Charter" (Monahan, 1987: 104). But Monahan does not stop there, for his constitutional philosophy is built upon a rejection of the notion that adherence to the doctrine of "fit" can alone provide the guidance needed to direct legal outcomes. He has argued, for example, that the belief (which he attributes to Ronald Dworkin among others) "that the jumbled mass of material that comprises the legal system as a whole is the expression of an intelligible underlying moral order is more fantasy than fact . . ." (Monahan, 1983: 312). Any such order is likely to be built upon "competing premises" and thus "the decision whether to apply one premise or its opposite" cannot be seen as "demanded by the materials themselves but is a function of judicial choice" (Monahan, 1983: 313). To fit, then, Monahan adds choice, or openness as Gallie described it. The values of democracy and community which he speaks of in *Politics and the Constitution* are not the only values to be found in the Charter, but we are justified in choosing them, as defining our vision of constitutional foundations in their light, he argues, because of their "intrinsic values" (Monhan, 1987, 105). For Monahan and theorists like him, the necessity of fit mandates reference to the constitutional order as it is, but the prospect of openness admits (and perhaps obliges) consideration of other values beyond that text and order.

The second point I wish to make in regard to theories of Charter foundations builds upon this observation. One of the central debates in legal philosophy has been that between positivists and advocates of idealist and naturalist (natural law) perspectives on the law. Legal positivism is a philosophy which holds that law is best understood as consisting exclusively of that which has been posited by the recognized law-making institutions of the state. The law in a given state is that which has been made by these law-makers and nothing else. Positivism suggests therefore that in attempting to understand what a given law means, we have no authorization to seek guidance in anything but reference to those institutions and the order in which they are found and the specific laws they have produced. Naturalists on the other hand argue that understanding what is law is a question which requires not just reference to the intentions and outputs of law-makers, but to principles
transcending the given legal order which offer guidance as to what law should be. Different naturalist theories furnish these principles by reference to different sources: some suggest a spiritual foundation, others a grounding in human nature, reason, morality, and the like. In its more far-reaching versions, naturalism suggests that only that which accords with the precepts of natural law should be understood as law; in less ambitious forms, it suggests that when the legal order is unclear as to what is required we may turn to natural law for further guidance.

These alternatives are, I think, accountable for within the constitutional grammar I am proposing here with the aid of the notion of openness I have just developed. I have argued that claims about both the social and legal character of the Charter must speak to a theory of Charter foundations; this suggests therefore a link between these two levels of constitutional meaning. To the extent that we understand characterizations of those foundations as being “open” and as admitting reference to a theory of legitimacy and social value as Monahan does, then I would suggest that we are offering our allegiance to a naturalist theory of law. Theories of Charter foundations built upon this view connect the more transcendant principles evoked in many theories of legitimacy and social value to theories of Charter foundations and through this ultimately to legal outputs. If, on the other hand, our view is that Charter foundations have a singular or highly limited character determinable by reference exclusively to the constitutional text and order per se, then our constitutional theory is more in accord with the positivist perspective which rejects any fundamental connection between theories of the ideal and characterizations of the legal order in aid of judicial decision-making. The dimensions of fit and openness then invite our attention in responding to foundational claims about the Charter.

Theories of Legal Description

The final element of constitutional meaning which I have argued to underlie opinions about the Charter is what I have called a theory of legal description. As I have said, such theories suggest the appropriate techniques, strategies, and approaches to employ in drawing constitutional meaning from a given understanding of Charter foundations. The diversity of legal thought on this matter has produced an abundance of examples from which might be drawn illustrations of this element of constitutional opinion.
Theories of legal description can, for example, be highly textually-reliant, in the sense that they understand constitutional interpretation as foremost a matter of simply reading the text and as not requiring or permitting the recognition of other sources of constitutional meaning. When the text alone fails to provide conclusive direction, such theories often suggest that the lacunae are legitimately fillable by the exercise of judicial discretion (Hart, 1961: 144).

One step beyond this conception of legal interpretation is that suggested by advocates of intent-based theories of the legal order. These theories also look to the text as a significant guide to constitutional meaning in itself, but supplement its guidance by reference to the intentions of the constitutional founders. Constitutional meaning in this view can be determined by an analysis of what the document's writers intended. It also implies therefore some conception of how to deduce such intentions. The techniques of legal description it implies are varied: consideration of what the historical context suggests might have been the larger purposes of those engaged in drawing up the constitutional document, reference to the records of the legislative history of the document and to the statements and opinions about their project expressed during the drafting process by those involved, and analysis of social attitudes drawn from historical records to provide contextual evidence of what constitutional phraseology might be thought to have intended.  

Another textually-oriented approach is that of "purposiveness", a doctrine of constitutional interpretation which has the sanction of the Supreme Court of Canada. It suggests that in drawing meaning from Charter provisions it is necessary to first give consideration to what their purposes are appropriately understood to be. In order to do so, one must look to the wording of the text, the structure of the constitutional document, and other evidence which indicates what purposes can be deduced from the given legal provision which is in contention.

Other theories of legal description depart more fully from the precepts of these textually-reliant perspectives. Some suggest that an understanding of the applicative meaning of constitutional provisions requires some reference to society outside the court room. Since constitutional adjudication has implications for all who live within the state, advocates of this approach argue it ought properly to proceed less from judges' views than...
from larger social views. Those of this orientation contend that interpretation and application of the constitution suggests reference to popular opinion, social values, and dominant traditions in the society. Other such theories suggest that constitutional interpretation is a matter requiring engagement in conceptual or moral philosophy. The judicial task in this view is that of drawing from the text a conception of its underlying values and proceeding from there through the use of reason and critical analysis to reach conclusions about the appropriate response to a given constitutional problem.

These are examples of a number of the possibilities available in regard to this element of constitutional meaning, and they raise the first point I wish to make here. They suggest that there is some degree of connection between theories of legal description and theories of Charter foundations. Textualist orientations, for example, might be understood as suggesting an understanding of constitutional authority as significantly self-contained. Less textualist theories suggest that such authority lies in something prior to or transcendant of the document itself. Theories of legal description are therefore not in this sense intellectually self-generating or independent; they presuppose a prior theory of the nature of the text to be interpreted. This is of course not an interpretive fact unique to constitutional law. Many theories of literary and Biblical interpretation are built upon the same premise. Those who argue, for example, for a metaphorical reading of Christian scripture can be understood to suggest that the writers of that text were speaking to believers non-literally; hence, that the dictates of God are made evident in something akin to poetry. More fundamentalist theories of interpretation which take the Bible text literally suggest contrarily that God speaks in the same way the Minister of Finance does through the Income Tax Act. Both approaches suggest a view of the nature of God as well as the Biblical text with which they are concerned.

But arriving at conclusions about the appropriate way to read a text is not something necessarily directed entirely by a prior theory of the nature of the text. Sometimes the attempt to apply a given approach will contribute to altering one's view of the text itself and suggest therefore the necessity of another method. Metaphorical theories of Biblical meaning, for example, become more compelling to those who were previously fundamentalist in their approach when that approach begins to reveal to them what they understood to be paradoxes or textual self-contradictions in the work in question. This
suggests the potential value in considering this element of meaning in the constitutional context. By pondering the implications of particular interpretive techniques, we may find that they are inappropriate or perhaps even that they suggest difficulties in the foundational views which drive them.

The final point I wish to make in elaboration of what I am calling theories of legal description relates to that title. Since it is legal description with which we are concerned here, there is some implication that this element of constitutional meaning is one which is predominantly of concern to courts and their critics. It is this insofar as it concerns the techniques to be applied in reading constitutional text. But a unique feature of the Charter suggests that in the Canadian case constitutional rights can be understood as gaining their definition not just in the legal arena but in the social arena via legislators and the general public as well. Because section 33 of the Charter permits Canadian governments to legislate notwithstanding court interpretations of the Charter’s sections 2 and 7 to 15, whether in Canada there is a “right” to freely choose to have an abortion as was at issue in Morgentaler or any other such right is in a sense a question not just for courts in the course of constitutional interpretation, but for elected representatives and the public who attempt to give their leaders direction in their legislative choices. Ultimately, the specific content of Charter rights is subject to potential mediation by the Canadian public’s understanding of the Charter and the rights it confers. Given the practical possibilities for section 33 override of many Charter rights, the question of what legal rights potential claimants can understand themselves as having in Canada may depend at times as much on how legislators and the public respond to the Charter regime as it does on courts’ interpretations of the document.

Theories of legal description are conceptions of the appropriate response to dilemmas of constitutional meaning by those charged with giving applicative meaning to the Charter’s provisions. To the extent those beyond the courts may potentially have a role in this task, then it is necessary that such theories speak to this role and offer some conception of its parameters and the considerations to be kept in mind when acting on it.

When I speak of theories of legal description in this work, therefore, I intend to suggest that they also imply a conception of the appropriate use of the notwithstanding clause by Canadian legislators as well as of the techniques of legal description to be applied by constitutional judges. Both aspects of this element of constitutional interpretation have a
direct impact on how we give applicative meaning to the provisions of the Charter.

* * * * * * * *

What I have presented here is the basis and some elaboration of the analytical framework I apply to consideration of some central Canadian constitutional values in coming chapters. I have argued that different attributions of social meaning to the constitutional regime suggest differing theories of legitimacy and social value and Charter foundations, and that divergent claims about the meaning of the Charter in the legal context suggest conflicting theories of Charter foundations and legal description. These divisions are not the only conceivable meta-arrangement that might be offered, nor would every theorist necessarily agree on the descriptive titles I have given these aspects of constitutional meaning. Nonetheless, I believe them to be a helpful ordering of the questions of constitutional philosophy which I think those interested in the issues of Charter meaning must face.

III. THE PRIMARY VALUES

To the rough “grammar” of constitutional meaning I have outlined might now be added some consideration of more substantive claims about the Charter — what might be called a constitutional “vocabulary”. One of the central arguments of this work is that the vocabulary of our Charter debate has been dominated by three “primary” Canadian constitutional values — positivism, democracy, and community — each of which is identifiable with fairly specific theories of legitimacy and social value, Charter foundations, and legal description. Two attributes of these schools of constitutional thought inform my characterization of them as “primary” in the Charter context. First, each of them has been of considerable historic and contemporary influence in our constitutional thinking. Secondly, and perhaps more importantly, there is about each of the primary values what might be called a certain “prescriptive validity” which makes the claims their advocates endorse in effect starting points in debate about the larger purposes and social goals of Canadian constitutional endeavour. A third commonality is also shared by our primary values: with some exceptions, their advocates in general either question the value and desirability of the Charter, or they suggest that its rights guarantees are best understood in constrained terms.
In its most general sense, positivism is a conception of the legal order as a self-contained system. The law is best understood, positivists argue, as that and only that which has been posited by the law-making institutions of the society. Its meaning is therefore contained within that frame and admits of clarification within only relatively narrow parameters. As a theory of legitimacy, positivism suggests the necessity of looking to the “facts” of constitutional circumstances rather than to claims of normative value. As such, its central concern is with whether or not the constitutional order has the acceptance of those who live under it, a fact which will be evidenced by its ability to function effectively and successfully enforce the legislative and legal outputs it generates. As a theory of Charter foundations, positivism proceeds from the understanding that the Charter meets this basic test; given this, positivists take the document to a great extent as speaking for itself, and when a reading of its provisions on their own fails to provide necessary interpretive clarity, they look for guidance to the roots of the legal order as they perceive them: the law-makers who created and authorized the Charter, the constitutional history of the document, and longstanding social traditions which underlie the legal order as it is. This in turn suggests a variety of possible theories of legal description, each of which however tends to suggest narrower rather than broader readings of the Charter's rights guarantees -- textualism, reference to founders' intentions (in general, understood fairly narrowly) and a constrained purposivism.

The positivist conception of the Charter has its greatest adherence in Canadian courts and the legal community (an unsurprising fact given the long positivist tradition in the Canadian legal order). Purposivism is official doctrine of the Supreme Court and those justices among its members who understand that interpretive conception in narrow terms might therefore be considered as Canada's foremost positivists. Much of legal education in Canada has also been argued to be positivistically-oriented (Vaughan, 1991), and perhaps Canada's most widely read constitutional scholar, Peter Hogg (whose Constitutional Law of Canada serves as the prescribed text in the vast majority of our law schools' introductory courses in constitutional law) has described himself as a “positivist purposivist” (Hogg, 1991).

Where positivism implies a factual rather than moral theory of constitutional legitimacy (although whether it can sustain that moral agnosticism is in fact one of the important questions of the chapter on positivism), both democratic and communitarian
responses to the Charter recognize a more normative dimension to the legitimative question. Democratic theories suggest that legitimate constitutional order ought enshrine and give pride of place to processes of public values identification which ensure that the determination of the laws and policies of the state involves the participation and consent of the governed. This theory of legitimacy suggests an at least potential conflict at the foundational level with what many take to be the implicit values of the Charter. Where democracy values "bottom up", collective, and public forms of values identification, strong rights constitutionalism, in which many important decisions about the public good depend on juridical rather than legislative assertions of value, represents a considerably more "top down" response to conflicts of social value. Democratic theories of the Charter respond to this conflict in two main ways. Most often, democratically oriented foundational characterizations of the Charter emphasize its discord with democracy's larger values and they suggest therefore the illegitimacy or undesirability of the Charter as a consequence. Some democratic theories of Charter foundations, however, seek to dispel this tension by suggesting that the document is understandable in more democratic terms. They suggest the viability of attributing to the Charter a more democratic foundational character. Democratic theories of legal description reflect these values, as they endorse interpretive approaches to the Charter which are more rather than less deferential to Canadian legislatures (except perhaps where the principles of democracy themselves are imperilled by governmental decision), the interpretation of constitutional principles by reference to widely held social values, and a greater use of the notwithstanding clause by Canadian governments in deference to popular sovereignty. Among Canadian thinkers whose constitutional philosophy proceeds from a significant or central valuation of primarily democratic values are Christopher Manfredi, Rainer Knopff and F. L. Morton, Patrick Monahan, Michael Mandel, and Allan Hutchinson.

Perhaps the most "primary" of the primary values in Canada has been the idea that the central organizing feature of our lives as humans is our community. Although this conception finds expression in our constitutional thinking in finer and coarser grained versions, it retains a certain similarity in all its manifestations. Whether it envisions Canada as an aggregation of aboriginal-Canadians, Quebecois, and the "Rest of Canada", or of provincially-based cultures, or of more precise ethnicity, the value of community as it is
played out in much of our thinking on the topic is one which relies on an understanding of Canadians as being defined and as owing social allegiance to one primary community with which they identify. What we must focus on in thinking about our social life in Canada is, in this view, the communities which form the fabric of that life. Communitarians see constitutional legitimacy as dependent on the recognition of the value and centrality of “local” cultural communities and their collective decision-making procedures. For them, the ideal constitutional order is one in which cultural communities are given the necessary tools to preserve themselves and to flourish, and which recognizes the likelihood of conflict between the often incommensurable values of our local cultures by providing the mechanisms of values identification necessary for the resolution or avoidance of inter-cultural disputes about social value. Like democratic theories of the Charter, communitarian conceptions of constitutional value most frequently suggest the foundational incompatibility of the Charter with these larger legitimative precepts. The individualist and universalist characteristics of rights in the strong sense are seen in this view as conflicting with the more collective and culturally localistic theories of value which communitarians understand as authoritative. As a theory of legal description, the valuation of community suggests a reading and application of the Charter which is highly sensitive to cultural differences and open to the possibility that its provisions might reasonably be given different applicative meaning in different communities. It suggests the possibility of giving legal meaning to the Charter’s provisions through the working out of a consensus about such meaning through a give and take between different cultural precepts, and it looks favourably upon the use of the notwithstanding clause when it is wielded by a government which is synonymous with a local culture. Among the leading scholars whose community- or culturally-oriented work I focus on here are Guy LaForest, Mary Ellen Turpel, Charles Taylor, James Tully, Patrick Monahan, and Avigail Eisenberg.

When I suggest that positivism, democracy, and community have been primary values in Canadian constitutional thinking, I am not asserting that they are our only values — there is simply too much diversity of constitutional thought as regards the Charter to make that comprehensive a claim. What I am suggesting rather is that the values which I have outlined here have a prescriptive validity in Canadian constitutional argument not associated with the values which underlie other claims of Charter meaning. The critical vigor of
democratic and communitarian oriented claims about the Charter is rarely matched with an equivalently vigorous critical consideration of democracy or community themselves. And while the positivism of Canadian courts has been subject to critique, it has been so more from the perspective of the other primary values than from alternative critical perspectives. All of this suggests (to echo Ronald Dworkin) that positivism is the ruling theory of law in Canada; democracy and community, the ruling theories of the Charter's most influential critics. This is intended as a work in political theory and the claims I make here about the predominance of the primary values are not therefore substantiated by anything like a statistical summary of their presence in our constitutional literature. I speak more from my own perception of the weight of the primary values in our constitutional thought than of their volume, although I think that consideration of the latter would produce the same conclusions.

Certainly, the central place these values claim in our constitutional conversations suggests that they are speaking to important constitutional problems in useful ways. But it also suggests the possibility that they have the status of defaults in our constitutional thinking. The primary values are to a great extent the already accepted values of our constitutional discourse and for that reason there is the potential that we might at times accede to their merit less critically than we otherwise might. As least one of the roles of the philosopher is the questioning of conventional wisdom and that is no less so for the constitutional philosopher than for those engaged in the pursuit in other areas of belief and knowledge. My focus on our primary values then, while attempting to give fair acknowledgement to their merit, is a critical one.
Notes

1 See also Marcel Adam, who has used similar phrases in his rejection of the Charter regime, calling it a "coup de force" and even a "fraud" (Adam, 1989: 13).

2 Beetz's reasoning consists of the following logical chain, the first and last links of which are the constitutional text: section 7 guarantees "security of the person"; such a guarantee must reasonably be understood as contemplating protection of a person's life and/or health; the procedural requirements mandated by the impugned provision restricting abortion in s. 251 of the Criminal Code must often cause dangerous delays in accessing abortion for women whose health is endangered by their pregnancy; the administrative regime dictated by s. 251 therefore endangers the life and/or health of such women thereby constituting a contravention of section 7. I have characterized Beetz's reasoning here as textually reliant; see also Lorraine Weinrib, who describes Beetz's decision as flowing from what she calls "consummately legal argument" (Weinrib, 1992: 32).

3 See, for example, Lorraine Weinrib, who suggests that Dickson's judgment is "internally incoherent":

The reasoning reads from moment to moment as an unflinching commitment to Charter values, both substantive and procedural. But it repeatedly blinks. As a result, the judgment gives no coherent vision of the Charter and no clear account of the failings of section 251. Yet the remedy afforded gives triumph to the wider principles elaborated.

(Weinrib, 1992: 42)

4 Gallie has suggested in a well-known and widely cited piece ("Essentially Contested Concepts" (Gallie, 1956)) that many philosophical or ideological concepts (such as "democracy") can be understood as having a range of meaning that is not subject to final determination. Gallie's point is one well-taken in constitutional philosophy and both American (see Dworkin, 1977: 103n) and Canadian commentators (see Gold, 1989: 529n) have seen fit to make note of it.

5 Of course, neither Aristotle nor Machiavelli use the modern term "legitimacy". Nonetheless, they speak of what constitutes the appropriate understanding of the state and its relationship to those who live within it, and their works therefore do address this concept by type if not by name.

6 Trudeau, for example, describes the day of the accord at Meech Lake as a "dark day for Canada" because, among other things, the proposed constitutional package proposed there in his view "weakened" the Charter of Rights (Trudeau, 1996b: 233).

7 This is a theory of constitutional interpretation which Ronald Dworkin advances in Taking Rights Seriously (Dworkin, 1977: 105) and which Patrick Monahan advances in the Canadian context (Monahan, 1987: 104).

8 See for example Deryck Beyleveld and Roger Brownsword, Law as a Moral Judgment (Beyleveld and Roger Brownsword, 1986).

9 See for example Ronald Dworkin's Taking Rights Seriously (Dworkin, 1977).

10 See R. H. Bork's "Neutral Principles and Some First Amendment Problems" (Bork, 1971) and Raoul Berger's Government by Judiciary (Berger, 1971). (Both cited in Peter Hogg's "The Charter of Rights and American Theories of Interpretation" (Hogg, 1987: 91n)).

Quebec is an obvious example of the sort of government which advocates of community might suggest could reasonably not withstand *Charter* rights (see, for example, Dufour, 1990: 115). Other scholars suggest that aboriginal governments should also be given the power to legislate notwithstanding the *Charter* or should be understood as not governed by its regime of individual rights (Turpel, 1989: 36).

Dworkin opens *Taking Rights Seriously* by characterizing positivism as the ruling theory of law (Dworkin, 1977: vii).

A consideration of the scholarly repute of many of those whose views are associated with the primary values evidences to some extent that weight I think.
Chapter 2: Positivism and the Charter

I. POSITIVISM AS A PRIMARY VALUE

One of legal philosophy's most longstanding and contentious debates has been that between positivists and advocates of natural law or idealism. Positivism is at its most basic a conceptual claim about law. At its heart lies what has been called the “separation thesis”, the argument that law and morality (or other similar such metaphysical sources of value) are separate. We understand legal order as it is most accurately, positivists argue, when we recognize that what the law is in any functioning society is a question of fact, a matter determinable independently of normative evaluation or philosophical preference. As a theory of adjudication, positivism suggests that law is what law-makers have said it is, not what we might wish it to be, and interpretive practice therefore is best understood as involving the description of law as it is rather than normative prescriptions about what it ought to be. Amongst positivism's most noteworthy advocates are John Austin, Hans Kelsen, H. L. A. Hart, and Joseph Raz.

Idealist legal theory, on the other hand, suggests the integration of law and morality. Its advocates argue that understanding what is law is a question which requires not just reference to the intentions and outputs of law-makers and other local legal facts, but to principles transcending the given legal order which offer guidance as to what law should be. Different naturalist theories furnish these principles by reference to different sources; some suggest a spiritual foundation, others a grounding in human nature, reason, political philosophy, and the like. In its more far-reaching versions, idealism suggests that only that which accords with the precepts of natural law should be understood as law; in less ambitious forms, it suggests that when the legal order is unclear as to what is required we may turn to the natural law for further guidance. Among the most prominent of those whose legal or political philosophy might be considered naturalist in orientation are Thomas Aquinas, Giorgio del Vecchio, John Finnis, and Ronald Dworkin.

In this chapter I argue that positivism is a primary Canadian constitutional value, of particular influence in our courts' understanding of Charter meaning. My contention is not that Charter jurisprudence is wholly characterizable as positivist or even that our
constitutional adjudicators are wed to an explicitly positivist vision of the legal order. It is, rather, more an argument of tendency and tone. Positivism is appropriately understandable as a primary Canadian constitutional value because its interpretive presumptions impose a subtle guidance on much of our judicial thought on Charter meaning. While many Charter judgments are identifiably positivistic in orientation, many more appear to proceed from what would seem to be more idealist premises, yet offer constructions of Charter meaning which are perhaps more limited in their reach and their consideration of the moral possibilities of the Charter than they might otherwise be if positivism did not possess the prescriptive validity which it appears to have for Canadian jurists. The importance of positivism as a shaper of judicial response to the Charter suggests the need for some critical attention to its claims and the commitments it implies.

However, two initial obstacles present themselves to that undertaking. First, it must be noted that the neat distinction I draw between positivism and idealism in the opening paragraphs of this chapter becomes significantly less clear in the context with which we are concerned here -- in regard to a legal order which embodies a rights charter which speaks, although not always clearly, in terms of moral tone. For many positivists as well as for idealists, this suggests the necessity in giving such terms definition of adverting to at least some species of moral deliberation. But given this acknowledged necessity, how it might be asked is it possible to conceive of law and morality in such a situation as distinct or separate? Is there in a rights charter context like our own any real significance to the positivist-idealist divide, or is it an “anachronistic” concern (Devlin, 1988: 6)? If the latter, then my critical focus here is unwarranted. I respond to this potential obstacle to the claims I set out here in the sub-section below entitled Positivism, Idealism, and the Rights Charter Context. There I offer a brief conceptual discussion of what I understand to differentiate positivism and idealism in a rights regime. Both perspectives offer intellectually coherent responses to such an order, but their constitutional “grammars” differ significantly.

The second difficulty which stands in the way of my critical objectives in this chapter is less conceptual and more directly practical. Although positivism is a primary value for Canadian courts, it is not for a number of reasons always an entirely easy or obvious task to identify its presence in the judicial record. As I have already suggested, I think the
influence of this interpretive perspective is more often subtle than overt; this suggests the necessity of a more nuanced means of its identification than might be required if Charter judges were more directly positivist in their legal orientation.

What is more, Canadian judges understand themselves to be collectively of a school of constitutional interpretation which denominates itself as “purposivist”; that is, which suggests that the applicative meaning of constitutional provisions is appropriately construed in consideration of the purposes which might be attributed to them. Unfortunately, however, this self-characterization tends to obscure more than it clarifies for our purposes here. Purposivism is not describable as positivist, idealist or otherwise because it is such a broad characterization that it encompasses virtually any interpretive theory one might wish to embrace. I offered in the previous chapter as an exemplification of judicial disagreement over the Charter a number of judgments from the case of R. v. Morgentaler ([1988] 1 S. C. R. 30), highlighting at opposite ends of the judicial spectrum in particular the judgments of Justices Bertha Wilson and William McIntyre. Wilson and McIntyre approached the task of Charter interpretation from very different perspectives and came to almost paradigmatically opposite conclusions about the meaning of the relevant Charter provision in Morgentaler. Yet both understood themselves (as do the rest of their fellow Supreme Court judges) as engaging in a “purposivist” reading of the Charter. Any useful claim about the influence of positivism in our courts’ readings of the Charter must therefore offer some means of identifying its presence in the Charter record even though the Canadian judiciary has adopted a blanket self-description as “purposivist”; some means of distinguishing between more and less positivistically-oriented purposivism is necessary. I offer a more extended discussion of these problems and some potential responses to them in the subsection below entitled Charter Positivism and Constrained Purposivism.

Positivism, Idealism, and the Rights Charter Context

I have suggested that the concept of a positivist orientation to the law in a legal regime embodying a rights charter which speaks in terms of moral tone is not a clear one. Many positivists acknowledge and even argue for the necessity in such an order of a construction of legal meaning which does look to morality and engage in moral deliberation, a fact which would seem to bring into question the positivist commitment to the notion of law and morality as separate, which in turn might at first glance appear to suggest perhaps the
inapplicability of the positivist-idealistic divide in a rights charter context. I think that divide, however, is an important one. Positivism and idealism suggest in the rights charter context quite different perspectives, which in turn lead to very different understandings of the constitutional order.

As I will argue here, the alternatives suggest significantly different conceptual commitments at each of the levels of constitutional meaning I outlined in chapter one. I suggested there that comprehensive claims about constitutional meaning could be understood as implying intellectually prior sub-claims about three distinct elements of that meaning: a theory of legitimacy and social value; a theory of the nature and source of constitutional authority within the given order (a theory of constitutional foundations); and a theory of legal description (which suggests the appropriate technique or techniques to apply in drawing conclusions about the applicative legal meaning of constitutional provisions given a particular view of a regime's foundational authority). Positivism and idealism differ significantly along each of these dimensions, although each offers a coherent conception of constitutional possibility.

As a general statement of its basic tenets, we might begin with a characterization of idealism as a theory which proceeds from an understanding of the authority of law as dependent on principles which transcend the legal order itself. Consideration of what constitutes a legitimate constitutional order is therefore a matter requiring reference to standards which must be elaborated independently of the given legal regime with which we are concerned. In naturalist theories, those standards are understood as complex and content-ful, as incorporating quite substantive claims about social value — about such things as human nature, appropriate or desirable social priorities, and the good or ideal state. It is also worth noting here that while naturalist legal theorists are in broad agreement about the necessity of elaborating a rich theory of social value as a legitimative standard, they are at considerable odds over what the specific content of such a theory might be.

At the foundational level, naturalism suggests an understanding of the authority of a given constitutional order as dependent on and derived from its accord with the principles suggested by its substantive theory of social value. An order which is at odds on every point with the moral values mandated by that theory will be one which is understood as lacking authority, as having no claim to direct action within a state. But whether a legal regime is
understood as having such a claim to authority is not necessarily a determination subject to a simple yes or no answer (although at the extremes it may well be). To advert to a concept I discussed in the previous chapter, naturalism suggests that the question of the foundational character of a legal regime is an "open" one, that is, subject to some degree of critical consideration, moral choice, and construction. What is more, most naturalists understand that construction as being properly a matter of attempting to understand and characterize the legal order in a way which brings it as far as possible into accord with the moral precepts dictated by the theory of legitimacy and social value which they have constructed independently of the legal order. Such a construction takes place in reference to a conception of legitimacy and is directed at producing a depiction of the given constitutional order which is most conducive to its being understood as legitimate in naturalist terms.

In accord with these legitimative and foundational precepts, idealism suggests a conception of the appropriate techniques of legal description as including moral deliberation about the meaning and implication of foundational values which are themselves given shape by moral deliberation about questions of legitimacy and social value. It mandates therefore a connection between a content-ful, elaborated and explicit theory of social value and the applicative legal description of a regime's constitutional provisions.

Positivist legal theory proceeds in the light of some quite different principles. At the most basic level, it suggests a conception of the authority of constitutional law as in a sense self-contained, as the starting point for legal deliberation. Unlike idealists, who understand the authority of the constitutional order as something to be evaluated in light of moral principles which transcend that order, positivists take such an order to be authoritative if it is taken by those who live under it as such, a fact which will be evidenced in its production and maintenance of a functional legal order. As a consequence, positivism understands itself as neutral about or conceptually unconcerned with the specific questions of social value with which idealist legal theory is concerned. The standards of legitimacy which authorize the constitutional order are not taken as independent of the order.

At the foundational level, positivists understand the authority of a given constitutional order as determinable within factual rather than normative parameters; a legal regime can be understood as authoritative to the extent that the order it establishes has the widespread obedience or allegiance of those who live within it. When such an order includes
constitutional statements of moral principles, these are understood by positivists as deriving their authority from the fact of their having been posited rather than from, as I have said, metaphysical or other sources of value.

What, if any, conceptual commitments do these views of legitimacy and constitutional foundationalism then suggest in the way of a theory of legal description? There is considerable controversy and uncertainty among positivists about what if any theory of legal description their legitimative and foundational precepts suggest. At one end of the spectrum of possibility lie the views of positivists like Joseph Raz. Raz argues for what he calls the “sources thesis”, which suggests that positivist legal description entails the avoidance of an engagement with moral values. In discussing what he calls the “social theses” of law (of which Raz says, “in its most general terms the positivist social thesis is that what is law and what is not is a matter of social fact” (Raz, 1979: 37)), Raz distinguishes between “weak” and “strong” senses of that concept (the latter which he renames as “the sources thesis”):

The difference between the weak and strong social theses is that the strong one insists, whereas the weak one does not, that the existence and content of every law is fully determined by social sources.

I . . . argue for the truth of the strong social thesis.

(Raz, 1979: 47)

In short, Raz argues for a view of law as identifiable in all cases without the necessity of independently moral argument.

Legal scholars like E. P. Soper have pondered the extent to which positivists in general are committed to this sort of view. Soper argues that the views of positivists like H. L. A. Hart are compatible with an understanding of law as in some cases identifiable by moral argument -- that is, with what Raz calls the “weak” social thesis (Soper, 1977). So too does W. J. Waluchow, an important Canadian positivist. Waluchow argues for a more “inclusivist” positivist conception of law which he contends is compatible with substantive and non-neutral moral deliberation about legal terms of moral tone such as those in which the Charter speaks (Waluchow, 1994).

My own view of the interpretive commitments positivism suggests falls somewhere between Raz’s and Waluchow’s. As I argued in chapter one, there is I think by necessity a
connection between theories of foundational constitutional authority and the interpretive techniques one applies in constructing legal meaning. As I said in regard to interpretations of holy texts like the Christian Bible, the way in which we attempt to understand textual commands (particulary when their meaning is subject to debate) is at least to some extent suggestive of how we understand them as speaking to us and in what sense we take their authority. Literalist theories of Bible meaning make the most sense to those who understand the Christian scripture as “God’s Holy Word”, delivered directly to them by way of human scribes inspired by the Holy Ghost. More metaphorical readings of such meaning (which are therefore also considerably more open in turn to the suggestion that the text has more than one possible meaning) are more sensible from the perspective of those who understand the creation of Biblical text as having involved human intermediation in a large way. In either case, how the text is read depends on how the reader understands the nature and source its authority.

Similarly, I would argue, to the extent that one understands constitutional authority as resident in or derived from the existent legal and social order (as opposed to, say, from some more transcendant theory of its moral authority as idealism suggests), then one is by some degree of logical necessity I think committed to a view of constitutional meaning as resident in, derived from, or, at a minimum, as not substantially incompatible with the values which we might associate with that order. Two plausible alternatives to the view I am arguing for might be considered here. In the first, it might be argued that the moral meaning of Charter provisions is not delimited and that it is therefore open to those attempting to give applicative legal meaning to the Charter to attribute to its relatively indeterminate provisions any plausible meaning they might bear. In the second alternative, it might be argued that the moral meaning of the Charter’s provisions is delimited by and therefore construable in reference to some larger, independent theory of moral value not connected to the existent legal and social order. These are the alternatives, however, I would argue, of, respectively, legal realism on the one side and naturalism on the other. For a variety of reasons, positivism disassociates itself from both these possibilities.

This in turn suggests that while positivism is compatible with a view of moral deliberation as admissible and perhaps even necessary in the context of the sorts of guarantees made by the Charter (as Waluchow argues), that moral deliberation is best
understood as in some sense delimited and given its shape by reference to the constitutional order as it is rather than as it might ideally be conceived (Raz’ sources thesis in less dogmatic terms). For these reasons I understand positivism as suggestive of an interpretive practice understood as connected to the existent legal and social order and disconnected from, neutral, or agnostic about the broader and more content-ful theories of legitimacy and social value to which naturalists urge we refer. As I will suggest shortly, it is this sort of legal deliberation about Charter meaning which I denominate as positivist in the Charter context and my critical focus in this chapter is directed at interpretations fitting this description.

These I would suggest are the basic presuppositions associated with and necessary to make sense of a positivist conception of constitutional law in a legal order containing a rights charter. They suggest the formal plausibility of rights charter positivism and give, I hope, some sense of the conceptual coherence and logic of such an understanding. As I argue in the next sub-section, in the context of the charter with which we are concerned here, positivism has more than simple conceptual plausibility: its interpretive prescriptions are manifest in a great deal of our Charter jurisprudence and, what is more, there are some significant reasons why this conception of legal order might be considered as compelling in general and particularly in the Canadian context.

Charter Positivism and Constrained Purposivism

Because they speak in terms of moral tone and with considerable abstraction, rights charters tend to suggest in the adjudicative realm a certain openness and freedom, a potential for considerable breadth of interpretive understanding. As I have argued in the conceptual brief just offered, positivism I think suggests important limits to this freedom. I take it as suggesting, for example, (1) an adjudicative neutrality about the moral character of the constitutional order and thus the illegitimacy of a judicial elaboration of a theory of moral or social value understood as independent of that order; (2) a conception of the moral meaning of constitutional provisions as discoverable or immanent in the existent legal and social order which is understood to provide the authorization for constitutional power; and (3) as a consequence of this, a significant connection to and delimitation of constitutional meaning by the existent legal and social order. The positivist conception of adjudication in the rights charter context suggests, in short, a significantly more constrained and delimited
vision of the moral possibilities of the constitutional order than does its intellectual rival, idealism.

What all of this suggests in turn, I would argue, is a means of distinguishing within Canadian courts' broad self-description as "purposivist" between more and less positivist orientations to the legal order. I understand purposivism which evidences a judicial understanding of its interpretive mandate as directing elaboration of the moral meaning of Charter provisions by reference to morality of a wide and regime-transcendant scope as most compatible with and suggestive of a more idealist than positivist orientation to the law. I describe this theory of legal description as unconstrained purposivism. Conversely, Charter readings which limit themselves to consideration of the moral purposes of the Charter understood as regime-dependent and delimited are, I think, most compatible with and suggestive of a more positivist legal perspective. I describe this theory of legal description as constrained purposivism. These alternative are given an uncharacteristically explicit expression and elaboration in judgments in two Charter cases which I think offer perhaps paradigmatic examples of purposivist judging in its idealistic and relatively unconstrained form and in the more constrained and positivistically-oriented alternative.

Perhaps the foremost statement of Charter law understood from what I would describe as a relatively unconstrained perspective is that of Chief Justice Dickson in R. v. Oakes. In attempting to give meaning to the Charter's s. 1 limitations clause and offer guidance to future courts in its use, Dickson held that:

\[\text{[t]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.} \]

\[(\text{Oakes: 136})\]

This central, oft-quoted passage from Oakes speaks I would suggest to an unconstrained and idealist purposivism in both implicit and explicit terms. Dickson's attribution to s. 1 of fairly
significant substantive content implies a conscious reliance on something beyond the minimalist theory of social value suggested by positivist legal theory. The values and principles he asserts as essential to a free and democratic society are content-ful and appear to be derived from a specific and not uncontroversial vision of freedom and democracy in ideal rather than socially-delimited terms.

And in fact, Dickson makes explicit what the terms of his judgment suggest by implication. He understands the moral values of which the *Charter* speaks as deriving their authority (he speaks, for example, of their genesis) and meaning (the underlying principles are our standard) not from the *Charter* or the Canadian constitutional or social order, but from "the underlying values and principles of a free and democratic society". What *Oakes* suggests is that it is not Canadian freedom or Canadian democracy which constitute the relevant standards of *Charter* meaning, but freedom and democracy understood in broader and much less constrained terms. All of this suggests that Dickson’s specific elaboration of *Charter* meaning is given explication and justified by an adjudicative theory which understands the *Charter* as a statement of moral principles authorized because moral rather than because posited.

For an equally clear statement of the constrained and positivist purposivist *Charter* vision, we can turn to a case to which I have already had occasion to refer in this work, *R. v. Morgentaler* (1988), and the judgment there of Justice William McIntyre. In attempting to determine whether the *Charter’s* s. 7 guarantee of “fundamental justice” should be understood as forbidding the restrictions on access to abortion then embodied in the *Criminal Code*, McIntyre defined his interpretive mandate as admitting of reference to “the language, structure and history of the constitutional text,... constitutional tradition, and... the history, traditions, and underlying philosophies of our society” (*Morgentaler*: 140). As I noted in the previous chapter, McIntyre sought clarification of the moral meaning of s. 7 primarily in the historical records of the legal order of which the *Charter* is a part; the statutory record of Canada and England dating back to 1770, past Canadian laws on abortion, and the testimony of then Justice Minister Chrétien before the Special Joint Committee on the Constitution of Canada in 1981. His references suggest an understanding of constitutional morality as something immanent in the constitutional order itself and not as independent of that order.
Like Dickson, McIntyre offers explicit as well as implicit evidence of his orientation to the law. While he acknowledges that judicial review has been given expanded scope by the coming of the Charter, McIntyre argues that it would be a mistake to think that "judicial discretion can be unlimited" (Morgentaler: 139). “[T]he Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time”:

The decisions made by judges ... and the interpretations that they advance or accept must be plausibly inferable from something in the Charter. It is not for the courts to manufacture a constitutional right out of whole cloth.

(Morgentaler: 141)

And McIntyre offers a particularly strong condemnation of overly broad purposivism in the conclusion of his comments on Charter interpretation in Morgentaler. He adopts the words of American Supreme Court Justice John Harlan, who rejected in his 1964 decision in Reynolds v. Sims ((1964) 377 U.S. 533) the

... current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. ... when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

(Morgentaler: 141)9

For McIntyre, then, questions of constitutional meaning are understood as properly referred to the Charter and the existent constitutional order and not to moral visions elaborated independently of that order.

Where Dickson’s Oakes judgment suggests an understanding of the authority of the Charter’s provisions as derived from their moral quality, McIntyre’s Morgentaler decision implies an understanding of them as owing their authority and hence being given their meaning in reference to the legal and social order in which they exist. Dickson’s Oakes judgment exemplifies a relatively unconstrained and non-positivistic purposive approach to the construction of Charter meaning; McIntyre’s Morgentaler judgment on the other hand
suggests the more constrained and delimited purposivism which I identify with positivist legal presuppositions. The contrasting judgments serve well I think as emblems of what I believe are purposivism's two very different faces. In both judgments, what is understood as an appropriate theory of legal description is spelled out in clear, formal terms which enable us to identify with some specificity what their writers have in mind. And in both, the referents upon which their authors rely are I would argue most readily made sense of and justified from within theories of legal order which proceed from, respectively, non-positivist and positivist premises. It would be difficult to justify Dickson's independent and universalistic democratic standard on positivist terms since those terms offer little warrant for reference beyond the existent legal and social order; it would be equally difficult to justify McIntyre's focus on the existent legal and social order from a perspective which understood constitutional meaning and legitimacy as established by standards which transcend any particular constitutional order or society.

Of course, rarely is it the case that Charter judgments are as explicit or self-conscious in their discussion of legal theory at this level as is Justice Dickson in Oakes or Justice McIntyre in Morgentaler. Equally rarely is it the case that judicial allegiance to one or the other of these alternative interpretive models is quite so unalloyed. As I suggested above, as regards the Charter, positivism is more often an influence and restraint upon the reach of readings of its meaning than it is a direct motivator of judgment. In the more typical instance, then, the characterization of a given legal judgment in these terms must be to a significant degree a matter of inference and construction, of a search for indicators of adjudicative influences and orientations rather than of facially self-evident identifications. Three sorts of interpretive responses to the Charter suggest I would argue the influence of positivist legal presuppositions.

First, at the most basic and easily identifiable level, are judgments which rely in their construction of Charter meaning upon traditionally positivist techniques of legal description. Justice McIntyre's Morgentaler judgment succeeds in very short form in identifying all three of the approaches most often associated with positivism in this form. He advocates reference to “the language, structure and history of the constitutional text” (Morgentaler: 140), referents which correspond roughly to the positivist interpretive techniques of textualism, structuralism, and “originalism”. Textualism is determination of constitutional
meaning understood as admitting of reference primarily to the constitutional text given its plain meaning. Structuralism is the attempt to determine constitutional meaning by a consideration of what its structure and the institutions it has created suggest as its central underlying values. "Originalism", which suggests the importance of the "history" of the constitutional text, is the notion that such meaning should be understood by reference to what those who wrote the constitution would understand as the appropriate sense of the provisions of the constitutional order in the given context. Each of these techniques suggests an understanding of constitutional meaning as primarily determinable by the existent legal and social order and not by referents beyond it.

At the next level are judgments less positivist in their interpretive methodology but which nonetheless offer an explicit justification of their interpretive conclusions in reference to the existent legal and social order. Justice McIntyre's argument for the importance of "the history, traditions, and underlying philosophies of our society" in Morgentaler (140) suggests this tack. It is also well exemplified in Justice Beverly McLachlin's Appeal Court level judgment in Andrews v Law Society of B.C (4 W.W.R. 242). The contested legislation in Andrews was the Barristers and Solicitors Act of B.C. which set out the requirements for membership in the provincial bar, one of which was the possession of Canadian citizenship. Andrews, a prospective applicant who was not a Canadian citizen, contested the requirement on the grounds that it contravened the Charter's guarantee in s. 15 of equality before the law. In rejecting arguments by the Law Society's solicitors that the statutory requirement was legally valid, McLachlin concluded her deliberations by noting that:

... citizenship was not seen as essential to the practice of law in this province prior to 1971. It is still not viewed as such in most jurisdictions; only two other provinces require lawyers to be citizens. In the tradition of the British Commonwealth, citizenship has never been a requirement for the right to practise law. These facts belie the contention that citizenship is vitally and integrally connected with the lawyer's role in society.

(Andrews: 257)

While she also engages in more normative consideration of the implications of s. 15 in Andrews it is this consideration with which McLachlin concludes her deliberations. It
suggests an understanding of the ambit and possibility of the Charter as appropriately construed by reference to the prior practices and longstanding traditions of the legal order, and thus what would appear to be ultimately a positivistic conception of the nature and source of its authority.

Finally, a positivistic orientation or influence can be inferred I would argue even in Charter judgments which more fully engage with moral questions but which fail to fully elaborate on or explore the sources of moral value they invoke. It is perhaps in this form that positivism is most influential in the Charter record. As I suggested in my conceptual brief above, positivism suggests an approach to the construction of constitutional meaning which avoids commitment to the sorts of content-ful theories of moral value suggested in naturalist interpretive theories. As a consequence, the readings of legal meaning it suggests in the Charter context tend to be minimalist in their substantive commitment to moral theory writ large.

What I am intending to convey in delineating these characteristics of what I have called “constrained purposivism” is not that the authors of these sorts of judgments are by necessity advocates of positivist legal philosophy. What I am suggesting rather is that Charter judgments which speak within these limits bear evidence of a certain deference to positivist notions of law and legal authority. The delineation of constitutional meaning primarily by reference to the existent legal and social order or in neutralist terms I would argue suggests or is at least best justified and given most coherence by a conception of the constitutional order as having its foundation in that order; that is, as authoritative because posited. Less constrained constitutional readings which seek guidance beyond the existent legal order are, conversely, more coherent and justifiable if understood as proceeding from a theory of constitutional foundations which locates their authority in a moral order less completely tied to the society in which it is found. My argument, then, is that the forms of judicial constraint which I have outlined here and which I argue suffuse much of the Charter record suggest a positivistic conception of the nature and source of Charter authority, whether or not their authors would explicitly adopt such a vision.

The Appeal of Positivism

Although I have suggested there is room for debate about whether any particular Charter judgment is positivist in its orientation or by dint of its self-constraint, it is clear I
think that a great many judgments are self-limited in ways which suggest at the very least a positivist influence in our judiciary's decision-making. Few Supreme Court justices have not written a number of Charter judgments which could not be characterized as constrained in their purposivism. Of course, some justices are arguably more prone to such a view of constitutional interpretation than others — we more often see identifiably positivistic nuances in the judgments of McIntyre, LaForest, McLachlin, and Beetz: less often in those of Dickson and Wilson, for example. One might also note “eras” of Charter positivism as well: those judgments of the Court in the Charter’s early years are on the whole perhaps more idealistically-oriented; those after the early Charter glow had begun to wane are more often constrained and positivistic. Despite the room for debate however, I do think there is an identifiable and arguably quite strong orientation to positivist conceptions of law and the construction of legal meaning to be found in the Charter record. And while positivism is I have been arguing in the main a primary value for our courts, it is not without unberobed followers as well. Among its prominent academic advocates are W. J. Waluchow and Peter Hogg (Hogg's Constitutional Law of Canada serves as the prescribed text in the vast majority of our law schools' introductory courses in constitutional law (Hogg, 1999)). So too has much of our legal education in Canada been argued to be positivistically-oriented (Vaughan, 1991: 409). All of this suggests, then, that positivism has considerable appeal across a broad range of the legal community.

Before embarking on a critical consideration of this interpretive perspective, then, these facts suggest the importance of some consideration of the nature of positivism’s appeal. Why, we might ask, does its perspective have the hold it does on those engaged with the law, from first year law students to venerable Supreme Court justices? Given its longstanding pre-eminence as a theory of law and adjudication both in Canada and elsewhere, it is clear that positivism speaks to something about legal order which we ignore at our peril. Perhaps the first of positivism’s not inconsiderable charms is the immediate apprehension it gives of being self-evident common sense. Surely the law is THE LAW in a way which is disconnected from our desires of what it might be: anyone who has marched in protest, campaigned for social justice, or furtively “smoked a joint out back” as the song goes experiences with immediacy law as a “fact” rather than an ideal. Any effectively functioning legal order has the ability to make manifest the desires of those in control of its
law-making institutions in a way largely independent of any particular conception of moral value or of the wishes of those who are not in a position to make the laws. Positivist legal theory might be said to acknowledge and account for this reality by making clear the distinction between law and morality.

What is more, that distinction itself might be thought to have an inherent moral value. As H. L. A. Hart has argued, to suggest that that which does not correspond to a given moral ideal is not law (as does idealism in its more extreme versions) is to obfuscate what positivism helps make clear -- the distinction between law and morals. Idealism suggests a conception of legal interpretation as "open" and as therefore of admitting the redrawing and reconfiguration of legal commands in the light of moral values. In so doing, many positivists argue, it softens the "rough edges" of law which might prompt citizens to seek better law from their governors. By keeping the differences between law and morality clear, it is argued, we are better able to respond critically to law which is immoral (Hart, 1958: 619 - 20).

Another difficulty with the naturalist perspective which positivists point out derives from the extensiveness of the disagreement of its advocates about the nature and content of the "natural law" to which they urge we refer. Naturalists argue that what we understand as law must be measured and evaluated against a binding moral standard which is appropriately understood as transcending any given legal order. Yet they are at considerable odds over what that standard might be. As Peter Hogg has noted:

I do not know how to identify natural rights, from where they derive their authority, or what the legal effect of their breach could be. I do not trust any judge to reach legal conclusions on these matters. My skepticism is reinforced by the widely differing accounts of rights that are given by legal philosophers such as Dworkin, Rawls, Nozick, and Finnis, who do believe in natural rights.

(Hogg, 1987: 89)

Positivists do not face this dilemma because they do not believe that law is subject to such standards. For them, the authority and thus the source of the law's applicative meaning is to be found in the existent legal order and not in the heavens or in philosophical or spiritual treatises. The former suggests a considerably more readily identifiable source of interpretive values than do the latter.
As a final point, we might note that there is, in the Canadian context with which we are concerned here, perhaps some especial value in positivist neutrality about moral and social values. In countries like our own in which there are significant divisions in cultural outlook and in which a multitude of value systems hold reign, it might be suggested that positivism can be understood as suggesting a considerably appealing simplification of the legal task. Because it implies a view of law as relatively separable from ethics, morality, and spirituality, positivism can be argued to suggest a way forward for constitutional adjudicators who face the task of seeking the applicative legal meaning of relatively abstract constitutional provisions. Any claim about constitutional meaning which founds itself in values argued to be transcendant, universal, and mandatory is likely to be, to say the least, controversial in a society like our own. Positivism understands itself as neutral about such matters, and its appeal in this sense to those faced with interpreting the Charter is in this sense then perhaps an understandable one.

I have to this point offered a reading of positivism which can be taken as suggesting the validity and appeal of this Charter perspective. I argued for its conceptual plausibility in the rights charter context, suggested its importance as an influence on our judiciary’s responses to the Charter, and offered a number of reasons — explanatory and justificatory — for this appeal. I turn now to a more detailed consideration of the specific commitments I would argue positivism to suggest in the Charter context as a theory of legitimacy and social value, Charter foundations, and legal description. Viewed in a more critical light, the positivist perspective on the Charter becomes considerably more problematic than its popular appeal in the Canadian context might suggest.

II. POSITIVISM AS A THEORY OF LEGITIMACY AND SOCIAL VALUE

Positivism as Neutrality

Before I can begin an outline the legitimative theory which I suggest underlies positivist interpretive prescriptions for the Charter, one potential objection to such an endeavour must be noted. As I have emphasized, positivists understand their legal philosophy to suggest a certain neutrality about questions of constitutional legitimacy. In this view, positivism might be said to be appropriately understood as suggesting primarily a
conceptual theory of law and a concomitant array of interpretive approaches appropriate to such a theory. Its concerns then are descriptive — with what law is — and not prescriptive — with what law should be. By the very fact that a theory of legitimacy and social value as I have described it implies reference to moral or other benchmarks beyond the legal system itself, it is something with which legal positivism might be thought to be unconcerned. To the extent that this is so, the analytical framework which I seek to apply here is inappropriate: there is no place for a critical consideration of the legitimative and social values of positivism because it might be said to have none.

Such a view is implied at times by legal philosophy's perhaps best known positivist, H. L. A. Hart. He describes the work (*The Concept of Law*) in which he sets out his positivist conception of law in its most complete form as "an essay in descriptive sociology", for example, and suggests that it is "concerned with the clarification of the general framework of legal thought, rather than with the criticism of law or legal policy" (Hart, 1961: vii). For Hart, these alternatives can be understood as readily separable endeavours. So too in "Positivism and the Separation of Law and Morals" does Hart suggest that legitimative concerns such as "ought this rule of law to be obeyed?" are answerable in some other way than by consideration of legality *per se*. "Surely" Hart says,

\[ \ldots \text{the truly liberal answer to any sinister use of the slogan 'law is law' or of the distinction between law and morals is, 'Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality'.} \]

(Hart, 1958: 618)

Hart's suggestion implies the possibility of being at the same time a legal positivist and a committed social critic whose conception of legitimacy and social value is so significantly different from that embodied in the legal order that it prompts civil or other forms of disobedience. If Hart is correct, then I am out of bounds in attempting to attribute to those whose reading of the Charter is positivistic a particular set of legitimative premises: legal positivism in this view does not imply a complex of views about such things as the nature of a legitimate constitutional order.

To the extent that legal positivism is a purely academic, sociological, or predictive enterprise, Hart's characterization of it does indeed seem valid. To say that it was against the law in the former Soviet Union to openly criticize communism, for example, in no way
implies that one is defending or acting within a belief in the legitimacy of such a regime. Nor does every lawyer who must advise a client that the Charter's guarantee of freedom of association does not provide to Canadians a right to strike believe that that is a good thing, that the social order prescribed by the Charter is legitimatively defencible with respect to this element of its legal meaning. But there is a significant difference between these endeavours and that with which we are concerned here — judging itself. Unlike disinterested academics or law-describing attorneys in their offices, those acting in the judicial capacity are active participants in the construction of legal meaning and in the furtherance of the legal order within which they work. This participation (presuming it is voluntary) implies I would argue a certain moral responsibility. As Ronald Dworkin suggests in *Taking Rights Seriously*,

> When a judge appeals to the rule that whatever the legislature enacts is law, he is taking an internal point of view towards a social rule; what he says is true because a social practice to that effect exists, but he goes beyond simply saying that this is so. He signals his disposition to regard the social practice as a justification for his conforming to it.  

(Dworkin, 1977: 51)

To understand oneself as appropriately responding to questions of legal meaning within positivist terms is, I would argue, to in effect commit oneself to the application of the law as it has been posited and in so doing to underwrite a conception of it as authoritative because posited, regardless of its specific moral content. This is a conception of legal practice which is not simply descriptive: when adopted as part of one's own practice it is prescriptive too.

Constitutional judging seems therefore to imply a connection with legitimative questions about the constitutional order which is not evaded by proceeding from positivist adjudicative premises. That is, unless there is something about positivistic interpretation itself which transcends such considerations or nullifies such conclusions. While judging may be legitimative in its implications, as I argue, perhaps positivist judging, because it does not bring with it any complex of evaluative belief, is in some sense "neutral" and therefore freed from or at least less heavily of such moral implication than alternative approaches.

Professor Hart's work also suggests this possibility at times, as is evident for example in his exploration of a potential naturalist critique of positivism in "Positivism and the
Separation of Law and Morals”. To his claim that law and morality are separable, Hart suggests, might be counterposed the argument of natural law philosophers that legal orders unavoidably embody a moral order derived from natural law; all such orders, it might be suggested, are built upon and must respond to the dictates of human nature. Hart acknowledges the facial and limited validity of such claims. There are, of course, some basic and necessary elements that must be part of any functioning legal system (it must not be inimical to human “survival”, for example, and any functioning legal order will therefore contain a minimum content such as proscriptions on murder and the like), the “natural”-ness of which positivist theories of law such as his own must acknowledge (Hart, 1958: 623). Nonetheless, Hart’s acknowledgement of a “minimal content” of law does not constitute the adoption of the naturalistic view of his foremost philosophical opponents, for

Natural law theory . . . in all its protean guises, attempts to push the argument much further and assert that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival, and these dictate a further necessary content to a legal system (over and above my humble minimum) without which it would be pointless.

(Hart, 1958: 623)

Therefore, while

[o]f course we must be careful not to exaggerate the differences among human beings . . . it seems to me that above this minimum, the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is “necessary” in this sense.

(Hart, 1958: 623)

Hart’s implication, then, is that positivist legal theory is of minimal substantive content and agnostic about the sorts of considerations I have described as “theories of social value”. Unlike natural law which implies broad claims about human value, positivism does not entail such commitments.

But while it is indeed true that positivism avoids the difficulties inherent in natural law theory of attempting to deduce too much from “nature”, it is not true that its adoption for the purposes of constitutional adjudication implies that those so doing are underwriting
any less ambitious or extended a view of “the purposes which men have for living in society” than are their naturalist counterparts. Positivistic interpretive practice in fact implies the acceptance by adjudicators of a certain social vision. It is a constrained endeavour in the sense that it prescribes in quite specific terms an interpretive content for constitutional meaning which adjudicators must follow, but that content itself is not neutral or minimal. The adoption of such practice carries with it implications for legal outputs in the sense that a positivistic approach to the reading of the constitution will in no small number of cases be productive of different understandings of the applicative meaning of the constitutional text — and hence of different legal outputs — than will potential alternatives. It produces just as do its more explicitly values-adopting naturalist alternatives a particular and identifiable sort of constitutional order.

As I will argue shortly, to the extent that constitutional interpretation limits itself to consideration of such things as the text, the intentions of founders, to a constrained purposivism more generally as positivism suggests, it in fact endorses a particular vision of social order and moral value. By taking their interpretive guidance from the existent legal and social order, constitutional adjudicators privilege the “views of human purposes” embodied in the *status quo* and in the minds of the representatives of the powerful — those men who have held seats at our constitutional tables when our current arrangements were being negotiated. Positivism suggests a reading of constitutional meaning which takes these views about human purposes as particularly authoritative. Positivist interpretation of law produces, as do its alternatives, a particular and specific constitutional order, as unique and identifiable in its outline as any naturalist alternative. It is not therefore neutral in this sense either.

Nor is Hart the only legal theorist whose work suggests that positivism constitutes a neutral analytical tack, a sort of default mode of legal interpretation from which departures must be specially justified. When the Canadian scholars Rainer Knopff and F. L. Morton, for example, suggest that Supreme Court justices “succumb to the seduction of power” when they fail to exercise judicial restraint and deference to law-makers by engaging in an overly substantive review of legislation (Knopff and Morton, 2000: 22), their implication is that by so doing judges take themselves beyond the bounds of the duly constituted legal order — they “make up the law as they go along” (Knopff and Morton, 2000: 9). Supreme
Court Justice William McIntyre assimilates less constrained approaches to judicial interpretation than his own in *Morgentaler* to adding to or otherwise rewriting the constitution, adopting as I earlier noted the words of United States Supreme Court Justice John Harlan, who has said that

... when, in the name of constitutional interpretation the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be for the amending process.

*(Reynolds: 625; cited in *Morgentaler*: 141)*

And Peter Hogg has suggested that adoption by judges of a more naturalistic disposition to constitutional interpretation “would pose a serious threat to democratic government because it would authorize judges to give legal force to values that had never been approved by any democratic process” (Hogg, 1991: 417) — in short, that to do so would be to appropriate a status as value-givers when they have no warrant to do so.

Knopff's and Morton's, McIntyre's, and Hogg's views each seem to suggest that by adopting a positivistic interpretive tack judges are in some way “following orders”, acting within their stead in the command structure of the legal order. To the extent that this is so, perhaps “neutrality” might be found here. If adoption of a positivistic adjudicative strategy is akin to acting on the orders of a superior officer as in the military, then perhaps positivism does imply a disconnection from legitimative concerns or questions of social value, in the same way, for example, that an enlisted man's obedience to his lieutenant's commands to charge a bunker does not impute to the former any belief in the wisdom of his orders. But while the notion of “following orders” may validate the neutrality of a positivistic approach as regards sub-constitutional laws, it does not, I would argue, do so as regards constitutional-level laws like the *Charter*.

It is clear I think that judges are following orders when they give interpretation to what H. L. A. Hart has called “primary” — that is, sub-constitutional — rules like the *Income Tax Act* in a positivistic way. The orders they are following are those of the constitution under which they operate. To hold, for example, that the *Income Tax Act* does not apply to, say, judges and their families when it is plain that it does, would indeed be akin to rejecting the constitutional order giving to Parliament the power to pass tax laws and assuming such power oneself. Primary rules such as the *Income Tax Act* can reasonably be understood as
having a specific applicative force determinable by reference to “secondary”, constitutional-level rules like the Constitution Act, 1867 and the Charter. It is far less clear, however, that judges can be said to be merely following orders when what is at issue are constitutional level questions themselves. Such secondary rules have no transcendent reference to direct their interpretation. There are no self-evident “tertiary” rules to which to refer for guidance as to their construction and application. In this sense, then, judges must provide their own “orders”, finding or creating for themselves a conception of the nature of their relationship to the constitutional text, a theory of how it binds them and others, and of what interpretive tack that relationship mandates or admits. There are no “orders” to be followed and neutrality cannot therefore be found here either. Despite its self-perception, positivism is not in fact neutral about constitutional legitimacy. Its view of law as binding because posited is a legitimative commitment which brings with it a particular and identifiable set of interpretive values. Those values I would argue bring with them the same necessity of justification and potential for critique as do those suggested more explicitly by various naturalist conceptions of legal order.

Positivist Legitimacy

Having said all this, then, what legitimative theory or theories do I argue to underlie positivist conceptions of constitutional interpretation? We might begin by considering the more directly apparent legitimative presuppositions evident in some representative examples of positivist legal scholarship. Given the diversity and depth of the positivist literature, no consideration of such issues short of book length in itself could hope to encompass all of positivist thought on this topic. My explorations here, then, are limited to the positivist thought of two of that school’s most influential scholars, H. L. A. Hart and Hans Kelsen. While it is certainly possible that those engaged in or advocating positivist constitutional adjudication might proceed from a vision of the legal order built upon conceptions other than those of Hart and Kelsen, the influence of these scholars would suggest that their works are at the very least among those we would think most likely to provide theoretical justification for positivist responses of the Charter.

As I noted above, Hart describes constitutional level law as consisting of “secondary rules”, which have as their function the specification of “the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their
violation conclusively determined” (Hart, 1961: 92). Since such “rules of recognition” constitute the foundations of the Hartian legal system, our interest here is in how they can be understood to speak authoritatively, in what resides their claim to order the society in which they are found. Hart suggests that the existence of these rules of recognition is a “matter of fact”, which can be ascertained by looking to the “practice of the courts, officials, and private persons in identifying the law” (Hart, 1961: 107). Serious statements of legal validity by those within a legal order, Hart argues, imply two presuppositions: the acceptance by the person making the statement of the given rule of recognition, and the understanding that that rule is “actually accepted and employed in the operation of the system” (Hart, 1961: 105). In Hart’s view, then, a constitutional order has its foundations in a social acceptance of its authority sufficiently broad that the regime can effectively function.

Kelsen, like Hart, suggests a conception of the legal order in which the authority of laws of direct application (legal norms) can be traced back to more fundamental laws. Where for Hart the notion of social acceptance constitutes the headwaters of the river of legal authority, for Kelsen that source is a fundamental norm (“grundnorm”) the validity of which is “presupposed” and subject to no further elaboration: “[t]he quest for the reason of validity of a norm is not — like the quest for the cause of an effect — a regressus ad infinitum, it is terminated by a highest norm which is the last reason of validity within the normative system . . .” (Kelsen, 1949: 111). When “[w]e say, for instance”, Kelsen explains, “‘You shall not kill because God has forbidden it in the Ten Commandments’” “[t]he reason for the validity of the norm, You shall not kill, is the general norm, You shall obey the commands of God” (Kelsen, 1949: 110). We can similarly trace legal authority back to and beyond constitutional sources:

If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and was laid down by an individual usurper or by some kind of assembly. The validity of the first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained. That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the
For Kelsen, the existence of such a norm can be ascertained as a matter of fact; a new order is established when “individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order” (Kelsen, 1949: 118). “The basic norm of any possible legal order”, he asserts, “confers legal authority only upon facts by which an order is created and applied which is on the whole effective” (Kelsen, 1949: 120). For Kelsen, the authority of the basic law of a legal regime (which in generic terms can be said to be “obey those who laid down the first constitution”) resides in its social observation which can be empirically ascertained by the efficacy of the general order.

Both Hart’s and Kelsen’s views suggest a conception of the fundamental laws of a legal order as having that status by virtue of their having the at least implicit confirmation of a sufficient portion of the population that the order functions effectively. Constitutional adjudication which proceeds from this sort of conception of law is underwritten, I would argue, by a theory of legitimacy which conceives of a constitutional order as being legitimated by the fact of its effective existence. This more or less explicit principle of Hart’s and Kelsen’s legal theories also suggests some further less facially evident legitimative implications. My suggestion here is that adoption of positivist conceptions of constitutional interpretation which proceed from Hartian, Kelsenian, or similar premises suggests on behalf of their adopters a constitutional view which underwrites the ratification and perpetuation of the status quo in the society governed by such an order, a narrow, functionalist, Machiavellian (as I described it in the previous chapter) view of constitutional legitimacy, and a conception of the citizen-state relationship in which the former is deferential to the latter.

To begin with the status quo, it is worthy of note I would suggest that both Hart’s and Kelsen’s philosophies of law proceed from an understanding of questions of the authority of a legal order in the typical case as requiring reference to the past. Kelsen’s theory of the legal grundnorm suggests that current questions about the validity of legal prescriptions are resolvable by tracing back their claims to prior events in time. The ultimate source of such validity in Kelsen’s view is the authority of those who founded the “first constitution”. While Hart rejects the Kelsenian view in these specifics, his own legal theory is no less tied
to the notion of continuity. In a central argument early in *The Concept of Law*, Hart contends that John Austin’s conception of law as habitual obedience to the command of the sovereign fails to account for “the continuity to be observed in every normal legal system” (Hart, 1961: 53; emphasis added). “[I]t is characteristic of a legal system”, Hart asserts

... to secure the uninterrupted continuity of law-making power by rules which bridge the transition from one law-giver to another: these regulate the succession *in advance*, naming or specifying in general terms the qualifications and mode of determining the law-giver”.

(Hart, 1961: 53)

What is more, if a new legislator is to have as he normally does the right and presumption to step into the shoes of his predecessor, “at the moment of succession there must, during the reign of the earlier legislator... have been acceptance of the rule under which the new legislator is entitled to succeed” (Hart, 1961: 54). What Hart’s argument suggests is that he understands current legal authority as having its roots in prior authority, in the social acceptance in the past of the order which gives shape to the present. At the theoretical level, positivism suggests an adjudicative approach which places a high value on the past.

This theoretical predisposition to the past finds its expression in practical terms in the reality of positivist constitutional adjudication. It is an approach whose sources of constitutional wisdom include as I have quoted Justice McIntyre as saying the “history of the constitutional text... constitutional tradition, and... the history, traditions, and underlying philosophies of our society” (*Morgentaler*: 140), something perhaps well exemplified in the dissenting judgment of Justice Belzil of the Alberta Court of Appeal in *R. v. Big M Drug Mart* in 1984 ([1984] 1 W.W.R. 625). In arguing that the federal *Lord’s Day Act* did not contravene the Charter’s s. 2 guarantee of freedom of religion, Belzil argued that “it was realistic to recognize that the Canadian nation is part of “Western” or “European” civilization, moulded in and impressed with Christian values and traditions, and that these remain a strong constituent element in the basic fabric of our society” (as summarized by Chief Justice Dickson in his judgment on BigM at the Supreme Court level (*R. v. Big M Drug Mart* ([1985 ] 1 S.C.R. 295: 310)). “I do not believe”, Belzil said, that the political sponsors of the Charter intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loath to
assume that role. With the Lord's Day Act eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar? Such interpretation would make of the Charter an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless and godless nation contrary to the recognition of the supremacy of God declared in the preamble. The “living tree” will wither if planted in sterilized soil.

(Big M (Alta. Ct. Appl.): 663 - 4)

Differences of opinion about such matters underlie differing judgments in the American constitutional orb as well. The opposite understandings of the Fourteenth Amendment reached by the United States Supreme Court in Plessy v. Ferguson (1896) ((1896) 163 U.S. 537) and Brown v. Board of Education (1953) ((1953) 347 U.S. 483) speak not just to different views about the meaning there of “equality” but also of what sorts of interpretive presumptions might properly be brought to bear in attempting to make such such decisions. In Plessy, the Court held that the Louisiana Separate Car Act which segregated passengers in rail cars did not contravene the Bill of Rights’ guarantee of “equality before the law”, and that the state:

[i]n determining the question of reasonableness [of the impugned measures] ... is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.

(Plessy: 550)

In short, the Plessy court considered the question of equality to be one subject to interpretation in light of the established social order and its longstanding traditions (which in this case included a colour line). Brown, in which the Supreme Court declared the doctrine of “separate but equal” treatment of the races unconstitutional, represents not just a rejection of Plessy’s view of the legality of segregation, but an explicit rejection of its notion of constitutional meaning as resident in the past. Justice Warren held there that:

[i]n approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.
Those critical of the Warren Court frequently voice their objections to its interpretive theory in terms of its departure from and abrogation of the guidance of the past. Clifford Lytle, has for example, documented the critical commentary of jurists like Dozier deVane who argue that the Warren era court was to be condemned for its departures from *stare decisis* (Lytle, 1968: 96). Raoul Berger has suggested that *Brown* was wrongly decided, in no small part because it ignores what must be taken as the original intentions of those who brought the Fourteenth Amendment into being (Berger, 1971: 348 - 50).

At both theoretical and practical levels, positivism suggests, I argue, a particularly strong orientation to the past. Does this in itself, however, tie it in any special way to the status quo? If that past is a “progressive” one or if the constitutional document speaks in a timeless way, does positivism not suggest the continuing perpetuation of progress or the protection of the timeless values of the original constitutional order? A consideration of the nature of the sources of adjudicative guidance to which positivist interpretations most frequently look — the constitutional text and legal records of interpretation of that text, and longstanding social attitudes as evidenced mainly by the record of a society’s legislative decisions over time — suggests not. While it is possible to at least argue a claim for the timelessness of some overarching vision embodied in a constitutional document (although many in these values skeptical times would be unconvinced by such an argument), it is not, I would argue, possible to argue in any convincing way for the timelessness of particular and momentary understandings of such a vision. While in its general form a constitution might speak to a transcendent vision of social order, it must be given voice in its specific and applicative meanings in real constitutional cases by real men and women whose understandings of such a vision are, because they are mortal, limited by their place in the social order and by their limited existence in time.

Positivist strategies of adjudication suggest the importance of the legal record of prior interpretation. But to the extent that the legal record memorializes a continuingly positivist legal vision, references to it will in fact be references to a yet still more distant past: yesterday’s judicial decision referred to the previous day’s, and on back *infinitum*. It is in fact this sort of approach which the Warren Court explicitly rejects in *Brown* when it asserts that the “clock cannot be turned back”. Its root source is ultimately that early era closest in time.
to the founders themselves, and in looking here what positivism finds is not the
timelessness of grand constitutional vision, but the petty and localized specifics of the time-
bound understandings of the founders and their era. American founders spoke of
"equality", but they meant of and for white men. Canadian founders guaranteed a sort of
religious freedom (through their provision for denominational schools in s. 93 of the
Constitution Act, 1867), but what they constitutionalized were protections for Protestants and
Catholics only. In both cases they were right generally, but wrong specifically (and, to be
fair, in a way more evident to those of us of a later day than it could possibly have been to
them themselves). To the extent that positivist jurisprudence ties itself to our past, it
perhaps tends to lead us more often to the latter understandings of constitutional meaning
rather than the former.

Much the same might be said of a country's legislative record as well. Since
legislation is passed on behalf of or certainly at least curtailed in its ambitions by the values,
preferences, and interests of the socially powerful, the social decisions of a nation viewed
over the long run of time are likely to be in their character of a fairly conservative nature.
This is likely to be so even when such decisions are continuingly more "progressive" over
time. Since a collective characterization of statutory history is something of the equivalent of
finding their statistical mean, that characterization will be significantly less progressive than
the most recent of legislative enactments. To take this record as guidance is therefore more
often than not to reify as a social norm what is in fact only a partial record of societal values —
partial both in the sense of expressing only a portion of the reality and in privileging the
values of the socially powerful over those less able to bring their influence to bear on
legislative decision-making. Much the same can be said I think of judicial readings of
"social traditions" as well.

By all of this I do not mean to suggest either that positivism necessarily demands
something as simplistic as textual interpretation by reference only to founders' intentions
understood in the narrow sense or that it denies the possibility of the evolution of
constitutional meaning over time. No interpretive perspective likely to be of appeal to as
 estimable a body as a nation's supreme court will be as black and white as this in its
prescriptions. What I am suggesting rather is the (I hope) somewhat more subtle argument
that positivistic jurisprudence to a much greater extent than alternative perspectives ties
itself to the more general social attitudes of the past and to an undervaluation of contemporary reconstructions of textual meaning. It suggests, then, a constitutional vision which ratifies and reifies the status quo, a vision which tends therefore to give us Plessy rather than Brown; Justice Belzil's vision of s. 2 of the Charter and not Justice Dickson's. The final results in Brown and BigM both necessitated departure from positivistic juridical preconceptions and, in the light of a longer perspective, I would suggest, bear out the wisdom at least in their cases of such departure.

I have suggested to this point that positivist thought suggests a theory of legitimacy in which efficacy and continuity (and hence in the latter case the status quo) are central values. These in turn suggest a third observation about the notion of constitutional legitimacy embodied in positivist practice. The positivist vision of constitutional adjudication is, I would argue, one built upon a view of constitutional legitimacy as appropriately understood as narrow and functionalist in the Machiavellian sense I described in chapter one. There I suggested that legitimacy understood narrowly implies a view of the constitutional order as having as its foremost imperative the establishment and maintenance of a stable regime, an end which is achieved in this view primarily by the accommodation of the constitutional demands of powerful social forces so that the regime has the support of enough of the population to maintain the social order it has established. Positivism's concerns with both continuity and efficacy suggest the importance of stability; its tendency to preserve or at least minimalize changes to the status quo suggests as I have argued that its orientation (whether intentionally or not) is to the socially powerful.

The unappealingness of this vision of law is evident perhaps even from the positivist perspective itself: arguably, H. L. A. Hart himself sought to distance his conception of the law from such implications in their more extreme form. Two aspects of A Concept of Law suggest this reading of Hart. The first of these arises in his discussion of the obligatory character of law. Hart begins by suggesting that perhaps the most basic form of a non-obligatory interaction is of a gunman ordering his victim to hand over his purse. As an introductory example, the gunman situation does have some initial appeal as a theory of law - penal statutes with their explicit promises of specific punishments for behaviour proscribed by the state do seem analogous to the gunman, for example. But, as Hart famously asserts, law is not "the gunman situation writ large" (Hart, 1961: 7).
The second aspect of Hart’s theory which suggests his desire to avoid what I have called a Machiavellian view of law proceeds from this observation. What is it about a legal order which distinguishes its commands from those of gangsters who have taken over the local village? In the standard case, Hart suggests, obedience to commands in a legal order is something more than a response to threats of punishment: acceptance of such an order brings with it the notion that obedience is right (Hart, 1961: 57). There is in a functioning legal order an internal orientation to the law—a “reflective, critical attitude”. “What is necessary” for the existence of ‘binding’ rules Hart tells us

... is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’.

(Hart, 1961: 57)

Both these aspects of Hart’s legal theory appear to suggest something beyond the Machiavellian view’s enshrinement of order and stability. Order can be achieved by any sufficiently powerful gunman, and its attainment does not require on behalf of the governed any particular internal orientation—certainly not at any rate a belief in the “rightness” of the order. But while Hart’s theory appears at this point in A Concept of Law to suggest (if my view is correct) some desire to evade a Machiavellian view of law and order, does it, we might ask, succeed in such an end?

Hart notes that in any society there will be those who do not accept its laws and “are only concerned with them when and because they judge unpleasant consequences are likely to follow violation” (Hart, 1961: 88). Presumably, however, to the extent that law is not the “gunman writ large”, social acceptance will have a certain breadth and character. If only one person accepts or if the acceptance is of the power rather than the authority of the state then it is hard to see how we do not have the gunman. But what breadth is required to differentiate a legal order from gangster rule? Speaking from a God’s eye perspective, are we looking for 50%+1 of the population? Two-thirds? 95%? “[A]t least some” Hart offers unspecifically in his introduction of this notion (Hart, 1961: 55), and presumably enough to enable the effective functioning of the regime (Hart, 1961: 108). But in fact a much more
explicit statement is available to us. He argues that there are “two minimum conditions necessary and sufficient for the existence of a legal system”:

[O]n the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens need satisfy: they may obey each ‘for his part only’ and from any motive whatever...

(Hart, 1961: 113)

It is in its most explicit form which Hart’s answer is the most perplexing. Surely what distinguishes law from the gunman (if such a distinction is indeed to be found in positivist conceptions of law) is that those who are urged to obey by the holder of the gun understand such demands as authoritative rather than merely threatening. Yet a state’s officials are those who hold its power — they are, to use Hart’s analogy, the gunman. If only they understand the legal order from an internal, critical, reflective perspective then how, it must be asked, does law in that sort of society differ from the “gunman situation writ large”?

What then about the character of social acceptance? Hart suggests that at least some in any legal order must have an internal orientation to the law which is, as I have said, critical and reflective. This too is a difficult vision to make out, particularly as regards constitutional law. Laws at the constitutional level (in the Canadian case at any rate) speak with a considerable degree of abstraction. Yet at the same time, positivist interpretive strategies suggest the desirability of avoiding broad or effectively meaningful specifications of the background content of law — their focus is on law as law, not, for example, on law as the expression of some more deeply meaningful moral (or other) order. But if we are to proceed from this interpretive perspective given the reality of our constitutional text, must we not then understand social acceptance of the legal order as being not of its specifics, but of something far less defined — of an order whose shape and character is to a great extent yet to be dispositively outlined? Since constitutional jurisprudence is as much about attempting to define what the principles of secondary rules themselves are as it is about giving them application, what are we to understand a society as accepting when the laws of its constitution are to a great extent yet to be construed, are not yet in existence in the public
mind? How, we might ask, can there be social acceptance of something that has not yet come into existence or even been widely contemplated? If constitutional authority depends on social acceptance of the regime established by the constitution, then it would seem to bring with it little authorization for those aspects of the social order which come into being through judicial responses to unanticipated constitutional questions.

One possible response to this critical line is the argument that it is not social acceptance of discrete judgments upon which Hart's theory would depend in a constitutional regime, but upon social acceptance of the overall constitutional order, an order which accords to judges the responsibility of interpreting the meaning of constitutional provisions in given cases. But this version of the social acceptance thesis raises the question of upon what interpretive principles judicial decisions in such a regime would rely. Are we to understand judges in such a regime as responding to new constitutional issues as they see fit? Viewed in this light, the social acceptance thesis bears some resemblance to a negotiation in which one party agrees to a contract which includes a term giving the other party the right to at their own preference add later provisions unilaterally.

If, on the other hand, we are to understand judges as giving animation to the constitutional order by reference to the past and to the understandings of the founders and thereby constraining judicial interpretation (another viable positivist strategy), other problems arise. As I have already argued, this vision of constitutional evaluation directs us toward a status quo from which we might prefer to depart. What is more, since many of the most interesting and significant problems of constitutional meaning concern issues unlikely to have ever been contemplated by the founders in their wildest moments of speculation (and this becomes ever more true the further in time we move away from the founders' moment in history), it is not certain that founders' visions will have in many cases much to offer us as guidance.

In either case, what these versions of the social acceptance thesis suggest is that citizens are bound not to the constitutional order in which they live, but to the visions of that order promulgated either by uninstructed agents (judges) or all-authoritative stand-ins (the founders). To the extent that the social acceptance thesis implies this level of disengagement, it is, I would suggest, premised on a particularly deferential vision of the
relationship of the citizen to the state and its powers that be. It is difficult, to see how this sort of relationship to the legal order is one which can be described as "critical" or "reflective". A constitutional order which binds citizens to judges, founders, or the *status quo per se* (that is, judges, founders, or the *status quo* whatever vision of the legal order they command) is one in which, I would argue, the mass of those who live under it are offering their rubber stamp rather than their critical attention.

This suggests from our own critical perspective some concerns. Hart's theory stipulates that law is identifiable as implying the critically reflective acceptance of those it binds. If it at the same time implies (at least at the constitutional level) a lack of critical reflection, then it is at least potentially open (again, when used as a theory of constitutional interpretation) to the charge of incoherence. This is an unsettling thought given its place as one of our most influential statements of the positivist vision of law. Hart avoids such charges by acknowledging that only the officials of a legal order need be understood as giving law a critical and reflective acceptance. The difficulty here, though, is that we are then returned to law as gunman, a legal vision which Hart is equally desirous to avoid (as are most non-positivists). Of course, such charges also do not stick if we accept that the Hartian conception of critical reflection (and thus of social acceptance) is a thin one, content with a vision of citizens as indeed deferential in their relationship to the constitutional order.

It is this latter possibility which is of most import for our discussion here, in two ways. First, we might ask rather simply if this sort of vision of the legal order is one to which we would happily wish our constitutional adjudicators subscribe. Are we content or morally satisfied with a constitutional view which understands citizens as bound to the order in amoral and Machiavellian terms? Some might respond to this question by arguing that any constitutional order implies some deference on the part of citizens to the powers-that-be. If we are to understand constitutions as binding those who live under them and as requiring expert interpretation, they are instruments to which our obedience in less than completely specified terms must sometimes be necessary. But, I would suggest, at least some alternative conceptions of constitutional law which are available to us are much less susceptible to such claims. Conceptions of constitutional meaning as appropriately derived in deference to the current views of a democratically elected legislature suggest a more
active and directive relationship of citizens toward the constitutional order. And conceptions of the constitutional order as morally binding upon citizens and which therefore understand constitutional interpretation as requiring reference to philosophical or other elaborations of constitutional meaning drawn from the nature of that moral tie suggest that citizens are bound not to the order *per se* as in positivism, but to deeper legitimating principles which underlie that order. Neither of these conceptions are tied to the notion of citizen deference in the way that our explorations of positivistic constitutional law suggest it is.

Secondly, whether or not this sort of constitutional vision is morally appealing or not, there is now some question as to whether the sort of deference implied by positivist views can any longer be expected within the Canadian constitutional order. For a variety of reasons it would seem that as a nation we are far less prepared in the present day than ever before in our history to understand the state and the social order it commands as ordained from above and unquestionable. As Neil Nevitte has argued, "[i]n political matters", Canadians

\[\ldots\] are becoming less deferential, less compliant, more inclined to speak out and to be more self-directing and autonomous in reaching their own conclusions about the political world.

(Nevitte, 1996: 267)

This would seem to be particularly so as regards the constitutional order. In 1987, as the events surrounding the Meech Lake constitutional accord were just beginning to unfold, Peter Russell suggested that our constitutional history to that point suggested the necessity of Canadians asking themselves "whether we could become a sovereign people" (Russell, 1987: 126). The public response to the constitutional package proposed at Meech Lake and to the subsequent one at Charlottetown suggests that -- perhaps in part due to the changes in our attitudes to the constitutional order brought about by the *Charter* itself12 -- Canadians are significantly further along that path of development now than they were before 1982. Despite the apparently widespread agreement of Canadian political and media elites that the constitutional revisions proposed in these packages were a good thing, a majority of Canadians opposed them and succeeded in preventing their enactment. In a sense, many Canadians understand themselves as having an "ownership" in the *Charter*
in a way which suggests that our “well-entrenched self-image” as “passive”, “attracted to order”, and “unusually acquiescent to elite direction” (Bell, 1992) is passé. All of this then suggests that a vision of the constitutional order which starts from a view of citizens as bound to it whatever shape or form it is given is itself perhaps passé as well.

III. POSITIVISM AS A THEORY OF CHARTER FOUNDATIONS

Theories of legitimacy are claims about what might be called the standards by which legitimate constitutional order is to be identified. I have argued that the legitimative vision implicit in positivist constitutional theory — most specifically in the theories of Hans Kelsen and H. L. A. Hart which I discussed above — represents a standard which we ought not adopt, because it directs us toward a theory of constitutional order in which the status quo is given especial privilege and in which citizens are understood as tied to that order in fairly passive terms. While an evaluation of theories of legitimacy depends, of course, on what are essentially normative claims (“the status quo and passive citizenship are uncompelling values”), the next level of constitutional meaning we might consider here — theories of Charter foundations — requires a more (although not wholly) descriptively-oriented approach. In considering questions of constitutional foundations, the issue is not the compellingness of positivism’s legitimative standards, but the extent to which the Charter might be thought to accord, for better or worse, with those standards. Is the Charter, we might ask here, viably understood in Kelsenian or Hartian terms, as deriving its authority from its connection to a prior constitutional grundnorm (a la Kelsen) or the social acceptance (a la Hart) of the Canadian population?

While this might seem a potentially abstruse or primarily academic question, it is in fact one of significant relevance to the question of Charter meaning. As I argued in the previous chapter, one might suggest that there is an important and necessary connection between the tactics and approaches to the question of the applicative legal meaning of constitutional provisions (theories of legal description) and one’s theory about the source and nature of constitutional authority. Positivistically-oriented theories of legal description depend in an important sense on positivistically-oriented theories of constitutional authority. Attempts to tie the meanings of the Charter to such things as text alone or to such sources as the intentions of constitutional founders suggest an understanding of the document as
deriving its authority from positivist sources of constitutional value. The attempt, on the other hand, to tie the meaning of the Charter to more transcendant sources of constitutional value — via, for example, the independent moral deliberation prescribed by naturalist interpretive theories — suggests an understanding of constitutional authority as located elsewhere than in the legal order itself.

In considering the viability of positivist interpretive responses to the Charter, then, an important question which must be addressed is that of whether the Charter can be viably understood in positivist terms. My argument here is that positivistically-oriented interpretive responses to the Charter are problematic because, in fact, positivistically-oriented foundational characterizations of the Charter are themselves problematic. Kelsen’s theory suggests, for example, that the legal and social authority of constitutional arrangements derives from their connection to prior and more ultimately authoritative constitutional grundnorns. Yet the grundnorns of constitutional authority to which we might tie the Charter are in fact taken as authoritative and compelling by an ever decreasing number of Canadians. What is more, the facts surrounding the events of 1982 suggest that the enactment of the Charter may constitute a considerable departure from the recognizable Canadian grundnorns to which this conception of legal authority would seek to tie it. The Hartian social acceptance thesis, on the other hand, is problematic in application to the Charter because significant elements of the Canadian population have not “accepted” the Charter; some means of explaining or accounting for the obligations of these Charter dissenters is to be desired. Additionally, the social acceptance theory might be thought to represent a poor or under-nuanced depiction of the character of Charter authority. Those large numbers of Canadians who do accept the Charter arguably recognize its authority as deriving from its moral qualities rather than from the mere fact of their acceptance of its provisions. If this is the case, even positivistically-oriented interpretive responses to the Charter ought recognize this potentially important moral dimensions of its meaning.

Grundnornic Charter Foundationalism

Our thinking about a grundnornic theory of Charter foundations might begin with a consideration of the events, moments in history, and personality or personalities to which we might trace back the authority of the Canadian state. We of course begin with the Charter itself and the Constitution Act, 1982. These in turn direct us back to the Constitution
Act of 1867. Both documents have their own legal foundations in the Parliament of Westminster and the monarchy of the Commonwealth. Why this source? More locally and recently (relatively speaking), we look to the Battle for the Plains of Abraham in 1759, the British victory at which replaced French authority in what was to become Canada with English. More distantly, we look to another battle, that of Hastings in 1066, where William's victory laid the roots of the British legal order and our monarchy. If we are to understand the Charter as deriving its authority from the actions of the “founders of the first constitution”, as Kelsen's theory suggests, then the Canadian legal order has deep roots indeed, traceable back through nearly a thousand years of history whose culmination is captured photographically in the well-known picture of Queen Elizabeth II signing the Constitution Act, 1982 in Ottawa.

But while those roots may be deep in chronological terms, are they nearly so deep in perhaps more important terms, in the emotional or sentimental sense? Alan Cairns has suggested that “to live in Vancouver is to see that in the Canadian future” our traditional “constitutional signposts”, among them the notions of founding peoples and the Plains of Abraham, “have diminished credibility” (Cairns, 1992: 9). Certainly this must be so, as Cairns' image of Canada as “Vancouver” emphasizes, for the ever increasing number of Canadians whose ethnic background is not British. While the battle for the Plains of Abraham raged, my own fathers' ancestors, for example, were tilling the soil in Ukraine. It is also so, one would imagine, even for those whose ancestors provided our “founding peoples”. For Canadians of French and aboriginal descent, neither Hastings nor the Plains of Abraham would seem particularly stirring memories. But even for many of those whose ancestry does tie them to the British Isles, these constitutional signposts would seem to have an ever decreasing value: multiple generations separate most of them from English ties which become ever more distant in time and consequence from their present sense of value and identity.

Perhaps these realities are especially apparent from a Canadian perspective because of our proximity to the United States. There the notion of a legal grundnorm as the foundation of constitutional authority appears alive and well. George Washington, the Declaration of Independence, the Revolution of 1776, and the founding fathers all have for Americans what seems to be a real and enduring mythopeic value, an authoritativeness as
sources of constitutional authority and wisdom which seems lacking in Canadian equivalents. And of course, some significant differences underlie the two nations' different orientations to this version of constitutional foundationalism. The American experience was more local (all of the significance of 1776 lies on American soil whereas the Plains of Abraham, while on Canadian soil, was in reality a British battle won by British troops), more dramatic (a revolution), and, perhaps most important of all, has had the advantage of continuing dramatization by the American cultural machine (although it has been in recent times ever more subject to critical deconstruction in intellectual circles). Whatever the reason, it is clear that national history has a great deal less visceral appeal as a source of constitutional authority in Canada than in the U.S. The difficulty with grundnormic visions in Canada is that they suggest a view of constitutional authority as having its foundations in sources which I would argue few Canadians understand as having meaningful authority.

This is an argument which applies to the Canadian constitutional order in its entirety (and thus to the Charter as part of that order of course). But there is an additional argument against grundnormic theory that applies to the Charter and the Constitution Act, 1982 more specifically. It suggests that even if we accept the validity of grundnormic foundationalism for the constitutional law which preceded 1982, the Constitution Act, 1982 was brought into being in a way which represents a significant disconnection from that prior legal order. Two versions of this thesis are available to us, both of which represent criticisms of the controlling legal decisions, the Patriation Reference ([1981] 1 S. C. R. 753) and the Quebec Veto Reference ([1981] 2 S. C. R. 793), which set out the parameters of constitutional amendment which governed in 1981 and 1982 during the negotiation and enactment of the Constitution Act, 1982.

In the first version of this argument, it is suggested that the Supreme Court of Canada constructed a formula of amendment which was, quite simply, wrong. In failing to recognize the right the Quebec government was seeking to exercise to veto the significant constitutional changes affecting it, the Court, it is argued, proceeded from a fundamental misunderstanding of a basic constitutional principle underlying our legal order. This is an argument advanced, for example, by Samuel LaSelva in The Moral Foundations of Canadian Federalism. LaSelva suggests there that Quebec should have been understood in 1981 as having the power to veto the pending constitutional changes of the Constitution Act, 1982.
(LaSelva, 1996: 49 - 63). In abbreviated form, his arguments are as follows.

1) While in constructing a formula of amendment in 1981, the Supreme Court relied heavily on a reading of constitutional convention drawn from prior amendments to the Canadian constitutional order, a more authoritative source of instruction was available to the Court than precedents of amendment: the text and structure of the Constitution Act, 1867 and, in particular, s. 94 of that Act, which read as follows:

Uniformity of the Laws in Ontario, Nova Scotia and New Brunswick
Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia and New Brunswick, and of the Procedure of all or any of the Courts in Those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted: but any Act of the Parliament of Canada making Provisions for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

2) LaSelva suggests that s. 94 should be considered as a provision which facilitated passing control over some s. 92 matters from the common law provinces to the federal government but not as in itself a provision of formal amendment.

3) Since s. 94 is a means of altering the division of powers without recourse to formal amendment, constitutional logic would lead us to expect that the requirements of the latter be more stringent than the former. That is, we would expect the standards for formal amendments to the constitution to be more difficult to achieve than the standards for actions taken under s. 94. LaSelva makes two arguments for this assumption. First, he suggests that s. 94 would be purposeless if it set out a higher standard for changes than that implied in formal amendments, for then the federal government in attempting to acquire s. 92 powers could simply rely on the easier amending procedure and s. 94 would be ignored. Secondly, s. 94 presumably serves the function of protecting provincial powers; it could not do so if formal amendment offered the federal government an end run around the provision.

4) In turn, if the purpose of s. 94 is the protection of provincial interests, we would expect the requirement of greater stringency to be realized in some way which relates
to that interest: “a formal amending procedure would have to be more stringent in terms of the role of the provinces” (LaSelva, 1996: 58).

(5) “[S]ince only Quebec is excluded from s. 94, it seems plausible to assume that it is Quebec’s role that must give the amending procedure its greater stringency or rigidity” (LaSelva, 1996: 59). The solution which best fits these parameters LaSelva argues, is one in which we understand the formal amendment of the constitution as requiring the consent of all provinces including Quebec.

LaSelva’s arguments have considerable significance to attempts to foundationalize the Charter by reference to a Canadian “grundnorm”. To the extent that these sorts of arguments are thought to be compelling, they suggest perhaps the most calamitous of possibilities – that the Charter, at least within a grundnormic frame of reference, is invalid since the Constitution Act, 1982 did not have the consent of the Quebec government. This is a conclusion which our judiciary has not embraced, nor, one would think, would like to embrace. To the extent that these sorts of arguments are wrong (that is, to the extent it can be claimed that the Supreme Court did not reach indefencible legal conclusions about the terms of constitutional amendment in 1981), their popularity among a significant portion of the Canadian population (Quebec nationalists for example) suggests that our constitutional grundnorm is one with which a regrettably large portion of the population would take issue.

The second version of the disconnection thesis to which we might here look suggests less that the Court was wrong about the Canadian legal grundnorm it applied in 1981 than that it ignored it entirely. In relying so heavily on constitutional convention (as opposed to constitutional law) and in giving that convention the particular reading it gave it, the Patriation Reference majority, it is argued, brought into its judgment a set of values regarding the Canadian constitutional order which was out of bounds to it. This is, perhaps surprisingly, the position of Pierre Trudeau, who argued that in the Patriation Reference, adopting positivist Peter Hogg’s words, the Supreme Court of Canada allowed itself “to be manipulated into a purely political role,’ going beyond the lawmaking functions that modern jurisprudence agrees the Court must necessarily exercise” (Trudeau, 1996d: 252). The convention of “substantial provincial consent” which ultimately governed the enactment of the Constitution Act, 1982 was one that Supreme Court judges, Trudeau contended, “decided
blatantly to *invent*" (Trudeau, 1996d: 254). There seems to be “little doubt”, he argued,

... that the majority judges ... set their minds to delivering a judgment that would force the federal and provincial governments to seek a political compromise. No doubt believing in good faith that a political agreement would be better for Canada than unilateral legal patriation, they manipulated the evidence before them so as to arrive at the desired result. They then wrote a judgment which tried to lend a fig-leaf of legality to their preconceived conclusion.

(Trudeau, 1996d: 256)

In essence, Trudeau’s arguments suggest that the Court failed to carry out its duty with sufficiently positivistic constraint and in so doing constructed an amending formula with no foundation in the existing legal order. This is in itself a fact with no small consequence for the subsequent shape and character of the constitutional package which was negotiated under its guise. Trudeau (as well as many others) have argued that the Charter would not have included a notwithstanding clause had the federal government not been constrained by the convention of substantial provincial consent (which gave a number of provinces which desired that item significantly more negotiating leverage than they would otherwise have had) (Trudeau, 1996d: 259).

The second version of the disconnection thesis is as damaging to a grundnomic theory of Charter foundations as the first. It suggests like the first that grundnomic foundationalism is inapt as a theory of Charter authority. If what Trudeau is claiming is true, the parameters of amendment which contributed to giving the Charter its final shape have no connection to what grundnomic positivists would understand as the fundamental premises of our legal order. What that would suggest in turn is that interpretive strategies justified by a conception of the constitutional order as having its authority in the Canadian grundnorm are inappropriate and that interpretive authority as regards the Charter is therefore perhaps more appropriately sought in some other theory of constitutional authority.

**Social Acceptance as Charter Foundationalism**

For such a principle positivists might turn to another alternative, that suggested by H. L. A. Hart’s “social acceptance” theory. A Hartian-inspired theory of Charter foundations might be taken as suggesting that the Charter’s authority derives from its acceptance by the
Canadian population. But while the Charter does have the support of large numbers of Canadians, there are also a great many who would reject its authority, especially among those Quebecers whose government chose not to give their consent to the Constitution Act, 1982. The difficulty with a foundational theory which seeks Charter authority in the realm of social acceptance, then, is that it seems unable, at least at first consideration, to explain how the Charter regime can be understood as binding the not insignificant numbers of Canadians who in fact question its legitimacy.

Of course, the social acceptance thesis is not consent theory; Hart does not suggest that constitutional legitimacy derives from the acceptance of all persons bound by constitutional order, but from numbers sufficient to ensure that a legal order is capable of efficacious function. In this view, then, the social authority of the Charter might be understood as flowing from the support of those broad numbers of Canadians who do accept the constitutional revisions of 1982. Non-accepters, like Quebec nationalists and other Charter dissenters might be understood as obliged to obedience not because they have accepted the Constitution Act, 1982, but because the acceptance of sufficient numbers of their fellow citizens makes their own preferences immaterial. Intriguingly, this is in fact the sort of theory of Charter foundations which is often endorsed by Charter dissenters themselves, particularly those most anxious to emphasize the illegitimacy of the constitutional project of 1982. When, for example, Quebec nationalists like Gérard Bergeron describe the events of 1982 as a “constitutional coup” (Bergeron, 1983: 65), they are characterizing the passage of the Charter as an act of coercion or disregard, in which a constitutional majority satisfied its own preferences at the expense of the weaker parties at the bargaining table.

While this is a characterization of the Charter which those charged with giving it legal enforcement would be anxious to deny or avoid I think, there is in fact some logic to such claims if Charter authority is understood as resting simply on the foundation of majoritarian social acceptance. Without more, the argument that a particular set of constitutional ideas is to govern our lives together because “we like it that way even if you do not” is hardly likely to be seen as generous, fair, or just. The problem I wish to note here is not, however, that positivist social acceptance theory is unjust (that is the sort of claim more appropriately advanced at the level of legitimative argument), but that it is inaccurate — or at
least un-nuanced — as a characterization of the sort of authority arguably ascribed to the *Charter* by those who do “accept” it.

Where positivism suggests that constitutional authority resides in social acceptance understood in relatively broad terms, there are arguments to be made that Canadian acceptance of the *Charter* is better understood not as resting on the claim “you must recognize the *Charter* because I do”, but on something more like “I recognize the claims of the *Charter* because it gives expression to a moral vision which is binding on all of us”. While this sort of claim is difficult to substantiate via such things as public opinion polling — few pollsters would be prepared to ask “on what grounds does the *Charter* represent an authoritative constitutional claim for you?” — some consideration of Canadian responses to the *Charter*-weakening constitutional proposals of Meech Lake and Charlottetown suggests the validity of this theory. The high level of public debate surrounding Meech and Charlottetown, the passion of Canadian public responses to the debate and the final results — popular rejection of Meech, a referendum rejection of Charlottetown — suggests I would argue that the underlying theory of *Charter* authority informing the responses of a great many Canadians to these constitutional proposals was in an important sense moral in character, rather than one understood as derived simply from their own constitutional whims or preferences.

The significance of this observation is two-fold. First, to the extent that the sources of *Charter* authority are more appropriately understood as moral rather than merely preferential, some possibility remains open for explaining or accounting for the obligations of the *Charter’s* non-accepters. The authority of the *Charter* in this view might be thought to derive not from a self-referential form of social acceptance, but from a theory of moral value which is understood as binding independently of the acceptance (or non-acceptance) of those bound by the constitutional regime. Of course, this in itself is not a “solution” to the problem of non-acceptance. If we recognize the source of *Charter* authority as a moral claim endorsed by its majoritarian accepters, some consideration is required of whether the majority’s moral vision is a compelling one, and whether it is one which a dissenting minority might reasonably be expected to recognize. Nonetheless, this conception of *Charter* foundations suggests justificatory possibilities which positivism’s more self-referential theories of social acceptance perhaps obscure.
Secondly, in regard to questions of legal meaning, a recognition of the Charter's authority as dependent on moral rather than preferential claims suggests some obstacles to justifying positivistic interpretive responses to the Charter which seek guidance in primarily social sources of valuation. If the "social acceptance" which underlies the Charter is acceptance of some deeper moral vision, then, presumably, even those employing positivistically-oriented interpretive responses to the Charter might be expected to investigate and advert to a greater extent to that underlying moral vision in seeking to make sense of the Charter than to more positivistically-appealing sources of value such as text or unexamined social tradition. In turn, to the extent that the Charter's authoritative sources of value are moral in character, they might be expected to direct courts to question, critique, and sometimes reject public values which conflict with those moral sources more often than is likely to be the case when constitutional meaning and popular public values are understood as one and the same thing.

IV. POSITIVISM AS A THEORY OF LEGAL DESCRIPTION

In the previous section I suggested that positivistic interpretive approaches to the Charter are potentially problematic because they are dependent on positivistically-oriented theories of constitutional foundations which might be thought inapt in the Charter context. My focus in this section in considering the viability of positivist interpretive strategies as responses to question of the Charter's legal meaning is a perhaps more "technical" one. For a number of reasons I would argue that neither traditional nor more contemporary positivist theories of legal description are satisfactory in the responses they suggest to the dilemmas of Charter meaning. Positivist approaches to the definition of the Charter's legal meaning either suggest a search for guidance in sources which in the Charter context are not rich enough to produce sufficiently determinate or justified readings of its meaning, or in sources which suggest a vision of the moral possibility of the Charter which is undesirably limited in its horizons.

Traditionally Positivist Techniques of Legal Description: Originalism and Textualism

While virtually all constitutional interpreters are textualists in the limited sense of understanding their search for constitutional meaning to appropriately begin with the text of the relevant document, "textualism" in a more formal sense is an understanding of such
searches as appropriately remaining within and ending with the text as well. In “The Charter of Rights and American Theories of Interpretation” — an article which has something of the air of a positivist manifesto — Peter Hogg argues in fairly clear terms for what can be taken as a textualist orientation to questions of Charter meaning. Hogg argues that “judicial review of legislation must be based exclusively on the words of the constitution” (Hogg, 1987: 102). He suggests that those words should be “given a meaning that seems natural to contemporary eyes” (Hogg, 1987: 102) and which draws upon the purposes we can attribute to them in construing their meaning (Hogg, 1987: 103). Judicial review which is “non-interpretivist” in taking its guidance from “standards that are not to be found in the text” is illegitimate (Hogg, 1987: 112).

With respect to Professor Hogg, I would argue that as plausible and reasonable as textualism may be in the context of statutory law and even as an entrée to questions of constitutional meaning, it is a problematic approach as a mainstay of Charter interpretation. To embrace a textually limited response to the dilemmas of Charter meaning requires reliance on a premise of doubtful validity: that the terms of the Charter’s text such as “equality”, “liberty”, the “free and democratic society” and the like have a determinative meaning, or even a meaning which falls into a narrow range of possibility. The ideas and ideals to which the Charter refers are unlike the highly specified provisions of the Income Tax Act, they are not “terms of art”, nor are they even much akin to terms such as “vehicle”, a word H.L.A. Hart famously used to exemplify the ambiguities of law in his discussion of positivism in “Positivism and the Separation of Law and Morals”. Disagreement about the terms in which the Charter speaks is not semantic, but more fundamental. The idea of “equality”, for example, can and has been taken to suggest that preferential hiring of people of colour is “affirmative action” and, conversely, “reverse discrimination”; that men and women are treated equally by an employee benefits scheme which provides no maternity leave (since to do so would be treating men and women differently) and, conversely, that failure to provide such benefits is unequal treatment (since so doing treats women unequally by making the absence of a need for maternity benefits among men the standard for all employees)\(^\text{15}\); and that “separate but equal” qualifies as equal and, conversely, that state-ordained separateness is itself an inequality.\(^\text{16}\) The same sorts of oppositional meanings can
be quite readily attributed to most other substantive rights in the *Charter*.

When Hogg suggests then that the text of the *Charter* be given a reading which "seems natural to contemporary eyes" he takes for granted what must be argued, and which is indeed unlikely to be successfully argued -- that is, that there is a singular "natural" reading of the various rights of the *Charter* which is available to us. In fact, he suggests what appears to be something that contradicts his own premises. In virtually his opening lines in "American Theories", Hogg asserts that he does "not believe in 'natural rights'" because he does not know to identify them and because of the "widely differing accounts of rights that are given by legal philosophers". His intimation is that there is simply too much disagreement about such things for us to assume their naturalness. But what naturalist legal philosophers like Dworkin, Rawls, Nozick, Finnis and the like are disagreeing about is the meaning of such things as "equality", "liberty", and "freedom". It is difficult to see how can Hogg can reject naturalism because the disagreement of its advocates about such things as "equality", "liberty", and "freedom" suggests its implausibility while at the same time suggesting there is a "natural" reading which can be given to terms like "equality", "liberty", and "freedom" when they figure in *Charter* litigation. The indeterminacy of meaning of such terms is not unfortunately dispelled merely by their enshrinement in a constitutional text.

Nor is it clear what Hogg has in mind when he suggests that textual readings should be those natural to "contemporary eyes". Does he mean that we can understand contemporary eyes as collectively seeing the same thing when they consider what "equality" or "freedom of expression" means? If so this would seem to be to fail in a serious way to acknowledge the diversity of contemporary opinions on such topics, particularly in a country like Canada. If on the other hand he has in mind a more limited notion of "contemporary eyes", we might wonder what select group he is looking to. Is it something like the majority of Canadians? The legal profession? "The common sense of the common people"? If this is what Hogg's interpretive theory suggests, then it mandates reference to sources of constitutional value which he has failed to specify or justify.

It is perhaps these sorts of difficulties which have led many American positivists of more traditional orientation to attempt to seek guidance as to constitutional meaning in a source which is richer in content -- in the thoughts and values of the founders of the
Constitutional theorists like Raoul Berger (Berger, 1971), Theodore Lowi and Benjamin Ginsberg (Ginsberg and Lowi, 1994), and Robert Bork (Bork, 1971) suggest that the appropriate source of wisdom in construing the meaning of the provisions of the American Constitution and the Bill of Rights is those who wrote and ratified those documents. “Originalism” is a theory of legal description which suggests that constitutional meaning should be understood by reference to what those who wrote the document would understand as the appropriate sense of its provisions in a given context. I have already noted a philosophical objection to this view of constitutional meaning in my earlier discussion of positivist legitimative theory — it suggests I argued a conception of society as obligated to the constitutional order through the founders and hence a view of citizens as deferentially bound to their state. Whether or not that objection is thought to be cogent or compelling, there are reasons specific to originalism as a theory of legal description per se which would seem to disqualify it from application in the Charter context.

As I suggested above, the Canadian constitution as a whole has not had the mythopoeic value that the American has; our founders, then, have not been seen by many as figures whose authority is personalizable in the same way as that of the American founders. In regard to the Charter itself, the nearness of its founding and hence its founders to the present day likely contributes to this (lack of) feeling: we rarely make heroes of those we know intimately. Furthermore, unlike the founders of the American constitutional order whose legacy includes not just the constitution itself but a large and weighty collection of thought about the meaning and values of their constitution, our Charter founders (with the obvious exception of Pierre Trudeau, whose constitutional vision I discuss in the later chapters of this work) left little in the way of an intellectual record of their political theory. As Paul Weiler has noted:

Open-textured language . . . [such as that of the Charter] . . . invites Canadian courts to confront directly the moral controversies lurking just beneath the surface. I might add that in such inquiries our judges would get no helpful guidance from the deliberations leading up to the Charter, since the people responsible for its enactment never even discussed, let alone arrived at, a consensus as to how their product would solve some illustrative hard cases, such as freedom of the press versus the law of libel.

(Weiler, 1986)
But perhaps the largest reason originalism has been of little appeal in finding Charter meaning is that -- to put it perhaps bluntly -- the facts of its creation suggest no such thing as founders’ intentions, at least in a generalized sense, can be imputed to it. I mean this in two ways. First, it is unclear whether a great many of the Charter’s founders can reasonably be said to have had discernible intentions as regards its specific meanings. Can we say, for example, to pick one founder at random, what Premier Bennett of British Columbia intended and understood to be the meaning of, say, s. 2’s guarantee of freedom of conscience when he signed the constitutional accord in 1981? A consideration of the character of the negotiations of 1981 makes it fair to say I think without disrespect to any of the signers that for many the Charter was one element in the larger package of the constitutional agreement. The particular meaning of given Charter provisions was of less importance for some premiers than other elements of that package, including the amending formula and amendments to the Constitution Act, 1867 in regard to provincial jurisdiction over natural resources.

Secondly, the founders’ intentions we can deduce and document suggest a considerable disagreement over the meaning and import of the Charter. As one example, Saskatchewan Premier Allan Blakeney’s well-remembered insistence (which was echoed by a number of other premiers) upon the inclusion of the notwithstanding clause in the Charter is certainly evidence of a Charter vision at odds with that of Prime Minister Trudeau. And while it is clear that the Blakeney view won the day (given the inclusion of s. 33), it is less clear if we are to understand that victory as total or partial. A citizen seeking guidance from the founders in deciding how to advise his political representatives on the use of the notwithstanding clause would therefore experience some difficulty. He would have to consider whether our best understanding of s. 33 is as a readily available tool to defend our democratically-enacted laws (as Blakeney might have had it), as available but morally repugnant and to be avoided (as Trudeau might have preferred), or as something in between these possibilities. This sort of question cannot be answered I would argue by reference to founders’ visions understood in postivist terms -- that is, without reference to a deeper theory of value which might enable us to resolve the very significant internal conflicts between the founders on what the Charter ought accomplish.
What the difficulties these more limited interpretive approaches perhaps suggest is the necessity of a positivist conception of constitutional interpretation with a broader perspective. Problems of moral meaning like those associated with many of the Charter's provisions are hard problems because they concern ideas and ideals about which disagreement exists at the most fundamental levels. More contemporary positivism responds to these difficulties by attempting to engage more fully with the moral dimensions of Charter meaning. The approaches it suggests to this problem are nonetheless true to positivist roots in that they suggest a conception of those dimensions which is constrained in its moral reach. Positivism suggests a conception of constitutional authority as rooted in the existent order and of the judicial role as a neutral one, understood as most appropriately encompassing the finding and applying of law and not in the normal order the "making" of it. These precepts suggest in turn a certain "neutrality" of interpretive approach which is expressed in attempts to construct the moral meaning of Charter terms in a way which avoids reference to complex and independent theories of moral value -- that is, a "neutral" moral deliberation -- and or which seeks its moral guidance in the existent legal and social order.

One Canadian positivist associated with the more expansive view of constitutional interpretation of which I am speaking here is W. J. Waluchow. In Inclusive Legal Positivism, he argues for the importance of a consideration of the moral dimensions of Charter meaning:

If one must interpret the Charter in light of its objects, and those objects are often moral rights and freedoms, then it follows that one cannot determine what the Charter means, and thus the conditions upon legal validity it imposes, without determining the nature and extent of the rights of political morality it seeks to guarantee. Yet, one cannot do this without engaging in substantive moral argument.  
(Waluchow, 1994: 145)

What is required, Waluchow argues, is "normative, moral judgment which tackles the tricky issues ...." (Waluchow, 1994: 154). In light of this reality, then, courts must "... eschew a narrow legalistic approach to Charter adjudication in favour of a much broader one which more firmly focuses on the interests or objects that the Charter sets out to protect"
Waluchow's paradigmatic example of inclusive legal positivism in the *Charter* context is Justice Beverley McLachlin's B.C. Court of Appeal judgment in *Andrews v. Law Society of British Columbia*. There McLachlin considered three evaluative standards which might be applied in defining the sorts of discriminatory laws that the *Charter*’s s. 15 guarantee of equality might be thought to prohibit:

(i) The irrationality standard: a law is discriminatory if “it draws an irrational or irrelevant distinction between people based on some irrelevant personal characteristic for the purpose, or having the effect of imposing on certain of them, a penalty, disadvantage or indignity, or denying them an advantage” (*Andrews*, 246);

(ii) The adverse and personal distinction standard: “a law is discriminatory if it draws an adverse distinction on the basis of a personal characteristic or category” (Waluchow, 1994: 150, citing *Andrews*: 249);

(iii) The unfairness standard: “a law is discriminatory if it draws any unreasonable or unfair distinctions, distinctions which are unduly prejudicial’ (Waluchow, 1994: 150, citing *Andrews*: 250-2).

The court ultimately settled on the last of these standards, concluding that the question to be answered under s. 15 should be whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected.

The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

(Waluchow, 1994: 151, citing *Andrews*: 252-3)

While Waluchow understands the *Andrews* court to have engaged in a substantive and moral consideration of *Charter* meaning in its construction of the *Charter*’s s. 15 guarantee of “equality”, it did so in a way which is suggestive I think of a conception of such deliberation as largely neutral and as not requiring a commitment to any particular theory of
moral value. In this sense, Andrews might be taken as a positivist success. It seems to suggest the possibility of an acknowledgement of the moral character of the Charter's s. 15 guarantee of “equality” without the necessity of reference to inadmissible and controversial theories of moral value elaborated independently of the legal order. A closer consideration of Andrews, however, reveals the difficulties which its neutrality brings.

In what way is the moral deliberation in Andrews neutral? To answer this, I must first briefly discuss a notion of conceptual evaluation suggested by Peter Westen. In his oft-noted article “The Empty Idea of Equality” (Westen, 1982), Westen argues, quite convincingly I would suggest, that the notion of “equality” is one which for all intents and purposes ought be considered “empty”. “For the principle to have meaning”, Westen argues, “it must incorporate some external values that determine which persons and treatments are alike, but once those external values are found, the principle of equality is superfluous” (Westen, 1982: 537). As evidence for this proposition we need only consider the American constitutional experience. The Declaration of Independence declares not only independence but the “self-evident truth” that “all men are created equal”. The XlVth Amendment to the Bill of Rights, ratified in 1868, supplements this assertion with a guarantee for all of “equal protection of the laws”. Yet the versions of equality these constitutional statements have suggested to Americans over the last two hundred years have differed across perhaps the entire range of possibility. The American constitutional order has been at different times understood as consonant with the slavery of black men, women and children, separate but equal treatment of the races, the desegregation of separate facilities, and in recent years what has been called by its opponents “reverse discrimination” and its advocates “affirmative action”.

It is its emptiness which has permitted the variegated readings equality has been given through American constitutional history. And it is different conceptions of human nature, capabilities and purposes, of more fundamental values, and of political philosophy more broadly which I would argue underlie these different views. Equality cannot be taken as admitting of slavery on the one hand and as mandating “reverse discrimination” on the other without in each case making reference to some more substantive source of guidance as to its meaning than the word itself provides.

In Andrews, then, the Court faced the task of attempting to give definition to a
conceptual value — equality — amenable to different and even opposite attributions of meaning. What is striking about each of the standards considered and especially so of that ultimately selected in Andrews, and what prompts my description of the Court’s reasoning there as “neutral”, is their lack of suggestion of a specific content, of a theory of moral value, human nature, social relationships, political theory, or the like. To say that equality is “fairness” is surely only to say that it is not “unfairness”, a proposition to which no one would be likely to give their disagreement.

What makes the Andrews reading of s. 15 not just neutral but problematic is that the fairness standard it employs is, unfortunately, as empty of conceptual content as is equality itself. Justice McLachlin suggests that in our determination of fairness and equality we weight the purposes of legislation against its effects. But our thinking about what are legitimate purposes and the weight we assign to such purposes depends on a more substantive evaluative vision than is provided in the notion of fairness alone. The Court suggests the standard is that of the “fair-minded” person. But while we might reasonably expect that the average person ought to understand that trucks should have their brakes inspected and replaced periodically or that red lights mean “stop” — the sorts of expectations embodied in tort law’s neutral “reasonable man” standard — we cannot with equal cause expect that sort of unanimous and definitive judgment about substantive moral issues.

The citizenship norm, which the Court overturned in Andrews, might in fact be considered a “fair” one if we understand citizenship as symbolic of “familial” membership in our community for those in positions of power and social leadership. This might be the argument of those whose constitutional perspective is communitarian, for example. From this vantage point, it would be unfair to treat as equals in regard to such positions those who are not equals in respect to this very important aspect of their social identity. On the other hand, the citizenship requirement might be deemed unfair if we understand fairness as implying a respect for the moral individuality of persons. In this view, the impugned provision is tantamount to the statement that “despite your individual and personal capacities, goals, desires, and achievements, we disqualify you from participation in this aspect of our social life (the legal system and our courts) which is otherwise open to others who are the same as you in these respects”. In this sense, it would be unfair to treat as
unequal those who are equals in what can be taken as the occupationally- or morally-relevant aspects of their being. Fairness without some background theory of political morality (to use Ronald Dworkin's evocative phrase) unfortunately cannot provide the necessarily determinate guidance that is required to choose between these possibilities.

Questions of constitutional meaning are questions not just about constitutional provisions, but about larger moral issues in human life. The sort of morally neutral consideration offered in Andrews of those issues is appealing because it seems to answer the questions about s. 15's meaning without necessitating any sort of moral commitment by the Court. But in avoiding the deeper issues which "equality" raises, the Court produces a judgment which is unlikely to be of much help to lower courts, offers no purchase for a critical consideration of the values at stake, and is unhelpful as a justification for the Court's decision because it potentially justifies too wide a range of readings of the applicative meaning of equality. To settle questions about such values requires I would argue more than neutrality can generally provide.

Just as textualism's defects suggest to those of conventionally positivist orientation the potential desirability of a resort to originalism, the unhelpfulness of more expansive positivism's neutral moral deliberation suggests a consideration of a richer source of moral guidance; a vision of morality as extant in the existent Canadian social and legal order. Unlike originalism, which as I have argued is too incoherent in the Charter context to be of much aid, reference to the existent order as a source of interpretive value is arguably capable of producing the sort of substantive moral vision required to guide legal judgments about the meaning of the Charter.

It is the sort of guidance sought quite frequently in Charter cases. Justice McLachlin in fact concludes her substantive deliberations in Andrews with such a reference, suggesting perhaps the role of this source of interpretive guidance in fleshing out the normatively neutral evaluation she offered there. I have already noted Justice McIntyre's references to the existent order in Morgentaler in the way of citations of "the history, traditions, and underlying philosophies of our society" (Morgentaler: 140). And to these examples we might add that of Justice LaForest in Egan v. Canada ([1995] 2 S.C.R. 513). In Egan the Supreme Court was called upon to consider whether the federal Old Age Security Act contravened s. 15 by failing to provide spousal benefits to those in homosexual partnerships.
The impugned provision of the Act defined "spouse" for the purposes of determining eligibility for spousal pension benefits relatively broadly. For its purposes a spouse was deemed to be someone who had lived with the pensioner for at least one year in a relationship in which the couple had "represented themselves as husband and wife". It also, however, required that such a person be of the opposite sex to his or her partner. In reaching his conclusion that s. 15's guarantee of equality did not extend to homosexuals like Egan in this sort of instance, LaForest held that:

... marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.

(Egan: 536)

LaForest's conclusions and his reasoning here suggest that the moral vision upon which he is relying in his construction of equality in Egan is that to be found in Canadian social traditions and our society's long-held understandings of marriage and human relationships. It is clear that these sources do suggest the substantive sort of moral vision required to make the difficult choices a case like Egan requires.

This sort of approach to the problems of legal description however brings us back to the sorts of questions I raised earlier in this chapter in my discussion of positivism's legitimative theory. The vision of morality suggested by a reliance on the values of the existent legal and social order is not all in all a neutral one. It commits us to ideas about human relationships and social value which are content-fid, and because of this subject to critique. And it is a vision which on upon reflection we might not find so appealing, for it seems often (although of course not always) to suggest a moral vision which is tied to the status quo, the past, and the morality of the Canadian "silent majority". But if this is its moral vision, then it is one that will not infrequently be at odds with a notion of rights as protections of individuals' independence in the face of the community and its collective values. And because of the especial weight it places upon the past, it will often be one which imposes a sort of drag on our thinking about the moral issues the Charter raises.
While we cannot and should not ignore the past or views about social values which are widely held, if we give them pride of place and an interpretive advantage we may often miss the sorts of things that morality more generally is thought supposed to bring to our attention. What is ultimately the most morally compelling answer to conflicts of social value may frequently be exactly that which is not obvious or widely accredited.

I am not intending to suggest that this sort of interpretive practice is simply "originalism" in another guise nor that it is wholly incapable of recognizing new developments in moral understanding. To the extent that it is tied to the moral vision of the existent social order, interpretive practice will of course reflect changes in popular understandings of such issues. What I am suggesting rather is that compared to some of the alternative interpretive models which may be available to us it is less capable of transcending originalism or of making the most of new moral understandings. And, of course, what I take as inviting of criticism of positivist interpretive practice may in fact be something that others of different philosophical orientation take as recommending it to us; many are uncomfortable with the notion of courts as social vanguards and think it proper that they trail rather than lead trends in our social thinking. My larger point is that regardless of one's views on this, positivist constitutional interpretation is, like any other form of the practice, itself a choice about the Charter's moral possibilities.

I would suggest then that positivism in both its more traditional and contemporary forms is problematic as a theory of legal description in application to the Charter. Its problems are both practical and philosophical. The "purposes" of Charter provisions are not readily deducible from the text or locatable in the intentions of its authors. The attempt to reach legal conclusions in a more moral yet neutral way — that is, without consideration of larger questions of moral value -- produces a jurisprudence which can be underjustified and may not infrequently fail to offer sufficient guidance to lower courts. And while a more substantive moral vision capable of producing more determinate legal outputs can be perceived in Canadian history and social traditions, that imputation of value to Charter provisions ties us to a past and to a vision of moral value that is not in all cases one to which we might wish to be tied.
V. POSITIVISM AS CHARTER THEORY

I began this chapter with a consideration of some of the grounds for the widespread appeal of positivist theories of law and of the Charter, including the notion that positivist conceptions of Charter meaning had a neutrality of character which recommended them to us given the extent of disagreement in Canada about such things as fundamental moral values. I argued that two of the more likely conceptions of constitutional legitimacy which we might impute to interpretive practices proceeding from positivist presuppositions are not in fact neutral. The models of legal order extant in the positivist theories of H. L. A. Hart and Hans Kelsen suggest (when adopted as precepts of constitutional adjudication) the central importance of regime efficacy, continuity, and the status quo; a narrow, functionalist, Machiavellian conception of constitutional legitimacy, and a deferential view of citizenship within a constitutional order. That vision of legitimacy and social value is neither compelling nor, I suggested, of continuing possibility in the contemporary Canadian constitutional context.

The grundnomic and social acceptance theses which are uncompelling as theories of constitutional legitimacy are equally difficult to defend as theories of Charter foundations. It is difficult to identify within the Canadian context a comprehensively authoritative constitutional grundnorm. What is more, some important arguments suggest that the Charter might be thought to represent a discontinuity vis-a-vis those grundnomic foundations that can be identified in the constitutional order which existed prior to 1982. The social acceptance thesis implied by a Hart-inspired view of Charter foundationalism is also problematic. It fails to account in a compelling way for the obligation of the significant elements in the Canadian population who have not “accepted” the Charter. I also argued that the relatively opaque theory of acceptance implied in positivism failed to recognize the extent to which social acceptance of the Charter is potentially understandable in moral terms. To the extent that this is so, it suggests the inappropriateness of positivistic interpretive responses to the Charter which fail to recognize the moral dimension of its social meaning. If the social acceptance underlying the Charter is an acceptance by the public of some deeper moral vision, then presumably even positivistixally-oriented interpreters might be exoected to investigate and advert to a greater extent to that underlying moral vision in seeking to make sense of the Charter than to more positivistically
appealing sources of value such as text or social tradition.

In the section just completed I offered a more technical critique of a number of positivist theories of legal description. I suggested that “textualist” approaches to the Charter must frequently be unhelpful to us because the text speaks of values such as “equality” about which disagreements are moral and fundamental rather than merely semantic. “Originalism” does not offer us recourse here because for much of the Charter’s content no definable intentions can be attributed to many of the founders. Those founders’ intentions which we might uncover are to a great extent at odds with each other, and therefore some means is required of resolving these disputes about the Charter’s meaning. And while a more inclusive and morally responsive positivism is preferable to these more traditionally-positivist techniques of legal description, it too is problematic. When it attempts to resolve questions of constitutional meaning “neutrally” — that is, without deeper consideration of larger questions of moral value — it fails to offer a reading of that meaning which is fully justified or which is likely to be of help to lower courts. Reference to the more substantive moral vision immanent in the existent Canadian legal and social order resolves this difficulty, but at the cost of committing us to a moral vision which is not neutral and which I argued is not an appealing one because it ties us to a past and to a vision of moral value that is not in all cases one to which we would wish to be tied.

Despite the appeal of positivism as a theory of law, then, a considerable number of objections present themselves to its adoption as a response to the problems of Charter meaning. I turn in the coming chapters to some other influential theories of Charter meaning which carry with them considerably more explicit moral content than do the positivist visions we have just considered. In the next chapter I offer a consideration of the first set of these theories, those which suggest a response to the Charter which proceeds from a central valuation of democratic forms of public reasoning.
Notes

1 I use these terms interchangeably here.

2 Austin is considered one of the fathers of modern legal positivism. In Lectures on Jurisprudence, he argues for an understanding of law and morality as separate spheres. He notes, for example, that he endeavours to

\[\ldots\] distinguish the laws proper which are set by God to Man, and the laws proper and improper which are sanctioned or oblige morally, from the laws proper which are sanctioned or oblige legally, or are established directly or indirectly by sovereign authority.

(Austin, (1970 [1832]): 343-4)

3 In the Summa Theologica Aquinas argues for "reason" as a source of moral wisdom and for a conception of legal authority in which unjust laws are considered invalid laws. On the issue of reason, he argues, for example, that

\[\ldots\] in human affairs a thing is said to be just when it accords aright with with the rule of reason: and, as we have already seen, the first rule of reason is the Natural law. Thus all humanly enacted laws are in accord with reason to the extent that they derive from the Natural law. And if a human law is at variance in any particular with the natural law, it is no longer legal, but rather a corruption of law."

(Summa Theologica, 1-2, qu. 95, art. 2)

4 In The Formal Basis of Law, Giorgio del Vecchio argues for a "critical idealism" founded on the "nature of man" and a recognition of positive and natural law:

The war against natural law, which many have declared in our day, is a reaction against the errors and omissions of the philosophical systems of the past; but it is unjust and irrational, if it attempts, under the pretext of correcting such errors and omissions, to destroy the object of these systems, which is essential to human nature. That law is only positive is a simple affirmation which has not been and cannot be proved, but is believed out of respect to a dogma of a passing philosophy. The idea of natural law, which has withstood the attacks of sceptics and empiricists in past times, will resist those of modern positivists, and will guide humanity in the future.

(del Vecchio, 1969 [1914]: 17 - 18)

5 In Natural Law and Natural Rights, Finnis argues for a conception of law rooted in the value of "practical reasonableness":

\[\ldots\] the concern of the [natural law] tradition has been to show that the act of "positing" law (whether judicially or legislatively or otherwise) is an act which can and should be guided by "moral" principles and rules.
What truly characterizes the tradition is that it is not content merely to observe the historical or sociological fact that "morality" thus affects "law", but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges, and citizens.

(Finnis, 1980: 290)

6 In *Taking Rights Seriously*, Dworkin argues that the resolution of questions of the legal meaning of the American constitutional order necessitates reference to a "background theory of political morality" (Dworkin, 1977: 106-7) requiring a substantive engagement in moral philosophy — "... a fusion of constitutional law and moral theory" (Dworkin, 1977: 149).

7 The *Charter*, for example, guarantees "freedom of conscience", "fundamental justice", "equality" and the like, terminology which, as Canadian positivist W. J. Waluchow notes, "figures prominently in virtually all modern moral theories" (Waluchow, 1994: 143).

8 One of positivism's central figures, H. L. A. Hart, has said, for example, in speaking of the legal response in such a context, that "[j]udicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle..." (Hart, 1961: 200).

9 McIntyre is citing Harlan in dissent in *Reynolds v. Sims* ((1964) 377 U.S. 533 (U.S.S.C.). As those interested in American constitutional law will immediately apprehend, the "current mistaken view" which Harlan rejects in this judgment is that of the majority of the Warren Court. The judgments of the Warren Court in the 1950s and 60s have been particularly subject to criticism for what positivists and legal traditionalists in general argue is their overly broad conception of the ambit of constitutional interpretation.


12 There is a considerable range of opinion as to the extent to which the *Charter* can be credited (or blamed) for these sorts of attitudinal changes, although most authors accept it as having at least some role. See, for example, Brodie and Nevitte, 1993, Cairns 1990, and Nevitte 1991.

13 In the *Patriation Reference* the Supreme Court ruled on references made by three provincial governments to their courts of appeal concerning the legality of Pierre Trudeau's threat to seek unilaterally on behalf of the federal government approval from the Parliament of Westminster for a package of constitutional amendments (which included the forerunner of the *Charter*). A majority of the Court held that the consent of the provinces to the proposed amendments was not required "as a matter of law" but that a "substantial degree" of provincial consent was required "as a matter of convention". In the *Quebec Veto Reference* the Court held that a substantial degree of consent could be obtained without the government of Quebec being included.

14 I find Trudeau’s positivist critique of the *Patriation Reference* surprising because, as I argue in chapter six, the former prime minister is strongly associative with a conception of
the Charter which emphasizes its naturalist or idealist qualities rather than its positivist roots. That someone with Trudeau’s philosophical orientation to the state would reach first to positivist arguments in criticism of the Patriation Reference serves to underline, I think, the almost sub-conscious appeal of positivist legal theory which I spoke of earlier in this chapter.

15 The former reading is from Bliss v. Canada (A.G.) ([1979] 1 S. C. R. 183), a pre-Charter case under the Canadian Bill of Rights; the latter, from Brooks v. Canada Safeway ([1989] 1 S. C. R. 1219), a Charter case.

16 The former reading is from the U.S. Bill of Rights case Plessy v. Ferguson; the latter, from Brown v. Board of Education.

17 In “American Theories”, Hogg suggests that

[s]ince judges are not elected or otherwise politically accountable, it is wrong in a democracy that they should possess a power to annul the acts of elective [sic] legislative bodies, except where there is an inconsistency with the constitution.

(Hogg, 1987: 112)
Chapter 3: Democracy and the Charter

I. DEMOCRACY AS A PRIMARY VALUE

Democracy is a theory of social decision making which suggests that it is our collective choices at the ballot box and through our elected representatives which ought to determine the shape and nature of our social institutions and the policies of our governments. Rights theory suggests that there are some choices which are not appropriately open to collective decision making, that there are some values with which we must begin and end in our thinking about our social life. There are, then, some significant grounds for dispute between those who are advocates of the democratic thesis in its stronger versions and those who argue for the necessity of an understanding of rights in their stronger versions, that is — to use Ronald Dworkin’s evocative phrase — as “trumps” of decisions reached by collective means (Dworkin, 1977: xi). If we value rights, we will likely be concerned by the “dangers of democracy” — majoritarianism, a potential lack of concern for individuals and the marginalized, and the notion of government as appropriately possessing the power to determine what are understood by many as the “private” values which rights are said to preserve. If we value democracy, we will likely be troubled by the notion that our collective decisions can be reversed by unelected judges, that many social values in our society are handed down to us from on high, by “expert” courts of law through their interpretation of constitutionalized individual rights.

The democrats whose work I discuss in this chapter believe that the Charter as we have come to know it represents an undesirable, perhaps even illegitimate, institution which impedes the realization of more desirable democratic possibilities in Canadian life. The constitutional philosophy of a great many Canadian thinkers proceeds from a significant or central valuation of democracy, but I focus in this chapter on the works of Rainer Knopff and F. L. Morton, Christopher Manfredi, Patrick Monahan, Michael Mandel, and Allan Hutchinson.

In The Charter Revolution and the Court Party, Knopff and Morton warn that the post-1982 regime has given judges an opportunity to “succe...
(Knopff, Morton, 2000: 22). Their work suggests that much of our courts' interpretation of the *Charter* is appropriately understood as the illegitimate imposition of judicial values upon Canadian democracy. What is more, a regime of strong rights is they argue, unnecessary — constitutional arrangements which pre-existed 1982 and democracy itself provide for Canadians the sorts of protections of individual value that rights liberals mistakenly seek in *Charter* guarantees. Democratic decisions about our social life are, they feel, better decisions than those courts provide in their stead.

Knopff and Morton describe Christopher Manfredi as a “valued co-worker in the vineyard of *Charter* politics”, and his response to the *Charter* bears some similarities to those of his co-workers. While Manfredi does not object to the possibility that *Charter* rights have value, he does suggest in *Judicial Power and the Charter* that the liberal constitutionalism of the *Charter* is potentially and problematically paradoxical:

The paradox is that judicial enforcement of rights in the name of liberal constitutionalism may destroy the most important right that citizens in liberal democracies possess, i.e., the right of self-government.

(Manfredi, 2001: 22)

If we understand our courts and only our courts as the repositories of constitutional wisdom about rights, Manfredi argues, we give up our collective power to determine the shape and nature of our social life. We need therefore to reclaim that power and can do so by revivifying the *Charter*’s notwithstanding clause, an act which would include its more frequent use and a reconsideration of what that use implies. Legislatures might appropriately make use of the notwithstanding clause not in aid of simple majoritarian overrides of rights, but as a means by which to contribute to their interpretive construction; the override in this view is not of rights *per se*, but of “the judicial interpretation of what constitutes a reasonable balance between competing rights (Manfredi, 2001: 191).

Like Manfredi’s, Patrick Monahan’s democratic political philosophy is at once both skeptical of judicial review and yet not entirely opposed to the notion of rights. In *Politics and the Constitution*, Monahan argues that judges “should not test the substantive fairness of political outcomes against some independent, normative standard” and that “there should be no set of social or political arrangements arbitrarily or permanently insulated from democratic debate and argument” (Monahan, 1987: 104). Yet he also suggests that “an
entrenched bill of rights need not necessarily be incompatible with democratic values” (Monahan, 1987: 102). The insight he builds upon here is that of American John Hart Ely, who has argued for an understanding of the American Bill of Rights as protecting primarily the forms, values, and processes of democracy. Monahan argues that the “drafters of the Canadian Charter embraced those elements of the American constitution designed to protect the democratic process, while largely excluding provisions aimed at guaranteeing particular substantive goods or values deemed fundamental”. As a consequence,

... judicial review in Canada ought to serve a limited and constrained set of purposes. A shorthand way of describing those purposes would be to say that judicial review should be conducted in the name of democracy, rather than as a means of guaranteeing or requiring ‘right answers’ from the political process.

(Monahan, 1987: 99)

Thus while Monahan is not inimical to the notion of rights, his conception of them is as servants of the more primary value of democracy itself, and thus as significantly more limited in their scope than the rights liberal vision would suggest.

Sharing Monahan’s skepticism about the “independent, normative standards” of rights liberalism are those somewhat further toward the “left” end of the Charter democracy spectrum, Michael Mandel and Allan Hutchinson. In The Charter of Rights and the Legalization of Politics in Canada, Mandel argues that the Charter has been a regressive development in our constitutional evolution. He rejects the notion that the rights of the Charter can be given definitive meaning merely through judicial “interpretation”. Court readings of the document are thoroughly “political” (and indeed could be nothing else) and the pretences by Charter advocates and the judiciary that they are not represent fundamental dishonesty (Mandel, 1989: ix). Since judges are inherently conservative and elitist in their political orientation, the politics which is in play in Charter application is in Mandel’s view socially retrograde and reflective primarily of the interests and perspectives of the socially powerful (Mandel, 1989: 43). Because of this, the Charter represents a step “backwards in history” to a time when “democracy was a dirty word” Mandel, 1989: x). And because it allows

... individuals to take shortcuts around representative institutions and groups and to advance claims which ‘trump’
more representative claims on the basis of consistency with abstract rights embedded in the status quo, [the Charter] is a perversion of democracy.

(Mandel, 1989: 60)

In *Waiting for Corafi*, Allan Hutchinson proclaims himself an "unapologetic advocate of unmodified democracy" (Hutchinson, 1995: xiii). He argues not only that the Charter has done little to enhance the well-being of marginalized Canadians but in fact that it is one of those liberal institutions which "neither promote equality nor engender respect for it" because they "limit the process and agenda of politics to the furtherance of private self-interest" (Hutchinson, 1995: 207). While he accepts that the Charter is here to stay, he argues that we would do better to turn away from it and toward a "dialogic democracy" and a more "fluid, participatory, and egalitarian vision of community" (Hutchinson, 1995: 206).

Despite the diversity of their deeper intellectual commitments on the "right-left" spectrum, Canadian democrats share a common faith in the values and possibilities of democracy and a belief that the Charter -- at least as an expression of rights in the strong sense in which rights liberals take it -- is an undesirable addition to our constitutional order which impedes our fully democratic self-expression as a nation.

*The Appeal of Democracy*

As my introduction suggests, it is not difficult to find academic responses to the Charter which reject the value of strong rights in the name of democracy. Nor is the popularity of this perspective limited to academia. Narrow and constrained readings of Charter rights by our courts are often offered in the name of deference to the elected legislatures or popularly-held social values. Conversely, when the rights of the Charter are given broad and relatively unconstrained application -- particularly in regard to highly controversial issues -- such readings are condemned by many Canadians as undemocratic and resort to the notwithstanding clause is widely urged.

Unsurprisingly, this perspective on the Charter has its elected advocates as well; Canada's current Official Opposition, the Canadian Alliance, has for example as part of its published platform this encomium on democracy and the Charter:

Supremacy of Parliament
75. We believe that an independent judiciary is a vital bulwark of the freedom of Canadians against the exercise of arbitrary
power by the state. However, we also believe it is the role of Parliament, not the courts, to debate and balance the conflicting rights inherent in developing public policy. Final responsibility for public policy must rest with Parliament instead of with unaccountable judges and human rights officials. We therefore affirm the legitimacy of the use of the Section 33 notwithstanding power in the Charter of Rights and Freedoms in cases where a court ruling conflicts with the intent of Parliament and the will of the public.

(Canadian Alliance, 2000)

For those in western societies, democracy has a visceral, almost self-evident appeal, and the belief in its values are deeply embedded in our history and social fabric. Canadian participation in the world wars — so often said to have been "fought in the name of democracy" — and our own continuing expansion of the franchise for example both seem to speak to the manifest destiny and desirability of the democratic way of life. And unlike Americans, who have always had a Bill of Rights at least in name, the notion of expressly declared rights is in Canada of recent vintage and in opposition to our traditional recognition of parliamentary sovereignty. There is then much to suggest and explain the appeal of the notion of unalloyed democracy to Canadians.

Like rights liberalism, democracy suggests a way — albeit a different one — of proceeding in the face of cultural and inter-personal disagreement about substantive values. As I will discuss in greater detail shortly, Canadian democrats offer a rich vision of possibility in such a context. Their conceptions of democracy suggest majority rule and the negotiation of broad compromise and through such collective endeavour the creation or realization of a collective solidarity through our coming together: "from the many, one". This is a vision of no little appeal in a country as diverse and divided as Canada.

Finally, while I have suggested that this Charter debate can be understood as one between advocates of democracy seul and of rights liberalism, it is clear that the democrats have much to say that charter liberals cannot and do not wish to reject. While the democrats reject strong rights, their philosophy is not entirely inconsonant with at least some larger liberal ideals. Both liberals and democrats seem to recognize in some form the value of individuals (to what other value can we ascribe democracy's central notion — "one person, one vote"?). And both suggest some degree of skepticism about the extent and transcendence of social "truths" (the individual freedom of decision which liberal rights
permit seems most appropriate as regards matters about which there either are no truths or about which we cannot be certain of what such truths would be). This common ground suggests then that rights liberals cannot simply dismiss out of hand democratic critiques of the *Charter*; the democrats’ view of social possibility deserves close attention and critical consideration.

II. DEMOCRACY AS A THEORY OF LEGITIMACY AND SOCIAL VALUE

Democratic theories of constitutional legitimacy have a somewhat hybrid nature. Unlike positivists, who understand constitutional legitimacy as a question of fact about the efficacy of a given regime, democratic notions of legitimacy require something more. They suggest in fact that only those constitutional orders which adhere to the ideal of democracy itself — that is, which embody processes by which the community collectively and democratically sets for itself its social path and ways of life — are legitimate. As part of their notion of the ideal, all the Canadian democrats whose work I discuss in this chapter embrace as well a vision of the values of communal solidarity, mutual respect and toleration among citizens, and real debate and deliberation about public values. Yet at the same time, democratic theories of the ideal are *limited*. Canadian democrats reject the notion of mandatory, discoverable, objective social truths. They suggest that many of the decisions by which we live our lives have to a great extent a contingency about them. There is in regard to most of our choices no big book in which we can look up the “right answers” — not just because there is no such book but because there are no such answers. The democratic ideal, then, is of a society which together works out its social values rather than one which realizes or expresses some pre-set and definitive vision of human good. While they take democracy itself as a mandatory social truth, little else in human life is for democrats understood as pre-determined or as excluded from the possibilities of democratic choice and social reconstruction.

Allan Hutchinson, for example, argues that:

> Insofar as we live by a telos, it will not be found in History, The Human Condition, or Rights-Talk, but will be created and criticized in our shared efforts at mutual understanding and debate. Meaning and normative standards will be available and real, but will hold no claim to universal validity. A society constitutes its own conception of rational argument rather than uncovers an independent criterion of rationality.
Hutchinson suggests then that "[f]or the democratic citizen, a good life consists in the public-spirited engagement with others over the shape and substance of 'the good life'" (Hutchinson, 1995: 215). Similarly, Patrick Monahan argues that

Democracy . . . is a reaction against the view that there is a natural or inevitable structure to social arrangements. The contexts that define human activity are the products of human reason and desire rather than the sacred embroidery of divine will or impersonal fate. Given the artifactual nature of any set of institutional arrangements, it follows that those arrangements ought to be subject to some form of meaningful debate and criticism. Democracy is the forum and the means for that debate. It seeks to subject formative structures and hierarchies to criticism and revision in the course of routine political activity.

(Monahan, 1987: 124)

These views on the contingency and elasticity of social truths lead its advocates to the conclusion that democracy represents the most legitimate solution to the question of how we ought to govern ourselves in our collective lives. Since there are no "independent theor[ies] of 'justice' or 'fairness'" (Monahan, 1987: 97) to which we can refer in our decisions about social value, we must seek to construct the truths by which we are to lead our lives ourselves. What makes such truths binding is our participation in their creation. Because democratic decision making processes are participative and inclusive, the social truths which they produce will be the most justifiable decisions about matters of collective interest. What is more, the practice of real democracy is itself of value. Its communality and collectivity contribute to the transformation of social life in democratic nations. By bringing citizens together in deliberation about their common values, Canadian democrats argue, democracy contributes to the creation of real and mutually-regarding community, to a better and more desirable form of social life.

These notions of social value also lead democrats to deny the legitimacy of a constitutional order in which rights are understood in the strong sense they are taken to have by rights liberals. Democrats see rights in this sense as problematic, undesirable, and unnecessary. They are problematic because in democratic eyes rights represent false truth claims and the imposition of judicial values upon society. Knopff and Morton argue, for
example, that rights are merely interests by another name. By labelling as a "right" what is in effect a claim or interest like any other in our society, we give it "[m]ore substance and respectability . . . than the demand would otherwise have had" (Knopff and Morton, 2000: 156); "[r]ights claiming, in other words, inflates issues well beyond their true significance" (Knopff and Morton, 2000: 156). Judicial claims to be producing readings of rights which are authoritative are "nonsense" to Knopff and Morton; "[m]ore often than not", the courts "make up the law as they go along" (Knopff and Morton, 2000: 9).

Rights in the strong sense are also undesirable. Many democrats argue that rights in this form are impediments to or corrosive of the sort of inter-connected social life to which we ought aspire. Rights-claiming encourages a liberal atomism and an "antipathy for common consciousness among citizens", producing a society which "is an aggregate of individuals secure in their abstract rights and liberties but divorced from each other" (Hutchinson, 1995: 187). Because they allow "individuals to shortcircuit representative institutions and groups, and to advance claims which 'trump' more representative claims on the basis of consistency with abstract rights embedded in the status quo", Michael Mandel argues, rights are "a perversion of democracy" (Mandel, 1989: 60).

What is more, rights in the strong sense are also at the end of the day unnecessary. Knopff and Morton suggest, for example, that "many of liberal democracy's early constitutionalists" were right in the belief that "representative democracy, not judicialized politics, is mainly how a sovereign people should protect rights" (Knopff and Morton, 2000: 151). The constitutional structures which pre-dated Charter rights (those providing for responsible government, for example) and the workings of democracy itself ensure that individuals will not be oppressed by social majorities. On the left end of the spectrum, Allan Hutchinson rejects such things as poverty rights talk as an aid to the poor (Hutchinson, 1995: 96), presumably with the understanding that democratic solidarity is likely to be more helpful to the impoverished than is a regime of liberal rights.

Two main motifs of democratic thought embracing these claims are evident in the works of the Canadian democrats I canvass here: one might be called "aggregative democracy"; the other, "deliberative democracy". The aggregative conception offers a model of democratic life which I argue is Lockean and perhaps most clearly understood via the metaphor of the capitalist marketplace. It presumes that those who live in any society
will be likely to have diverse and conflicting interests, but it suggests that through the workings of the democratic process those interests are effectively aggregated into social policies which are broadly acceptable. Both elected representatives and those in the public whose conflicting interests they must respond to have incentives to work out broad majoritarian compromises in which everyone gets at least a little of what they desire. Those who lose out in today's allocation of values are likely to win in tomorrow's as interests and alliances shift. This theory of Canadian democracy has its primary advocates in Knopff and Morton, but its presumptions I would argue also underlie Christopher Manfredi's Charter theory and make at least occasional appearances in the work of Patrick Monahan.

Where the aggregative model has some of the character of the prosaic and down to earth, the deliberative alternative might be thought to have a more immediately inspirational character. It suggests a notion of democracy as a process in which citizens come together to respectfully speak to each other about their public values and by so doing contribute to the transformation of themselves, others, and society at large. While deliberative democrats accept that there will be public disagreement about social values, they suggest both that a respect for the values of democracy and the workings of the process itself mediate such disagreement and that there is or can be among citizens at least a basic level of unity, social solidarity, mutual respect and tolerance. It is a conception of democratic life which is, I would argue, Rousseauian in flavour. It is also referred to from time to time as "civic republicanism", which bespeaks its heritage in the notions Greeks of the classical age had about the collectivity and communality of the life of their city-states. Yet it is also a vision of growing modern appeal. Among contemporary political philosophers beyond Canada's borders whose work bears the deliberative stamp are Amy Gutmann and Dennis Thompson, Michael Sandel, and Michael Walzer. This is a vision of democratic possibility which is found in the works of all the Canadian democrats I note here.

In this section I offer a sketch of these motifs and a critical response to the claims associated with them. I argue that these democratic models are problematic and hence theories of debatable legitimative value. They under-recognize the problem of individuals in the face of democratic collectivity and overestimate the ability of democracy seul to produce good outcomes for all.
Aggregative Democracy

The aggregative model of democracy presents a picture of social life in which diverse and often conflicting interests find their resolution and reconciliation in the mechanisms of a democratic process not unlike that of the capitalist marketplace. Its philosophical touchstones are John Locke, Alexander Hamilton, James Madison, Adam Smith, and American political scientists of the 1940s and 50s like Joseph Schumpeter and Robert Dahl whose conceptual ideal was “representative democracy”. It begins with the recognition that societies are made up of diverse individuals and groups whose interests are often conflictual. Given that reality, our only hope for a peaceable society is the acceptance that “the Majority have a Right to act and conclude the rest” (Locke, Treatises, Bk II, § 95). Knopff and Morton adopt Locke’s prescription and note that:

Liberal democracy works only when majorities rather than minorities rule, and when it is obvious to all that ruling majorities are themselves coalitions of minorities in a pluralistic society.

(Knopff and Morton, 2000: 149)

Or as Locke himself asserted:

For if the consent of the majority shall not in reason, be received, as the act of the whole, and conclude every individual; nothing but the consent of every individual can make anything to be the act of the whole: But such a consent is next to impossible ever to be had . . . if we add the variety of Opinions, and contrariety of Interests, which unavoidably happen in all Collections of Men.

(Locke, Treatises, Bk II, § 98)

In the aggregative view, politics is understood not as primarily about individuals seeking recognition of their rights nor as a collective pursuit of a common vision of social virtue, but as the means by which citizens attempt to attain realization of their diverse and frequently conflicting “interests”.

Aggregative democrats consider that the best means of meeting this end is not via direct democracy, but instead through a more representatively-oriented democratic system. The representative system serves the important function of providing a means of aggregating varied interests in a way which attempts to take into account to the greatest
extent possible the diverse claims we would expect to find in any large society. As Knopff and Morton note, at the heart of the “new science” of “liberal democracy’s early constitutionalists” (among them Hamilton and Madison) whose views they embrace, “was representative democracy, organized in a system of checks and balances, and superimposed on a society sufficiently diverse to require the moderating aggregation of many factions into decent governing majorities” (Knopff and Morton, 2000: 152). In this view, representation serves “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens” (Federalist Papers No. 10 [Madison]; Knopff and Morton, 2000: 152).

Political representatives and parties are in this view seen as much like firms in the capitalist marketplace. Robert Dahl, one of modern representative democracy’s foremost advocates, has suggested for example that perhaps the most fundamental method by which social control of public policy-making is exercised in democracies is through the “continuous political competition among individuals, parties, or both” for popular support (Dahl, 1956: 132). As a function of their self-interest in gaining and retaining power, political parties and political representative have considerable reason to attempt to accommodate as broad a range of public desires and preferences in their decisions as possible. Like firms in the capitalist marketplace, political actors have as their goal the maximization of “revenues”; not dollars in the political realm, but votes and popular support. As Harold Hotelling famously observed, the strategy which most successfully accomplishes these ends is non-extremism; a move to the “centre” in an attempt to maximize the political and ideological territory from which votes can be captured. The goal of self-interested political representatives in this model is the construction of public policy “products” which accommodate as broad a range of interests and desires as possible:

Elections and political competition do not make for government by majorities in any very significant way, but they vastly increase the size, number, and variety of minorities whose preferences must be taken into account by leaders in making policy choices.

(Dahl, 1956: 132)

Not only political representatives and parties are seen in this view as self-interest maximizers, but citizens as well. And like other political actors, citizens and the various
social interest groups by which they are represented have an incentive to consider interests other than their own. Because in a pluralistic society majorities come and go depending on the array of interests concerning a given issue, there is considerable incentive on the part of citizens not to "go for broke" in securing their own interests. As Christopher Manfredi argues, the notion that the "legislative vision reflected in statutes or other government action is the product of self-interested majorities who act without regard to the interests of the minority" is true only...

...if the majority is permanent; otherwise, the self-interest of those temporarily in the majority dictates that the interests of their opponents temporarily in the minority not be absolutely excluded from consideration. Majorities tend to dissolve, and must be reconstructed on every issue: today's foe on employment equity policy may be tomorrow's friend on anti-pornography policy..." (Manfredi, 2001: 198)

What all of this suggests, then, is a vision of a pluralistic society in which social values are produced via the interplay of the competing interests of groups large and small, aggregated, mediated, and reconciled by competing political representatives and parties seeking to produce maximally appealing public policies. It is not mutual identification or regard which produces the good for all, but the desire to secure one's own interests. Adam Smith's famous assertion that "[i]t is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest" (The Wealth of Nations: bk. I, ch. II) seems as apt in application to the aggregative democrats' notions of the political marketplace as it does to the economic marketplace of which Smith was speaking. The aggregative vision conceives of public values as determinable not by reference to transcendant theories of the good or of just distribution (as more rights based liberal theories of value might suggest), but as the product of aggregated citizen demands. It is a theory which takes social truths to be something of the equivalent of "fair market prices".

While my intention here is to offer a critical consideration of democratic responses to the Charter, it must be said that initial consideration of the aggregative model suggests its possession of some clear apparent merits. It seems accurate at least in part in both its acknowledgement of one important aspect of human nature (the motivation of self-interest)
and its depiction of the policy-making processes of representative democracy. And its
notions about the construction of social value — truth as market pricing — seem to offer at
least an apparently functional solution to the difficulties diverse modern societies face in the
search for public values. But while the aggregative conception of social life and value is not
without its recommendations, deeper consideration reveals some important problems. Two
central issues stand out. First, the democratic market — as indeed is also the case with the
economic market — does not always produce "fair market prices"; the allocation of social
value it produces as a consequence is therefore not always equitable even within its own
terms. Secondly, there is also some question as to whether the aggregative conception of
democracy as economic market is an entirely apt or desirable one. It arguably fails at times
to recognize or give weight to certain important human values — those, for example, which
are personal and individual rather than aggregable and collective.

Underlying aggregative democrats' notions of the value of the democratic model they
advocate is the belief that the aggregative process produces what I have called truths as "fair
market prices". This vision of social decision making suggests that through the processes
of the democratic market the interests of small groups which rights liberals would seek to
protect through the mechanisms of rights are both (a) accounted for in the process of
policy-making by competing political parties and representatives and other interest-seekers,
and (b) presumably incorporated in public policy decisions generally in a manner and to the
extent which their aggregate size would merit. These are, I think, the minimal standards of
decisions which can reasonably be understood as representing fair market pricing.
Unfortunately, they are not as invariably associable with democratic decisions as the
aggregative model suggests.

Aggregative democrats underconsider the extent to which decisions in
representative democracies are the product of bargaining between groups possessing
considerably disparate amounts of bargaining power. Groups whose interests are broadly
held and values widely shared have considerably more bargaining power than do those
whose interests are narrow or outside the norm. Of course, in the democratic view, this is
not problematic per se. There is no reason that interests which are narrowly held should be
incorporated to the same extent into public policy outputs as those which are widely held.
In fact, the former are appropriately given less weight than the latter because they are
indeed less weighty — less widely held. The problem which arises, however, is that these disparities produce on behalf of social “in groups” considerable leverage; such groups have little need to compromise when their representatives engage with those of other groups because they have an unequal share of social bargaining power. As a consequence, the sorts of “deals” which can be made are a reflection not just of the differences in the numbers of people who hold particular interests, but also of the relatively monopolistic bargaining position which large groups have relative to small ones. When it is the values of small minority groups which are at stake, there would seem to be little incentive on the part of political representatives attempting to maximize their own electoral popularity to offer public policies which fairly incorporate the desires of political interests whose market power is relatively small.

As an example of this problem, we might turn to an issue in public policy which Knopff and Morton themselves raise in The Charter Revolution. In 1988, Albertan Delwin Vriend was fired by his employer because he was a homosexual. He attempted to achieve redress for his dismissal via a claim to the Alberta Human Rights Commission. His claim was dismissed because the Commission’s mandate, Alberta’s Individual’s Rights Protection Act, did not prohibit discrimination on the basis of sexual orientation. Vriend challenged the constitutionality of the I.R.P.A.’s failure to protect homosexuals while protecting others on the basis of race, gender, and the like as an infringement of his s. 15 right to equal protection and benefit of the law. In 1998, the Supreme Court upheld Vriend’s claim and read into the Individual’s Rights Protection Act a prohibition upon discrimination on the basis of sexual orientation (Vriend v. Alberta ([1998] 1 S.C.R. 493)). Knopff and Morton offer Vriend as an example of judicial interference with the democratic process — Alberta’s popular elected government had explicitly decided against including sexual orientation in the I.R.P.A., and the Supreme Court’s decision constituted a repudiation of that collective decision (Knopff and Morton, 2000: 164).

The difficulty with the notion that groups like Vriend’s fairly lost out in a democratic give-and-take over the substance and content of the I.R.P.A. — a characterization which would be in keeping with the view of democracy as “working out” conflicts in group interests — is that, as Knopff and Morton themselves note:

[p]rior to the [Vriend Supreme Court] ruling, the Klein government could safely ignore this issue [homosexual rights],
I would suggest that Knopff and Morton fairly if perhaps unintentionally characterize the reality of the sort of attention that can be paid to interests like Delwin Vriend's in democratic bargaining. Whether our standard is simply an accounting for outgroup interests or also the fair relative weighting of such interests in aggregative decision making, the circumstances of Vriend and others like him would seem to suggest that the democratic market does not always in regard to important matters produce what might reasonably be considered fair prices — at least a minimal response to or accommodation of outgroup interests— even on aggregative democracy's own terms. Something more than the market alone is necessary to ensure that governments pay heed to the interests of those whose support they do not need.

This is the sort of dilemma Patrick Monahan appears to recognize. While his general prescription for readings of the Charter's rights is a narrower and more deferential one than that suggested by rights liberalism, he suggests that the Charter's s. 15 guarantee of equality might be understood in broad terms which would provide protection for groups of the sorts I describe here, for minorities and the like whom the democratic process may treat poorly. It is a conception of political order which seems to embrace both notions of democracy and rights, albeit perhaps a different vision of rights than that advocated by rights liberals. Monahan adopts John Hart Ely's view that judicial interpretation of rights ought not to be directed at measuring the "justness" of particular political decisions but at ensuring "that the political process — which is where values are properly identified, weighted, and accommodated — is open to those of all viewpoints on something approaching an equal basis" (Ely, 1980, cited in Monahan, 1987: 100). As Monahan notes,

This means making sure that the avenues of participation remain open and that legislation which discriminates against "discrete and insular minorities" not be permitted.

(Monahan, 1987: 100)

Nor is Monahan the only Charterist to find Ely's conception appealing. In Andrews v. Law Society of British Columbia ([1989] 1 S.C.R. 143), a foundational s. 15 ruling, Justice
Bertha Wilson (writing for herself, Chief Justice Dickson and Justice L'Heureux-Dubé) adopted what appears to be Ely's standard. Andrews was a non-citizen who sought membership in the British Columbia bar, an aspiration barred by the Law Society's governing statute which mandated membership only for Canadian citizens. Wilson held that citizenship status was a ground of characterization analogous to those in s. 15 (and thus forbidden by the Charter as discriminatory) in part because non-citizens represented a "discrete and insular minority" (Andrews: 152):

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending'.

(Andrews: 152; internal quotation is of Ely, 1980: 151)

Unfortunately, while Ely-ist theory manages by recognizing the importance of protecting outgroups to avoid the first of aggregative democracy's shortcomings — the problem of unfair market pricing — it unfortunately does not avoid the second — what might be called the problem of individuals in the marketplace. The logic of Ely's, Monahan's, and Wilson's adoption of the democratic theory of rights is that the workings of democracy protect "majorities" and in groups; rights, understood only as guarantees of access, are necessary to protect outgroups — "discrete and insular minorities". There are problems from the perspective of the individual with both the notion that all important but narrowly held social interests can be protected by protecting identifiable minorities, and with the notion that all interests associable with majority groups are "majority interests" which can be left to majorities to defend.

In regard to the first of these points, it must be noted that not all social interests are attached to identifiable groups which are either effectively represented in democratic bargaining or which are discrete and insular minorities of the sort which Monahan's Ely-ism would protect. Two interests of this sort which come to mind are those of individuals who wish to have the power of deciding for themselves to end their lives in circumstances of ill health\(^3\), and of individuals who wish to privately peruse unpopular forms of expression.

Neither of these are interests which if secured could be readily said to affect the well-being
of the general populace and it cannot therefore be said that the social majority has its own
defencible desires in preventing their attainment. Yet these are indeed the sorts of
interests which aggregative democratic mechanisms frequently fail to protect (legislative
prohibitions on suicide or assisted suicide and regimes of legal censorship are commonplace
in democracies, including Canada's). Since neither of these interests are widely held or
attached to identifiable and therefore protectable discrete and insular minority groups,
neither market majoritarianism nor Ely-ist minoritarianism are effective mechanisms for
their protection, even though they are not anti-majoritarian interests. The market
mechanisms of democracy are poor at protecting interests which are individual and personal
rather than collective and aggregable.4

Perhaps more significantly, it might be argued that even when the interests of
individuals are apparently tied to their membership in a powerful social group, we may often
go wrong by conceiving of them as "group interests" which are appropriately left to
majorities to secure or not secure as part of some overall package of well-being depending
on the market trade offs of the day. The outlines of this problem are evident in Patrick
Monahan's discussion of affirmative action programs in Politics and the Constitution, notably as
regards the well-known American case of University of California Regents v. Bakke (438 U.S.
265 (1978)). Bakke, a white man, challenged the University of California at Davis's
affirmative action program which had had the consequence of denying him admission to the
school's medical program in favour of a less-qualified student from a racial minority.
Monahan suggests that "affirmative action programmes do not violate the constitutional
norm of equality" (and by implication that the United States Supreme Court which
overturned the UC Davis regime was in error):

It is true that such programmes 'discriminate" against certain
groups or individuals on the basis of racial criteria. But the
difference is that the groups or individuals who stand to lose
through affirmative action programmes have never been denied
access to the political system. Rather, they are individuals like
Allan Bakke, a white male whose interests historically have
been vastly overrepresented in the political process.
(Monahan, 1987: 132)

This is certainly in keeping with the notion of democracy as a protector of "majority"
interests. But it also suggests some grounds for critical consideration of the analytical
assumptions at play here. While it is indeed the case that the interests of “white males” in general have historically “been vastly overrepresented in the political process” in California, are these the only sorts of interests at stake in Bakke? We might also consider the interests of Mr. Bakke in his individual capacity, as an person who aspires to higher education and a fulfilling career, and who might therefore desire or expect that his abilities and capacities would be measured as a function not of his gender or skin colour, but of his individual achievements and value. If we recognize Mr. Bakke individually and not simply as a member of a group, it becomes considerably more difficult to suggest that no harm has been done to him by trading off his fair and equal opportunity to go to medical school as compensation for the social privileges enjoyed by other white male Californians in the past and present.

The problem with the aggregative market vision of social value as Monahan’s theory reveals is that it is utilitarian in its conception of social well-being. It is concerned with and works best at securing maximal aggregate benefit without regard to its distribution to outgroups and individuals. Two different critiques of aggregative democrats might proceed from this fact. If their democratic theory is premised on at least some substantial valuation of individuals as individuals — as, for example, the notion of “one person, one vote” might seem to suggest — then the utilitarian disregard for individual well-being evident in aggregative notions of democratic value suggests a certain paradox (to appropriate Christopher Manfredi’s observation) in democratic beliefs. If on the other hand, democrats can be taken as having no qualms about the sacrifice of individual value to overall well-being, then they are not self-contradictory; they are believers in a system of value which one would suggest itself merits criticism for its failure to acknowledge the unique and valuable individual character of human beings.

Deliberative Democracy

In contrast to the model of self-interest upon which the aggregative theory of democracy is built, the deliberative motif suggests a more elevated conception of human life in collectivity. It argues for a vision of democracy as a vehicle for widespread citizen participation in public deliberation and debate aimed at producing common public values which respect all. As two of its better known advocates, Amy Gutmann and Dennis Thompson, argue, “the core idea [of deliberative democracy] is simple: when citizens or
their representatives disagree morally, they should continue to reason together to reach mutually acceptable decisions" (Gutmann and Thompson, 1996: 1). Similarly, Allan Hutchinson suggests that

\[
\ldots \text{citizenship under radical democracy} \ldots \text{is an engaged practice of civility in which the common good is always up for consideration and conversion. For the democratic citizen, a good life consists in the public-spirited engagement with others over the shape and substance of the 'good life'.}
\]

(Hutchinson, 1995: 215)

Nor do democrats aspire to just any sort of conversation. The debate they envision is of a special kind. It is not, first of all, like universalist philosophy. The citizens of a democratic nation are likely to reject "the philosopher's gifts", as Michael Walzer eloquently describes political philosophy which purports to speak to the universal, because they value their own "traditions, conventions, and expectations"; these "belong to the people and the gifts do not" (Walzer, 1981: 394 - 5). The form and nature of democratic reasoning is therefore local -- unique to the particular peoples engaged in it -- and not properly subject to universalist strictures like those embodied in the notion of human rights. As Patrick Monahan observes,

\[
[\text{the perspective values the process whereby citizens define their own traditions, conventions and expectations as opposed to seeking to emulate the choices of the inhabitants of some ideal or hypothetical world.}]
\]

(Monahan, 1987: 105 - 6)

Despite its non-universality and local specificity, the sort of democratic discourse to which deliberative democrats aspire is not without what can be taken as mandatory features or rules. Although Gutmann and Thompson suggest like all democrats that even the processes of deliberative democracy itself are ever subject to definition and re-interpretation through deliberation (Gutmann and Thompson, 1996: 348), they also define its hallmarks as "reciprocity", "publicity", and "accountability" (Gutmann and Thompson, 1996: 7 - 8). "Reciprocity" is the "capacity to seek fair terms of social cooperation for their own sake". "Publicity" is the requirement that the reasons that officials and citizens give to justify political actions and the information necessary to assess those reasons be public. "Accountability" is the requirement that one's reasons for policy preferences account for
others besides oneself. Knopff and Morton also suggest that one of the attributes of democratic dialogue is its openness and tolerance which they contrast to the “closed and intolerant character” of rights-claiming. And Hutchinson suggests that while democratic “...conversation offers no objective foundations”, “...participants are bound by their acceptance of the contingent, yet real, status of their own conversation and their shared commitment to respect its dynamic”:

The vision of a dialogic community — ‘mutual understanding, respect, a willingness to listen and to risk one’s opinions and prejudices, a mutual seeking of the correctness of what is said' - - is not abstract or disembodied, but can give concrete guidance to our practical lives”


All of this, then, contributes democrats believe to the realization and production of a mutual tolerance, social solidarity, and collective feeling of mutual regard; a society with a far greater sense of communality than that implied by the rights liberals vision. It is a conception of social truths as reflective of something akin to the Rousseauian “general will”. The deliberative motif suggests not

... simply the aggregation of private interests. Instead, it is an ideal which claims that individuals are themselves constituted, in an important if not exclusive sense, by their membership in community.

(Monahan, 1987: 105)

As Rousseau puts it in his discussion of the social contract in the ideal state:

Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole. At once, in place of the individual personality of each contracting party, this act of association creates a moral and collective body . . .

(The Social Contract: bk. II, § 6)

The deliberative motif suggests, then, that by our coming together in conversation like the ancient Athenians or Rousseau’s imagined collectivity to discuss the shape and nature of the good life, we can realize and contribute to the construction of a happier and more collectively self-conscious community and through those means produce social
decisions about our lives which will be both our own and reflective of a vision of social value which looks to the good of all. A regime of strong rights is as a consequence unnecessary because such a community is not prone to abuse of individuals, and undesirable, because rights-claiming corrodes the sort of social solidarity which collective decision making is aimed at producing (Knopff and Morton, 2000: 149). The deliberative vision does not ignore the possibility of occasionally significant disagreement or the clash of values in our society, but on the whole it suggests that these characteristics of modern life are washed out through the virtues of a truly democratic discourse.

But while it is an appealing and utopian vision, unfortunately it is these very characteristics which suggest I would argue the necessity of a critical response to the claims made on behalf of deliberative democracy. Not all disputes about issues of social value are as amenable to discursive reconciliation as the deliberative model suggests. And even if this were the case, it is doubtful that democracy seul is capable of producing the sorts of discourse and communality which would be necessary to produce such reconciliation. Deliberative democrats are, quite simply, too optimistic about the tractability of moral disputes, about human nature, and about democratic possibility.

What I have in mind when I suggest the intractability of social disagreement over fundamental values are the very sorts of issues which rights jurisprudence deals with regularly. Consider, for example, abortion. The deliberative model suggests that, somehow, a popular debate which pits among others 'pro-life' groups, many made up of staunch and sincere Christian believers, against equally staunch and sincere 'pro-choice' feminists will be capable of producing a legislative solution which all might at least accept. Deliberative democracy would have such groups respond to each other with respect, acknowledge the impossibility of "complete understanding" as regards these types of moral dilemmas, and "agree to disagree" (citations from Gutmann and Thompson, 1996). It need hardly be said that this seems rather hopeful indeed, nor that a great many contemporary debates about social values seem cut from the same cloth and therefore as unlikely to produce social consensus as is the abortion issue. (Homosexual rights in Alberta a la the Vriend case I earlier discussed might serve as another example). It might in fact be suggested that the more morally important the issue to which such disputes relate, the less they are amenable to democratic consensus-building and unity. Something more than an aspiration to
communality and consensus might therefore be thought necessary to our decision making about the hard choices involved in these sorts of issues.

Even if we might imagine that such disputes were somehow reconcilable given an appropriate decision making process, it is doubtful whether democracy seuil provides such a process. Both theoretical and empirical observations suggest that raw democracy is less productive of communality and consensus than its advocates suggest. At the theoretical level, those who are skeptical of democracy seuil's transformative abilities might point out that, despite the democrats' vision of the process's ability to produce a communal orientation, democracy is at its heart a system of decision making in which collective choices are made at the individual level. The most important democratic decisions take place in the privacy of the individual voting booth whether they be for political representatives or on individual policy questions as in referenda. Our choices there do not require us to reference public, collective, or universal values, they are not given justification in terms and language which must be common to all, and they are not subject to public exposure for critical consideration. Deliberative theory might be thought to strain credulity at least to some extent when it suggests that we can rely on individualistic decisions about matters which affect all to produce communally-oriented policy choices. Though we may often do the right thing in the privacy of the voting booth, that is little consolation for those hurt by our democratic decisions when we give in to the temptation to do the right thing for ourselves only. While deliberative democrats like Amy Gutmann and Dennis Thompson imagine a democratic life built upon "reciprocity" and "accountability", the fundamental mechanism of democratic decision making is structured so as to preclude accountability and in so doing makes reciprocity a difficult goal to realize.

And in fact, the long democratic records of the United States and Canada suggest that real democratic life often falls far short of deliberative visions of mutual regard and social harmony. Certainly few would see democratic life in the southern United States in the era before the Warren Court's expansive interpretation of the Bill of Rights as as cozy and mutually-regarding (certainly not at any rate for the African-Americans in such communities) as the deliberative vision would lead us to expect it to have been. And certainly, while there was much collective deliberation and direct participation in the state of California's 1978 referendum on Proposition 13, it can hardly be said that the sweeping tax cuts for property
owners and the consequent massive reduction in public services such as education it brought with it produced the sort of society which one would associate with notions of communality and mutual concern. While those on the "right" end of the democratic spectrum might be unconcerned when democratic decision making produces radical tax cuts for the propertied classes at the expense of public schools, it would seem likely I think that deliberative democrats like Allan Hutchinson and Michael Mandel would not see such outcomes as the sort of social solidarity they have in mind in their deliberative visions. Nonetheless, these are democratic outputs and, arguably, not unrepresentative of reasonable democratic possibilities.

Of course, it might be argued that the social attitudes embodied in these sorts of democratic decisions in the United States are less a product of deliberative democracy than of the atomistic individualism and self-interest engendered by the rights-oriented American political culture. Perhaps Canadians are more suited to the deliberative model because rights are a recent and foreign imposition upon our political system and we more readily embrace the sort of social solidarity which the deliberative democrats urge upon us. As Michael Mandel points out, for example, there is

... hardly any dispute that the Canadian record on human rights was no worse for the absence of a Charter than the US record for the presence of one and probably somewhat better. (Mandel, 1989: 50, citing Morton, 1987: 32)

But while the Canadian record may be a better one than that of the United States, Mandel, like other deliberative democrats (including F. L. Morton whose insight he cites in this passage) is too sanguine about the social reality of our past. One need only contemplate the Chinese head tax, internments of Canadian citizens of Japanese, German and Italian ancestry in World Wars I and II, the Quebec Padlock Law and Bill 101 to see that the democratic decisions of our governments only too frequently imply something other than a real communality.7

Deliberative democrats offer a halcyon vision of life in a democratic polity. Their vision of democracy as a vehicle for widespread citizen participation in public deliberation and debate aimed at producing common public values which respect all is an appealing one,
one which speaks to admirable and very readily defencible notions of legitimative value. But unless we believe that our most difficult moral conflicts are resolvable in a reconciliatory fashion, that an individual and self-referential decision making process produces communal and mutually-regarding decisions in even the most crucial and difficult moments, and that democratic practice in the real world is always expressive or productive of real social solidarity, then we are unlikely to be convinced of the realizability of the deliberative vision.

III. DEMOCRACY AS A THEORY OF CHARTER FOUNDATIONS

Democratic theories of legitimacy and social value suggest that valid constitutional order must embody to the greatest extent possible democratic processes for the construction of the public values by which citizens are to live. Against this legitimative benchmark, the Charter does not fare well. The notion of strong rights which democrats associate with the Charter regime is not consonant with the democratic rejection of rights in this sense as false truth claims and as authoritarian impediments to the ability of citizens who live under them to set their own course and to determine for themselves collectively the public values to which they appropriately give their allegiance. As a consequence of these views, most of the Canadian democrats whose work I cover here deny the legitimacy (in moral if not legal terms) of the Charter regime. Knopff and Morton's critical characterization of the post-1982 era as the "Charter Revolution" suggests in clear terms their view that this sort of order is an illegitimate one. So too does Michael Mandel's suggestion that "[i]egalized politics cannot simply be abolished"; "[i]t must be made to wither away" and Alan Hutchinson's urging that we "abandon the historical infatuation with liberal rights-talk and replace it with a renewed dedication to unmodified democracy".

But not all Canadian democrats are quite so doleful about the possibilities for democracy under the Charter. While most understand the Charter as embodying a constitutional order understandable and justifiable primarily from a perspective which takes the values of rights liberalism as authoritative, Patrick Monahan argues that we need not conceive of the Charter in such terms. A consideration of the Charter in fact suggests that it embodies a constitutional vision which is not rights liberal in its orientation, but democratic and communitarian. I focus in the remainder of this section on the democratic aspect of Monahan's theory; its communitarian foundationalism I take up under the same head in the next chapter.
As I earlier noted, Monahan's constitutional philosophy borrows from that of John Hart Ely, who has argued that the American constitutional order is best understood as primarily directed at protecting the forms and processes of democracy rather than more substantive values such as those we might associate with the rights liberal constitutional vision (Ely, 1980: 74). Monahan argues similarly that the

... drafters of the Canadian Charter embraced those elements of the American constitution designed to protect the democratic process, while largely excluding provisions aimed at guaranteeing particular substantive goods or values deemed fundamental.

(Monahan, 1987: 99)

To the extent that this constitutional view is compelling, it suggests (a) that the Charter can be understood as legitimate from the democratic perspective (contrary to the view of most Canadian democrats) and (b) that judicial understandings of the Charter ought not to be in terms of strong rights, but in terms of rights as protections of democratic values. In Monahan's own words:

... judicial review in Canada should be conducted in the name of democracy, rather than as a means of guaranteeing "right answers" from the political process.

(Monahan, 1987: 99)

Monahan's claims about the constitutional character of the Charter are premised on a number of intriguing conceptual notions (many drawn from the work of Ronald Dworkin) about the appropriate approach to the attribution or characterization of constitutional authority. The first of these is the notion of "openness". A consideration of the complexities of constitutional materials suggests that any constitutional order is likely to be amenable to a variety of different foundational characterizations. Since complex constitutional text is likely to be suggestive of a number of competing foundational premises, in seeking to characterize the legal materials associated with such an order, "the decision whether to apply one premise or its opposite" cannot be seen as "demanded by the materials themselves but is a function of judicial choice" (Monahan, 1983: 313). There is therefore a considerable degree of "openness" in the possibilities of such choice.

But while a number of Canadian democrats take this reality as suggestive of the
impossibility of law (at least in its objectivist sense), Monahan argues that two guidelines appropriately limit and direct our choices in the process of constitutional characterization. The first of these is "fit". Plausible claims about the foundational character of the constitutional order must bear some identifiable relationship to the order as it is, must acknowledge and speak, for example, to such things as the constitutional text and established constitutional institutions. While a number of theoretical characterizations of the Charter are open to us, many more are excludable if we take text and context in any way seriously. Monahan argues that his democratic theory offers a good "fit" for the Charter given its text and structure (Monahan, 1987: 104). The second of Monahan's guidelines of constitutional characterization suggests a means for deciding between the plausible competing premises we might locate in a given constitutional text. In making foundational claims about the constitutional order, we appropriately consider "at the broader level of political theory" the desirability, merit, worthiness of the competing constitutional premises the given text might support. Here, Monahan argues, "the goal is to offer an account of the Charter which demonstrates 'the best principle or policy it can be taken to serve'" (Monahan, 1987: 163; internal quotation is of Dworkin, 1977: 160). Monahan argues that an important reason for giving the Charter a democratic characterization is "the value of democracy itself" (Monahan, 1987: 105).

My critique of Monahan's democratic theory of Charter foundations is not directed at the meta-level of his constitutional philosophy. Indeed, I think openness, fit, and philosophically-based choice are quite compelling approaches to the foundational characterization of constitutional authority. Less compelling I argue are Monahan's more specific constitutional claims about the Charter. In the previous section I outlined a number of reasons why I thought the value of relatively unconstrained democracy was overestimated by its Canadian advocates, and those arguments I think apply to any notion that the Charter ought to be read in democratic terms. My critical focus here then is on Monahan's view that a democratic reading "fits" the Charter, a notion which I think is equally problematic.

Monahan's argument for a democratic reading of the Charter is founded on two related perceptions of the document's text and structure which suggest the viability of its characterization in democratic rather than rights liberal terms. The democratic vision of
rights suggests an understanding of them as procedural rather than substantive in their focus: rights are desirable as protections of the democratic process but undesirable as statements of more substantive value which are more appropriately worked out democratically. Monahan argues that the rights of the Charter speak to us primarily in procedural rather than substantive terms. The democratic vision of rights also necessitates an understanding of them in what might be called "soft" rather than "hard" terms. While rights liberals understand rights as individual "trumps" of collective decisions, democrats reject as illegitimate the broad and intrusive override of collective decisions by unelected judges. The reconciliation of democracy and rights requires therefore a subtler and softer view of the role and place of rights in a constitutional order. In this view, rights are conceived not as trumps but as evaluative guidelines by which courts can "recognize the complex and delicate balance between individual, community and state" (Monahan, 1987: 117). This conception of rights suggests therefore considerably more room for collective decision making and less frequent occasion for judicial override of such decisions than does the rights liberal alternative. The democratic vision suggests, to use Monahan's words, that "expansive interpretations of constitutional limitations are not necessarily to be preferred to restrictive interpretations" (Monahan, 1987: 118). Monahan's arguments suggest an understanding of the Charter as an embodiment of this generally more deferentialist democratic vision of rights.

Procedural or Substantive Rights?

Monahan's arguments against substantivist conceptions of the Charter's rights begin with an acknowledgement of the difficulties this view of constitutional value has faced in the American context in which it first arose. He notes in particular Laurence Tribe's "devastating" critique of Ely's constitutional theory in "The Puzzling Persistence of Process-Based Constitutional Theories" (Tribe, 1980). Tribe argues that contrary to Ely's view, a great many provisions of the U.S. Constitution do in fact speak in substantive rather than procedural terms. Monahan himself notes the "takings" and "contracts" clauses of the American Constitution as examples of that document's substantive bent. But while Ely's proceduralist claims are arguably not a good fit with the American constitutional regime, this is not necessarily an obstacle to our understanding of the Charter in democracy's procedural
terms. Monahan's claim is that

... a democratic conception of judicial review, although originally formulated in the American context, actually offers a far more convincing account of the purposes underlying the Canadian Charter.

(Monahan, 1987: 99)

Unlike the American Constitution, the Charter speaks Monahan argues on the whole and with few important exceptions not through substantive provisions like the contracts clause but in terms much more readily amenable to characterization as procedural in their orientation.

The difficulty with this view, as Peter Hogg suggests in “The Charter of Rights and American Theories of Interpretation” (Hogg, 1987) is that Tribe’s arguments seem almost as apt in application to Monahan’s Charter claims as they do to Ely’s American constitutionalism. While I do not suggest that a democratic and proceduralist characterization the rights of the Charter is an impossibility, I would argue that in regard to a number of the document’s provisions such a reading would be particularly strained and would require us to adopt a rather barren view of the deeper human values to which the Charter seems to speak.

This seems particularly evident in a consideration of the Charter’s s. 2 guarantees of freedom of expression and religion. In the democratic view, the protection of such goods is understood as a concommitant of a commitment to democracy. Free expression is necessary in order for individuals to freely voice their views in contribution to democratic debate. Religious freedom is necessary similarly because religious beliefs are value systems which underlie and inform the democratic will of citizens, sources of value to which we might refer in making our personal decisions about democratic choices. A democratic reading of these rights suggests then that they are protections of the necessities of democracy and this in turn suggests that their protections are of those elements of these freedoms which bear upon democratic debate, choice, and the like and not necessarily of everything broader schema of constitutional value would take them as protecting.

But potentially more compelling alternative understandings of the deeper foundational values spoken to by the s. 2 rights are available to us. It is I think possible and reasonable to understand these rights not as protecting democratic decision-making but as
protecting more directly the values they proclaim in their own right. Not democratically necessary freedom of expression or religion, but freedom of expression and religion *simpliciter*. There are two main reasons this view might be seen as preferable to Monahan's Ely-ist prescriptions. First, such a view does not require us to impose upon the s. 2 rights what seems to be an artificial constraint. The rights to freedom of expression, religion and the like are not in s. 2 proclaimed as requisites of democracy but are expressed in broad and unalloyed terms. Why then impute to them an origin in democratic notions of value? Of course, this does not in itself constitute a determinative argument against the democratic reading. We do require some means of attributing to these rights an applicative meaning which does not encompass all the world's possibilities and their breadth suggests the necessity of reference to something beyond the phrases themselves in order to do so. If there are exegetical reasons to impose constraints on these rights, then perhaps reference to democracy might be one means of accomplishing this end.

But there seems reason to think that we ought prefer less constraint in our reading of s. 2 than is mandated by the proceduralist reading recommended by Monahan's valuation of democracy. The problem with an endorsement of a procedurally-constrained reading of such things as freedom of religion is that it fails to acknowledge something which seems intuitively rather clear. One would think that real religious belief must be to the holder far more central and fundamental than any belief in the values of democracy could possibly be. It seems therefore odd to suggest that it is the values of democracy which licence the protection of religious freedom rather than the value of religious freedom itself. The same might be said of s. 2's guarantees of freedom of conscience and expression as well. If our search is for the "best interpretation" of the *Charter* as Monahan suggests it ought be, then it is questionable whether we appropriately seek explanations or justifications for the inclusion of protections of these sorts in a simple valuation of democracy. If there are larger and more important reasons to protect such things as religious freedom than a valuation simply of the forms and processes of democratic decision-making (such as the inherent value of the guaranteed freedoms to human dignity and well-being perhaps) then those reasons would seem to provide better justification and explanation for this *Charter* content than does democracy. If this is the case, then what follows is an understanding of the merit and value of the *Charter*'s guarantees of freedom of religion, conscience, and expression in
clearly more substantivist than Ely-ist and proceduralist terms. And unless we discount the value of the s. 2 rights as constitutional signposts, this would seem to undercut in a serious way Monahan's procedural characterization of the Charter in general.

Of course, some Charter rights are indeed "procedural" rather than substantive in their character. Section 7 and the other legal rights in ss. 8 to 14, for example, can all reasonably (although not conclusively) be argued to constitute procedural rather than substantive guarantees. But as Hogg (and Tribe before him) points out, the processes with which these sorts of guarantees are associated are not democratic or political; they are legal rights and hardly therefore justifiable as values purely democratic in their genesis. While "the legal rights are predominantly . . . procedural, . . . they are quite unlike the rights to speak, assemble, associate, and vote":

. . . the purpose of according due process to those accused of crimes has nothing to do with the political process, and everything to do with respect for individual liberty, dignity, and privacy. The reason why a legislative body cannot impose more expeditious and efficient methods of law enforcement is because the constitution insists that the liberty, dignity, and privacy of those accused of crime must be given priority over the exigencies of law enforcement.

(Hogg, 1987: 108)

Like Hogg, "I agree with Tribe, who concludes that a 'right to individual dignity, or some similarly substantive norm, [is] the base upon which conceptions of procedural fairness are constructed'" (Hogg, 1987: 108, citing Tribe, 1980: 1070). A great many of the rights of the Charter are arguably not procedural in their focus, and a great many of those which are are not procedural in the democratic sense. Monahan's procedural claims about the Charter on behalf of his democratic vision is I would argue therefore difficult to make out.

**Hard or Soft Rights?**

The differing perceptions of the values and possibilities of democratic decision making embodied in the rights liberal and democratic theories of constitutional value are reflected in the two perspectives' differing conceptions of rights. The skepticism of rights liberalism about collective decision making suggests a view of rights in relatively broad and hard-edged terms. This conception suggests therefore the legitimacy and necessity of significant judicial oversight and the perhaps relatively frequent rejection or revision of
democratic decisions which fall short of constitutional standards. Because democratic theory places considerably more faith in collective decision making than does its rights liberal alternative, it suggests (to the extent that it contemplates a regime of rights at all) a conception of rights which envisions a greater scope for democratic choice. In this view, rights are understood in “softer”, narrower terms, as something more akin to negotiable and revisable evaluative guidelines for courts rather than as the individualist trumps of rights liberalism. In their interpretation and application of rights, then, courts more appropriately strive in this view to “recognize the complex and delicate balance between individual, community and state” (Monahan, 1987: 117) rather than seeking to measure the “substantive fairness of political outcomes against some independent normative standard” (Monahan, 1987: 105). This conception suggests that the occasions and circumstances in which constitutional judges properly overturn or revise collective decisions are less often likely to arise in the democratic than in the rights liberal vision of constitutional value.

In support of such a reading, Monahan points to a number of the Charter's most conspicuous structural features; what he aptly calls its “saving provisions”. Section 1, for example, declares that the rights of the Charter are appropriately subject to “reasonable limits”. The rights to mobility and equality in ss. 6 and 15 are limited by secondary provisions (6(4) and 15(2)) which curtail their reach. And section 33, the notwithstanding clause, gives Canadian legislatures the power to pass or preserve laws that our courts might otherwise see fit to strike down. The important presence of the saving provisions implies that the Charter embodies a vision of rights suggestive of an acknowledgement of the importance, value, and legitimacy of collective decision making. Monahan argues therefore that “expansive interpretations of constitutional limitations are not necessarily to be preferred to restrictive interpretations” (Monahan, 1987: 118) and concludes that “the best interpretation of the Charter is one which sees it as a reflection and a reinforcement of democratic ideals rather than as a negation of those ideas” (Monahan, 1987: 118). While Monahan's arguments in this regard have a certain appeal, I would argue that a closer consideration of the Charter's saving provisions suggests they are less supportive of his democratic claims than we might first be tempted to believe.

Perhaps the foremost of the Charter's saving provisions is the notwithstanding clause of s. 33, which enables legislatures invoking it to pass and preserve legislation which would
otherwise contravene the rights of ss. 2 and 7 to 15. Monahan argues that s. 33

... is a concrete commitment to the primacy of politics, and a commitment to the idea that liberty is not the enemy but the product of governmental institutions. On this view, the goal is not to construct a set of boundaries around public institutions. The goal is to make public institutions more accountable and responsive. What we need is more politics rather than less.

(Monahan, 1987: 119)

While I would agree with Monahan's view that s. 33 itself can be read as suggestive of a valuation of "politics" — that is, democratic decision making — it is not I would argue as representative an indicator of the overall character of the Charter as his arguments imply. For while s. 33 does make way for the democratically-motivated override of Charter rights, its presence also suggests that there may be good reason for constitutional judges to understand and construe those rights in significantly broader terms than would be the case in the absence of such a provision. What credence s. 33 gives to Monahan's democratic thesis with one hand it takes away with the other.

The central argument from the democratic side against strong and relatively unconstrained judicial interpretations of constitutional rights guarantees is that such readings represent interferences by the unelected judiciary with decisions made through democratic (and hence from this perspective more legitimate) means. But s. 33 seems to obviate this traditional argument on behalf of judicial deference. Its presence means that judicial interpretation and application of the Charter is subject to democratic oversight and potential overrule. In that context it might be argued that what is appropriate from the adjudicative perspective is a broad rather than narrow interpretation of rights; constitutional judges have no need to simulate and impose on themselves the democratic constraint the deference argument suggests since institutional means exist by which to actually impose such constraints should collective judgments on rights differ from that of unelected judges. While s. 33 itself therefore perhaps suggests the importance of democracy, its presence implies I would argue a reading of the provisions to which it implies -- and thus of much of the Charter -- in the broad terms of rights liberalism rather than the narrow terms suggested by the democratic vision.

Yet a number of the Charter's rights which I am arguing should be read in broad and
liberal rather than constrained and democratic terms are themselves restricted by sub-clauses which limit their reach. While the Charter, for example, guarantees the right to “move to and take up residence in any province” and to “pursue the gaining of a livelihood in any province” (s. 6(2)(a) and (b)), it restricts that guarantee by preserving to our legislatures (and thus to democracy) the power to pass laws that have as their “object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged” (s. 6(4)). And while it guarantees equality under the law and in general prohibits discrimination (s. 15), the Charter preserves to our legislatures the power to pass laws having as their “object the amelioration of conditions of disadvantaged individuals or groups...” (s. 15(2)). Like s. 33, Monahan suggests, ss. 6(4) and 15(2) imply “a concrete commitment to the primacy of politics”; that is, to democratically-constructed rather than judicially-determined public values. Here too I would argue that the saving provisions can be understood as suggesting something other than what Monahan’s arguments imply.

What is most noticeable about 6(4) and 15(2) is the specificity in which they speak. They do not set out broad and abstract conditions for limitations or exceptions to ss. 6 and 15, but define in detailed terms the occasions and goals which admit of restrictions to the mobility and equality rights. The specificity and narrowness of these restrictive clauses suggests two things. First, because they suggest specific and narrow principles of limitation and exception, the saving provisions in 6(4) and 15(2) would seem to suggest that the occasions and circumstances in which the Charter contemplates significant restrictions on the application and ambit of the equality and mobility rights are few. This in turn suggests that the rights these savings provisions govern are appropriately understood in the relatively broad and unconstrained terms suggested by the rights liberal model of rights rather than the softer and more constrained terms mandated by democratic theory’s “commitment to the primacy of politics”. Interestingly, Monahan himself seems to adopt this very view of s. 15 at the interpretive level, arguing for a strict application of s. 15 to strike down any and all democratic decisions which fail to adequately account for the interests of minority groups. I discuss the implications of this apparent paradox in my critique of democratic theories of legal description in s. IV below.

Secondly, the specificity of 6(4) and 15(2) suggests that the Charter speaks to us here in a way antithetical to democratic valuations of the contingency and fluidity of democratic
choice. Section 6(4) does not suggest that mobility rights can be abrogated in the name of preserving local culture or in aid of any value suggested by the “traditions, conventions, and expectations” of the people of a given province. It limits such decisions to those which improve the lot of the socially and economically disadvantaged. Nor does s. 15(2) seem to suggest a valuation of democratic decision making in all its contingent glory. It limits the guarantee of equality not in the name of any democratic decision by Canadian legislatures but on behalf of a narrowly defined democratic exception to the principle of equality — again, laws which enhance the well-being of disadvantaged individuals and groups. The character of these limitations suggests that their rationale is not democracy per se but rather a concern for the identifiably disadvantaged. This in turn suggests that 6(4) and 15(2) are invocations of what one would take as the sort of substantive constitutional value which democrats both reject and identify with rights liberalism rather than with their own more open and contingent ideal of public decision making.

The final saving provision of the Charter upon which Monahan’s democratic characterization of the document relies is s. 1. Monahan argues that:

... s. 1 is surely an indication of the centrality of democratic ideals under the Charter. Section 1 indicates that the ultimate criteria to guide courts in their resolution of constitutional claims is the idea of democracy.

(Monahan, 1987: 118)

The reasonable limits clause is perhaps the saving provision most strongly supportive of Monahan’s claims about the Charter. Unlike ss. 6(4) and 15(2), it speaks in broad rather than narrow terms — potentially suggesting therefore broad rather than narrow restrictions on the rights it governs. And, unlike s. 33, its interpretive implications in this regard are relatively unambiguous; it mandates in clear words democratic limitations on the Charter’s rights. What is more, the interpretive prescriptions of s. 1 apply to all the rights of the Charter. Given its central importance, it would perhaps be reasonable to conclude then that to the extent s. 1 can be said to be understandable in the terms Monahan urges, it would indeed be persuasive evidence that the Charter directs us toward a soft and democratic reading of the document’s rights guarantees rather than the harder reading a rights liberal characterization would suggest.

The central objection to Monahan’s conclusion that s. 1 directs us toward a primarily
democratic reading of the *Charter* is that the provision appears to embrace more than just democracy in its delineation of reasonable limits:

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 *Charter* sets out as its ideal not just a democratic society, but a free one as well. Does this not suggest perhaps then that something other than democracy alone -- the value of freedom -- must needs be accounted for in judicial readings of the *Charter*?

Two possible responses to this question suggest themselves. The first might be an argument that the words 'free' and "democratic" here are philosophically synonymous or at least highly coordinate. This is Monahan's position, as his adoption of Hannah Arendt's assimilation of democracy and freedom suggests:

Instead of continuing to view freedom as protection for our private lives, Arendt and others urge us to recapture a forgotten, alternative vision of the idea; freedom as active participation in public decision making.

(Monahan, 1987: 122)

And in support of this reconciliation of the *Charter* and democratic theory, Monahan suggests the validity of this constitutional observation by Chief Justice Brian Dickson:

Democracy is the periodic determination of the common will by the free expression of the genuine and informed will of the individual. There must be freedom of thought, conscience and opinion, or there can be no expression of the genuine will of the individual. There must be freedom of information, assembly and association, or there can be no expression of an informed will of the individual. There must be freedom of speech, or there can be no "expression" of the will of the individual. There must be universal suffrage and free elections, representation by population and required sittings and election of legislative institutions, or there can be no "expression of the common will".

All of the above rights are prerequisites to the proper exercise of democracy.

(Dickson, 1984: 327; quoting the Committee of the Constitution of the Canadian Bar Association)

What Arendt's and Dickson's words here suggest is that democracy and freedom are
understandable as rough equivalents rather than frequently conflicting values. To the extent that this view is a compelling one, it supports Monahan's reading of s. 1 in primarily democratic terms.

But there is another view of the implications of s. 1's references to both freedom and democracy available to us. In this view, the terms are not understood as synonymous, but as invocations of separate values. Seen in this light, s. 1 suggests then that while Charter rights may be subject to limitations in the name of democracy, those limitations must also give acknowledgement to the independent value of freedom as well. This conception of the reasonable limits provision is, I would argue, more consonant than that of the alternative with the overall character of a document such as the Charter. Neither in name nor implication is the Charter most readily made sense of from within democratic terms I would argue. The Constitution Act, 1982 did not bring us a Charter of Democracy, but a Charter of Rights and Freedoms. Constitutional logic would seem to suggest that to the extent the Charter was not simply an exercise in vanity by its prime agents it must be understood as at least an effort to bring to Canadian life something which it did not already have. Canada in fact already had a functioning democracy in 1982; what it did not have was an effective bill of rights.

In making his case for a democratic vision of Charter foundations, Professor Monahan suggests the adoption of Chief Justice Dickson's assimilation of democracy and constitutional rights guarantees in his 1984 speech to the Canadian Bar Association. I think there are perhaps more compelling Dicksonian words available to us in aid of the view from the other side which I am advocating here. In R. v. Oakes ([1986] 1 S.C.R. 103), Dickson held that in the applicative construction of s. 1,

\[\text{Oakes: 136}\]

The vision which Dickson offers us here is one which does indeed speak to
democracy, but not solely so as Monahan’s Charter vision would mandate. Many of the
to the Charter mandates “respect for the inherent dignity of the human person” and
“commitment to social justice and equality”, it is suggestive I would argue of a vision of
constitutional value which is concerned not just with the proceduralist preservation of
democracy and which would therefore be amenable to an understanding of rights in their
soft and limited sense, but with more substantive and non-contingent notions of human
good than democracy seul, or democracy with weak rights can ensure. While Monahan’s
foundational vision of the Charter in democratic terms is not an entirely unsupportable one,
there are I think more plausible and more desirable characterization of the document
available to us.

IV. DEMOCRACY AS A THEORY OF LEGAL DESCRIPTION

Theories of legal description suggest the techniques, strategies, and approaches
appropriately applied to determining the applicative meaning of legal provisions given a
particular theory of constitutional value. As I suggested in the first chapter, in the case of
the Charter these are issues which apply not only in the judicial realm but also at times in
the legislative; the presence of the notwithstanding clause in our rights charter means that
the applicative meaning of the document’s provisions is potentially subject to legislative as
well as judicial reasoning about the proper scope and ambit of rights. Democratic theories
of constitutional value suggest particular approaches to the interpretive application of
Charter rights in both these realms and I therefore offer some consideration of both
possibilities here.

Democracy, Rights, and Judicial Interpretations of the Charter

Two main interpretive directives which I think can be taken as representative of a
democratic orientation at the judicial level to the Charter can be found in the constitutional
prescriptions of Patrick Monahan with which I have already here critically engaged. As
regards the Charter as a whole and most of its provisions, Monahan’s democratic
foundationalism suggests that “expansive interpretations of constitutional limitations are not
necessarily to be preferred to restrictive interpretations” (Monahan, 1987: 118). The
democratic notion that “there should be no set of social or political arrangements arbitrarily
or permanently insulated from democratic debate and argument” (Monahan, 1987: 104)
seems to imply the endorsement in general of more deferential than activist readings of the
 Charter.

I have suggested that the foundational grounds for a democratic characterization of
the Charter are weak and I do not repeat those criticisms here. But the words of a number
of Canadian constitutional scholars suggest that perhaps judicial deference to democratic
decision is not dependent on higher level legitimative or foundational claims about the
Charter of the sort which Monahan advances. Rainer Knopff and F. L. Morton, Peter
Hogg, and constitutional judges like Brian Dickson, Bertha Wilson and Gérard LaForest
and others seem to suggest in various of their works that deference may be a neutral
requirement of good judicial practice rather than a concomitant of more controversial and
substantive claims about constitutional value. Knopff, Morton and Hogg advance arguments
which suggest that the value of judicial neutrality mandates judicial deference. Dickson,
Wilson and LaForest find that prescription in the notion that legislatures are more
competent “balancers” of competing interests than are courts. My argument here is that
these purportedly neutral interpretive level justifications of deference to democracy in fact
constitute an at least implicit endorsement of more controversial higher level constitutional
values and that they are therefore subject to the same sorts of criticisms to which
democratic theory is subject at the legitimative and foundational levels.

The exception to Monahan’s restrictivist interpretive prescriptions for the Charter is
s. 15. He argues for what I take to be an expansive application of the right to equality and
justifies such a reading in the name of the democratic values he associates with the Charter.
My argument here has a modicum of complexity. While I do think that the best reading of
the Charter is one which would mandate an expansive interpretation of s. 15, I do not think
that that reading is one mandated by the sort of democratic foundational reading of the
Charter for which Monahan argues. Thus while it may indeed be desirable in broader moral
terms to apply s. 15 broadly, one would be misled in believing that this reading of s. 15 in the
applicative context proceeds from the purely democratic foundationalism upon which
Monahan understands himself to be relying.
What gives the neutralist argument on behalf of judicial deference to democratic
decision its "neutral" character is its apparent avoidance of judicial entry into the
controversial realm of higher level moral or similarly substantive constitutional theory. One
of its American advocates, Robert Bork, suggests, for example, that "[w]hen constitutional
materials do not clearly specify the value to be preferred, there is no principled way to prefer
any claimed human value to any other" (Bork, 1971: 8). Rather than attempting to deduce or
construct appropriate interpretive values as guides to the applicative meaning of
constitutional rights, the value of judicial neutrality which Bork adopts demands in these
cases simply that courts leave legislative decisions alone (Bork, 1971: 8). The implications of
Bork's and similar arguments is that deferential decisions do not require in the same way
that activist ones do an independent justification. This is a view which seems to assimilate
judicial intervention to trespass on the territory of legitimate government. Such trespasses
can be justified (much as the deliveryman's entry onto our property can be justified by his
errand), but democratic "ownership" of the disputed territory need not be. Deference to
democracy is the default choice rather than one of two at least initially equally possible
alternative requirements of constitutional value.

The notion of interest balancing as justification for judicial deference to democracy
is similarly associated with an avoidance of the endorsement of higher level constitutional
values. The argument in this regard is that is that legislatures are better able than courts to
perceive, assess, and balance the conflicting social demands which underlie many rights
claims. It is differential institutional competence which is here understood as demanding
deferece; the decision is taken to involve only a consideration of which institution — courts
or legislatures — is more qualified to "handle the file".

These conceptions seem to underlie the views of a number of Canadian scholars and
jurists. In the opening pages of The Charter Revolution, Knopff and Morton for example
lament the fact that Canadian "judges have abandoned the deference and self-restraint that
characterized their pre-Charter jurisprudence and become more active players in the
political process" (Knopff and Morton, 2000: 13). Unlike "an earlier, more self-disciplined
generation of judges, a generation steeped in the doctrine of parliamentary supremacy",
contemporary Canadian jurists have "succumb[ed] to the seduction of power" (Knopff and
Morton, 2000: 22). Peter Hogg also makes the case for deference to democracy. In "On
Being a Positivist", for example, he argues for a rejection of the naturalist interpretive doctrine not just because it represents an imposition of values whose authority he finds questionable \textit{in se}, but also more specifically because naturalist readings of rights "... would pose a serious threat to democratic government because it would authorize judges to give legal force to values that had never been authorized by any democratic process" (Hogg, 1991: 417).

Despite the fact that they embrace different theories of constitutional value, Hogg and Knopff and Morton here seem to suggest the same thing: judicial decisions about interpretive practice appropriately begin with a recognition of the overarching legitimacy of the processes of democratic decision making. In this view, then, what must needs be justified in the realm of interpretive practice is not any and all decisions about the proper approach to reading the \textit{Charter}, but decisions which depart from the deferential and democratic norm. Although Knopff and Morton do offer a higher level democratic theory of constitutional value in \textit{The Charter Revolution} (most completely in chapter seven), their arguments at the beginning of the work seem to imply that there are independent justifications for judicial deference in \textit{Charter} decision making. They suggest, for example, that judicial abandonment of deference and self-restraint is akin to the ill-considered abandonment of one's chastity — it is giving in to the "\textit{seduction of power}" rather than making a reasoned judicial choice. And Hogg's invocation of democratic values comes in the course of a set of arguments aimed presumably at denying the validity of reference to notions of moral legitimacy in the process of legal interpretation — his article is, after all, entitled "On Being a Positivist".  

What these views imply, then, is that democratically-oriented deferential interpretive practice is justifiable not in reference to a comprehensive theory of constitutional value, but at the lower level and in the name of the less controversial value of judicial neutrality.

And while Knopff and Morton lament the decline of judicial deference under the \textit{Charter}, there is reason to believe that the death of this judicial orientation has been greatly exaggerated. A number of post-\textit{Oakes} cases seem to suggest that the non-deferentialist \textit{Oakes} standard of judicial review which I lauded in the previous section as a vindication of the stricter rights liberal reading of the \textit{Charter} may be \textit{too} strict in regard to \textit{Charter} claims outside the realm of the criminal justice system. Supreme Court justices like Dickson,
Wilson, and LaForest have argued in important cases that courts appropriately defer to legislatures when rights claims are raised in the face of legislation which affects multiple social interests. The notion here is that legislatures are more institutionally capable than courts of assessing and balancing the conflicting social demands which are involved in legislation in the field of social policy.

Chief Justice Dickson himself — the author of *Oakes* — held for the majority (which included Justices Wilson and Lamer) in *Irwin Toy Ltd. v. Quebec (A.G.)* ([1989] 1 S.C.R. 927)\(^\text{11}\), for example, that

> [w]hen striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

*(Irwin: 993)*

In dissent in *RJR-MacDonald v. Canada (Attorney General)* ([1995] 3 S.C.R. 199)\(^\text{12}\), Justice LaForest (writing for himself and Justices Gonthier and L'Heureux-Dubé) elaborates on this notion:

> Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups.

*(RJR-MacDonald: 277)*

Both Dickson’s and LaForest’s judgments invoke the notion of institutional competence and both seem to imply that the decision to defer to the legislature requires only an interpretive level decision about what institution should handle the file. Like Bork, Hogg, Knopff and Morton, these constitutional judges appear to proceed from the premise
that the deference decision does not necessitate the substantive consideration of a higher level theory of constitutional or social value.

The difficulty with such views is that the judicial disposition to deference is not I would argue reasonably understandable in neutral terms. At the most basic level, the idea that we begin with an acknowledgement of the overarching legitimacy of democratic processes and need only justify departures therefrom would seem an at least implicit endorsement of the sorts of legitimative claims about democratic value which I reviewed at the beginning of this chapter. It suggests that the only proper source of public values is our legislatures and the majorities who guide them and that courts act inappropriately when they seek constitutional guidance in other sources. Yet as I hope my arguments in this chapter have indicated, that notion of constitutional value is not uncontroversial nor need it be taken as a given; it depends on the adoption of some particular and substantive claims about human nature, social value, and democratic possibility and the rejection of other viable alternative values and theories of public good. While there are arguments to be made in favour of such a choice, neutralist notions of deference to democracy proceed as if no such choice was involved and no such arguments were required.

Some thought must also be given to the larger interpretive consequences of the deferentialist theory of judicial review. By its very nature, a deferential approach to the interpretation and application of constitutional rights is likely to be productive of a considerably different regime of rights than a more activist one. The alternatives are apparent in a consideration of the two very different outcomes in two similar equality cases — the deferentialist *Egan v. Canada* ([1995] 2 S.C.R. 513), and the more activist *M. v H.* ([1999] 2 S.C.R. 3). In *Egan*, the Supreme Court rejected the claim of homosexual Michael Egan that the federal *Old Age Pension Act* contravened s. 15 in its failure to provide conjugal benefits for homosexual couples even though it provided them for unmarried heterosexual couples. Justice LaForest, writing for four of *Egan*'s five judge majority, held among other things that the legislation was a legitimate expression of Parliament’s desire “to accord support to married couples who were aged and elderly, and this for the advancement of public policy central to society” (*Egan*: 535). In *M. v. H.* ([1999] 2 S.C.R. 3) concerned a lesbian couple whose relationship had broken down. “M” sought the aid of the Ontario *Family Law Act* in her request for post-relationship support from “H”, but was unsuccessful because the law
applied only to heterosexual couples (married and unmarried). A majority of the Court ruled that the failure of the Family Law Act to provide protection to homosexual as well as heterosexual couples contravened s. 15. Denying the government's s. 1 defence, Justices Peter Cory and Frank Iacobucci (for themselves and four others) rejected a deferentialist approach in *M. v. H* and warned against too broad a reliance on that approach to the Charter in general: "[t]he notion of judicial deference to legislative choices should not . . . be used to completely immunize certain kinds of legislative decisions from Charter scrutiny" (*M. v. H.*, 60; citing Cory J. in *Vriend v. Canada*, 530).

What Egan and the deferentialist approach in general suggests is that rulings like that in *M. v. H* in which cause is found to reject legislative decisions about important matters of public value are likely to be exceptions to the interpretive rule rather than something to be expected as a matter of normal practice. Whether one finds this desirable or not (and certainly democratic theories of constitutional legitimacy would seem to ratify the notion that judicial intervention ought to be an exceptional occurrence), it seems clear that licencing such consequences requires reliance on some larger picture of the point and purpose of rights and the relative value of democracy in that equation than can be provided by the value of "judicial neutrality" alone.

Interestingly, the *Irwin* and *RJR-MacDonald* "balancing" decisions can potentially be read as implying the rejection of these sorts of arguments. The characterization of democratic decision making offered by Dickson and LaForest in those cases seems to suggest that the deference decision may not implicate courts in the sort of higher level constitutional theory necessary to justify deferential consequences as I claim it does because there are no readily identifiable consequences which follow from that approach. In describing the legislative process in regard to the sorts of laws covered in *Irwin* and *RJR*, both Dickson and LaForest suggest that what is involved is "striking a balance", "assess[ing] conflicting scientific evidence", and "mediat[ing] between competing social interests". What these characterizations seem to suggest is that legislatures perform roughly the same chores in the determinations of the parameters of public policy as do constitutional courts—they balance, mediate, assess evidence. Given the superior access to the "necessary institutional resources" for this task, the decision to leave the job in the hands of the legislatures would seem a reasonable one. Judicial deference to legislative decision making
in this view is neutral because legislative decision making itself is given an air of neutrality.

The objection to this theory however is that it relies on what would seem to be a questionable view of legislative reality. Is legislative decision making really simply a matter of “mediation” or the “assessment of scientific evidence” or are some quite different, less neutral processes of evaluation its norms? What is more, even if we accept the judicial characterization of legislative decision in these instances as a “balancing”, it merits noting that we might expect in no small number of cases the balances legislatures strike to differ from those which courts or other observers might have found appropriate in the same instance. Democratic decisions about competing social interests take place in the context of a system which gives considerable incentive to decision-makers to balance, assess, and mediate in a way which privileges the interests of the majority, the socially powerful, and the popular. It is necessary therefore I would argue to qualify the characterization in *Irwin* and *RJR* of legislatures as “balancers”. One would expect that balances struck on the legislative scale will be likely more often than not to favour majoritarian rather than more independent conceptions of public value. The description of legislative decision making offered by Dickson and LaForest obscures that reality.

Of course, democratic political theory implies that there should be little objection to majoritarianist balances: for the most part it suggests that this is precisely what we do want. The contrary argument is that the purpose of rights and judicial review is to protect and preserve the interests of exactly those who do not tip the democratic scales. *Both* arguments are controversial. The problem with the notion of deference as neutrality and with the understanding of legislatures as “balancers” of competing social interests is that it elides this reality. Constitutional courts cannot simply adopt the notion of limited judicial review or invoke the institutional competence of legislatures in such matters; they need also to address and consider arguments about the *sorts* of decisions which the alternative institutions of court and legislature are likely to make. Their choices about these issues *do* require a consideration of the larger legitimative and foundational questions which the neutralist conception of deference to democracy fails to address.

The final democratically-oriented judicial prescription for the *Charter* which I address here is neither deferential nor premised on an agnosticism about higher level legitimative theory. It is Patrick Monahan’s vision of the meaning and application of the
Charter's equality provision, s. 15. Contrary to his more general preference for narrower rather than broader interpretations of Charter rights, Monahan's interpretive prescription for s. 15 suggests what can be taken as a broad view of the equality provision, one likely to mandate relatively frequent judicial rejection of democratic decisions. His argument is this:

... the norm of equality is designed to take account of the fact that certain groups and individuals possess unequal access to the political system. Despite guarantees of formal access, certain groups may nevertheless come to enjoy a de facto monopoly over state power, leading to the exclusion of certain minorities from effective participation in the system. The equality norm is an attempt to counter the presence of these systematic, but subtle, defects in the process. It claims that it is appropriate for the judiciary to subject decisions reached through such a tainted process to a heightened standard of review.

(Monahan, 1987: 129)

Besides his explicit description of his standard as a "heightened" one, there are other indicators which suggest that Monahan has in mind a broad understanding and application of s. 15

First, his conception of who qualifies for s. 15 protection is broad. The standard of effective participation is a qualitative, and, as Monahan says, subtle, one which would seem appropriately understood by constitutional judges to apply to much of society. It is to be invoked not just when claiming groups have been impeded in or prohibited from accessing the ballot box, but when groups have been unable to make effective use of their franchise. Monahan suggests, for example, that women, despite being a numerical majority at the polls, are a group who meet the standard, because they are under-represented in our legislatures. So too do groups who have "historically been denied equal access to the political system" (Monahan, 1987: 131, emphasis added) as well as those whose lack of access is a current problem.

Secondly, Monahan advances his standard in part in rejection of a narrower democratic alternative that seems quite cogent and to which we might have expected him to have some affinity. John Hart Ely's Democracy and Distrust provides much of the intellectual framework upon which Monahan's Politics and the Constitution is built. Yet Monahan explicitly rejects Ely's democratic theory of constitutional guarantees of equality, in part it would seem because the interpretive standard it mandates would too infrequently direct
courts to overturn challenged legislation.

Ely's democratic reading of the XIVth Amendment's guarantee of equality leads him to suggest that what the provision bars is not inegalitarian legislation per se, but inegalitarian legislation which has been passed from motives of "prejudice". Not all legislation in which disadvantaged groups fare poorly should be understood as forbidden, but only that which "treat[s] a group worse not in the service of some overriding social goal but largely for the sake of disadvantaging its members" (Ely, 1980: 153). The sense of Ely's arguments is this. If the justification for democracy is its ability to maximize the satisfaction of social interests (one of the principal arguments that Canadian democrats invoke on its behalf), then we would expect in the normal course that much democratic legislation would satisfy majority interests even when that has the consequence of failing to satisfy particular minority interests. (As Christopher Manfredi has noted, '[t]o be sure, any particular outcome of the legislative process will give one interest (or set of interests) more of what it wants than it gives others..." (Manfredi, 2001: 198)). At the same time, however, if democracy is about the satisfaction of social interests, legislation which has as its goal not the satisfaction of majorities but the dissatisfaction of minorities would seem to run counter to the requisite norms. If our goal is realizing the values of an effectively functioning democracy as Ely's constitutional theory suggests it ought be, then the XIVth Amendment is appropriately understood as a means of ensuring what we would expect fair democratic processes to produce. Inegalitarianism per se is not ruled out since we might expect a fairly functioning democracy to produce disparately optimal legislative outputs. Prejudice is ruled out, though, since its effect is to reduce rather than increase the optimality of governmental decisions.

But Monahan rejects the prejudice model of democratic equality. He suggests that Ely's standard is a problematic one because it requires courts to engage in the obviously difficult task of inquiring "into the motives behind legislation" and because "[t]here seem to be relatively few public policy choices which inflict harm 'for its own sake'" (Monahan, 1987: 127). In Monahan's view,

[the absence of equal access has this important implication: it does not matter whether the discriminatory legislation was enacted out of a simple preference for the interests of the majority over the minority, or whether it was motivated by "prejudice". In either event, the legislation is the tainted fruit of a tainted process. The disadvantaged minority did not have an equal voice in the process and for this reason it is illegitimate
for the majority to have disregarded the minority’s interests.
(Monahan, 1987: 131)

In these statements, the outline of Monahan’s s. 15 theory becomes clear. What he seems to have in mind is a conception of the provision as a broad prohibition on legislation which runs counter to the interests of disadvantaged groups which lack qualitatively effective access to the political process. We might call this, in contrast to Ely’s “prejudice” standard, an “egalitarianism” standard. Where Ely’s democratic reading of the XIVth Amendment suggests that prejudicial legislation is forbidden, Monahan’s democratic reading of s. 15 suggests that our target must be inequality itself (at least as it affects “discrete and insular minorities”). Posed in the form of an interpretive question, the egalitarianism standard can be taken to direct courts to ask roughly, “is the law inegalitarian in that a disadvantaged minority does less well as a consequence of the legislation than does the social majority?” Presumably legislation which invites the affirmative response is under such a standard appropriately struck down.

This is a broad and certainly initially appealing standard. Indeed, as a reading between the lines of my arguments throughout this work would suggest, Monahan’s expansive and ambitious conception of the meaning and purpose of s. 15 might be thought to have at least a rough affinity with that suggested by my own constitutional philosophy. Nonetheless, I think there is an important problem with Monahan’s s. 15 theory. What suggests this critical response is not that his egalitarianism standard is wrong, but that it seems not to follow from his own legitimative and foundational premises. It is a broad and appealing standard, but there is some question as to whether it is in fact a democratic one.

One would think, for example, to the extent that the notion of “democracy” has any core and indisputable content it must be associated with a fairly significant valuation of majority rule. Yet what then are we to make of Monahan’s assertion that in consideration of the applicability of s. 15 “it does not matter whether . . . discriminatory legislation was enacted out of a simple preference for the interests of the majority over the minority”? I would have thought that if democracy was our fundamental constitutional value this would matter very much indeed. I have suggested that Ely’s prejudice criterion which Monahan rejects is a sensible one from the democratic perspective and it seems more sensible here if democracy is our starting point than does Monahan’s egalitarianism standard. It can be
seen quite readily I think how democratic norms can be taken as ruling out on inequality grounds legislation which is aimed at thwarting minority interests; it is considerably more difficult to see how those norms can be taken as mandating the disqualification of legislation which reflects what democratic theories of value would suggest are legitimately self-regarding majority preferences.

The general thrust of Monahan's interpretive vision of s. 15 seems to be that contraventions of the provision are identified simply when legislation is inegalitarian. This notion also seems difficult to reconcile with the democratic starting points for which he argues. Monahan rejects, for example, the notion that the purpose of judicial review is to seek “right answers from the political process” (Monahan, 1987: 99). Indeed, like other democrats, he seems to reject the notion that there are “right answers” to be found. Echoing Michael Walzer, Monahan suggests that the merit of democracy is that it

\[\ldots\] values the process whereby citizens define their own traditions, conventions and expectations as opposed to seeking to emulate the choices of the inhabitants of some ideal or hypothetical world.

(Monahan, 1987: 105 - 6)

Yet surely the notion that inegalitarian legislation is unconstitutional legislation must suggest to us that there is a right answer to be found. Discriminatory legislation is the “tainted fruit of a tainted process” Monahan argues, but his interpretive approach suggests seeking the taint not in a consideration of whether the legislation is an inaccurate picture of honest majority interests or whether it embodies something other than the traditions, conventions and expectations of our society, but in the simple fact of its failure to treat minorities equally. If there are no right answers or if the answers we seek are to be found in the democratic process and the traditions of our society, then it is difficult to see from whence comes the apparently idealistic standard Monahan adopts.

Nor is Ely's standard the only alternative which Monahan might have considered. If our value is our local traditions, conventions and expectations as Monahan's constitutional theory suggests it ought to be, we might envision, for example a s. 15 standard which takes its guidance from broader social norms. Justice Gérard LaForest seemed to have a standard of this sort in mind in his 1995 decision in the *Egan v. Canada* case I earlier discussed. LaForest's reasoning in *Egan* suggests that in considering whether homosexual unions are
constitutionally or morally equivalent to heterosexual marriages, the Court might appropriately seek guidance in some deeper social norms. He held that

> marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.

*(Egan: 536)*

In *Democracy's Discontent*, Michael Sandel argues for a similar conception of judicial review in the name of his version of deliberative democracy. In illustrating his vision of democratically-oriented constitutional decision making, Sandel considers the 1986 United States Supreme Court decision in *Bowers v. Hardwick* (478 U.S. 186). There, homosexual Michael Hardwick challenged the constitutionality of a Georgia anti-sodomy law under which he had been charged. While Sandel agrees with the holding of the dissenting judgment of the Supreme Court's Hardwick liberals who would have struck down the law, he suggests that they might have taken a perhaps more compelling approach in their interpretation of their constitutional mandate in this case had they relied on something other than liberal, voluntarist notions of human good (that is, on the argument that decisions about sexual matters are protected from state intrusions in the name of the value of personal autonomy).

Sandel argues that the Court might have better sought guidance in a reference to larger social norms such as those associated with the institution of heterosexual marriage. In their 1965 *Griswold v. Connecticut* decision (381 U.S. 479), for example, the U. S. Supreme Court held that the intimacies of marital relations were not appropriately subject to state regulation, imbuing marriage with a constitutional “right to privacy”. Unlike LaForest in *Egan*, Sandel concludes that the norm of heterosexual marriage can be analogized so as to bring within its protection the homosexuals who seem to have been the target of the impugned Georgia statute. This social norm which Sandel advocates in place of the
voluntarist liberal alternative

... claims that much that is valuable in conventional marriage is also present in homosexual unions. On this view, the connection between heterosexual and homosexual relations is not that both are the products of individual choice but that both realize important human goods. Instead of relying on autonomy alone, this second line of reply articulates the virtues that homosexual intimacy may share with heterosexual intimacy, as well as any distinctive virtues of its own. It defends homosexual privacy in the way Griswold defended marital privacy, by arguing that like marriage, homosexual union may also be 'intimate to the degree of being sacred ... a harmony in living ... a bilateral loyalty,' an association for a 'noble purpose'.

(Sandel, 1996: 104)

While I think that Sandel's construction of the mandate of his society's traditions, conventions and expectations in this matter is more than a little strained (i.e., not a realistic conclusion about what an accurate reading of those traditions would in fact seem to dictate - upholding the Georgia law¹⁴), it does, like LaForest's probably more realistic reading of the implication of social values in Egan, suggest what seems to be a more democratic conception of the constitutional right to equality than that offered by Monahan's egalitarianism standard.

I think the difficulty Monahan would be likely to have with the traditions standard suggested here is much the same as he seems to have with Ely's prejudice standard. It is not that either alternative is undemocratic; I would suggest that both acknowledge to a considerably greater degree than does Monahan's simple egalitarianism standard the sorts of values he urges upon us in the name of democracy. The difficulty is rather that they mandate narrow standards which are far less apt to direct courts to overturn inequalitarian legislation than Monahan's broader standard and therefore likely to ill serve the discrete and insular minorities whose interests evidently (and rightly) concern him. Yet if our value is the local traditions, conventions and expectations of our society or the processes of a system of decision making which seeks guidance in majority preferences, surely we cannot be surprised nor do we seem to have very substantive grounds to demur when those traditions and processes produce something less than the ideal.

The problem with Professor Monahan's formulation of s. 15 is that it asserts a universalist standard — egalitarianism for discrete and insular minorities — in the name of democratic localism. But if we wish to invoke s. 15 against legislation simply because it is
inegalitarian in its adoption of measures which result in harm to discrete and insular minorities, it is difficult to see how we can do so via a *democratic* reading of the provision. The implication of my arguments is, as the old cliche has it, that Monahan wants to have his cake here and eat it too. His interpretive vision of s. 15 seems not to follow from the higher level legitimative and foundational claims he makes in regard to the *Charter*. But it is in great part because there are *interpretive* consequences to such claims that critical consideration of these matters is worthwhile. One must either accept the consequences of one's premises or abandon the premises themselves.

*Democracy, Rights, and the Notwithstanding Clause*

The presence of the notwithstanding clause provides Canadian legislatures with the power to pass or preserve legislation which would otherwise be struck down under ss. 2 and 7 to 15 of the *Charter*. Unlike other *Charter* provisions, little about s. 33 requires finely nuanced judicial consideration: it is (to use a phrase Pierre Trudeau applied in a different context) a "constitutional escape hatch" which legislatures can open with little difficulty. Its presence means that the meaning and ambit of the *Charter* rights it applies to are at least potentially a matter not just for judicial but for legislative consideration as well. Given the practical possibilities for section 33 override of many *Charter* rights, the question of what legal rights potential claimants can understand themselves as having in Canada may depend at times as much on how legislators and the public respond to the *Charter* regime as it does on courts' interpretations of the document. And it is easy to see how s. 33 figures in *democratic* considerations of *Charter* value. Its presence suggests that the means for salvaging the values of democratic life which democrats see the *Charter* as imperilling may be found in the document itself. Among those who have argued for its more frequent and widespread invocation are Rainer Knopff and F. L. Morton, Michael Mandel, Christopher Manfredi, Peter Lougheed, and Scott Reid.\(^{15}\)

Two main visions of s. 33's role predominate in democratic discussion of the notwithstanding clause. The first envisions the provision as appropriately applied in a way which directly licences the democratic veto of *Charter* rights. Scott Reid's *Penumbras for the People* emblematizes this perspective, as Reid argues for the use of the notwithstanding clause through direct "referenda to ratify or veto the *Charter* interpretations
of the Supreme Court" (Reid, 1996: 204). The second democratic visions of the role of s. 33 suggests a somewhat subtler and more indirect approach to its use in aid of democratic values. Christopher Manfredi argues for a legislative use of the notwithstanding clause (which is indeed what the provision in its current form mandates) proceeding from an understanding not that s. 33 “authorizes legislatures to override rights per se, but to override the judicial interpretation of what constitutes a reasonable balance between competing rights” (Manfredi, 2001: 191). What he is arguing for in effect is a conception of the notwithstanding clause as a tool by which legislatures might substitute their own considered judgments about the appropriate scope and meaning of the Charter’s rights for those of unelected courts, a means by which to ensure that the rights are given a public and democratic rather than judicial and elitist interpretation.

The difficulty with Reid’s vision and with other conceptions of s. 33 as a broad democratic veto is one which I have alluded to throughout this chapter — the danger of majority tyranny. A reliance on direct public decision making about the Charter is likely to produce a regime of rights which will fail to give due respect to individual and minority well being. This is a criticism which Christopher Manfredi himself raises in aid of his own more constrained conception of s. 33:

... the use of referenda to invoke section 33 may reinforce the notion that the sole rationale for limiting rights is force of numbers. Thus, rather than vindicate democracy, section 33 referenda might perpetuate the perception of majority tyranny that fuels the growth of judicial supremacy.

(Manfredi, 2001: 191)

What then of the subtler and less direct vision of the use of the notwithstanding clause which Manfredi offers? It is premised on the notion that majority tyranny is a danger and acknowledges a role for rights in its understanding that legislatures might deliberate about and apply the notwithstanding clause not so as to veto their application but in aid of their construction. Like other aggregative democrats, Manfredi believes that representative democracy offers a means of tempering majority tyranny. The problem with this notion of democratic possibility, I would argue, is that it relies too heavily on the distinction it draws between the general public and those they elect to serve their interests. While I think it true that legislators by necessity have a larger agenda than do individual citizens and interest
groups, I think Manfredi may be exaggerating the extent to which this is likely to be productive of protections of individual value. Individuals do not necessarily weigh heavily when considering “what constitutes a reasonable balance between competing rights”. Nor do they weigh heavily in the democratic incentive structure, which rewards political representatives who please majorities. Legislators rely on public support and this would seem to suggest a disincentive to becoming too philosophical or disconnected from the “common sense of the common people” in their consideration of Charter rights.

Even if we accept legislators’ ability to disregard the dynamic of what Manfredi’s fellow democrat Patrick Monahan has called the model of political rationality, it is still not apparent that we ought to expect legislative decisions about rights to differ greatly from those of the general public. Legislators presumably represent or reflect public values not only by dint of the incentive system but also because they sincerely share the same value system as those who elect them. Is there reason to think that the personal values or moral intuition of the average legislator differs significantly from that of the majority of his constituents? If it does not, it is difficult to see how a legislative treatment of rights would be expected to differ from that provided by Reid’s more directly democratic alternative which Manfredi rejects.

What is more, these are problems which would seem exacerbated rather than mitigated by the nature of legislative reasoning. Manfredi’s vision of s. 33 suggests its use in the name of rights, as a means by which to enable legislatures to take a hand in their interpretive application. This in turn suggests that in the process of legislative decision making the sorts of questions representatives might be expected to consider are “when is it appropriate to act in contravention of individual rights?”, “what is the meaning and purpose of guarantees of freedom of expression or equality or conscience in a society like ours?” and the like. These sorts of questions direct consideration of philosophical possibility which might be expected to produce answers that do not always depend solely on legislator’s pre-existing values or those of their constituents. But is it reasonable to believe that questions like this are the general stuff of legislative decision making? Like Dickson, Wilson, and LaForest, Manfredi seems to have a rather elevated conception of political discourse, one which assimilates it to judicial practice. I have suggested that this may not be an entirely realistic expectation. That is not to say that legislative debate is in all cases intellectually or
philosophically or morally barren, but to point out that these are not necessarily its norms nor would we expect them to be given the underlying incentive structure in play. Unless we have reason to believe that legislatures are likely to act even in hard cases as we expect (or can mandate) constitutional courts to, the notion that the notwithstanding clause will be used as a tool of rights interpretation rather than an expression of majority preferences is implausible. If we are concerned about the dangers of majority tyranny as Manfredi seems to be, the legislature would seem a pretty thin barrier to that peril.

Unfortunately, Manfredi has chosen tempting but difficult middle ground to defend in his advocacy of the use of the notwithstanding clause in the name of democracy and rights. Presumably to the extent that we recognize the necessity or desirability of rights as rights, we do so because we doubt the abilities of the democratic process to recognize in at least some important instances the sorts of individual values they are designed to protect. Yet surely then this skepticism about democratic processes must extend to the same democratic processes by which the use of the notwithstanding clause is determined. In fact, use of s. 33 is generally contemplated at the very times when a rights claimant has succeeded in the not always easy task of convincing a court that the legislature has not given fair recognition to an important individual value. What Manfredi’s theory of s. 33 suggests is that in those very instances legislatures will return to the drawing board, give renewed consideration to the individual value at stake, and give in good faith a real consideration to the possibility of recognizing the value before they opt to notwithstanding. This may indeed occur at times. Yet it is not unreasonable to think that the reality of human life and democratic politics is such that there are likely to be many occasions in which it will not.

If rights are to be valuable, one would think that they must be understood at least in part as presumptions against ourselves; that is, as values which direct us as a society to be wary of what our own self-interests or collective conventional wisdom would direct us to do. Yet the democratic theory which I have discussed in this chapter and which seems to underlie Manfredi’s advocacy of the notwithstanding clause offers little critical purchase for the presumption against ourselves. It suggests that rights are simply interests by another name, that there are as a consequence “no right answers”, and that the proper source of our public values is our collective will. These notions seem, despite the efforts of democrats like Christopher Manfredi and Patrick Monahan difficult to reconcile with a real respect for
V. DEMOCRACY AS CHARTER THEORY

I began this chapter with a discussion of democratic conceptions of the source and nature of public values. Canadian democrats are highly skeptical about the existence or discernibility of a broad realm of objective social truths. This view underlies their rejection of the liberal vision of rights in the strong sense and their advocacy of what they understand as a better model of social order; one in which democracy reigns and through collective processes of decision citizens are free to map out together the sort of society in which they wish to live. Two main motifs of democratic thought embracing these claims are evident in the works of the Canadian democrats I have explored here. The aggregative model of democracy suggests that we do not need strong rights because the aggregating processes of democracy produce social policies which are fair market reflections of the various weights of conflicting social interests. The deliberative model suggests that we do not need strong rights because the practice of democratic life contributes to the realization and production of a communality and social solidarity more productive of social well-being than rights liberalism. I argued that the aggregative market model was subject to the same criticisms which are often directed at the economic market. Like the economic market, the democratic market is not always “fair” even on its own terms. Even when it is, it is productive of maximal aggregated public good; endorsement of this as our goal implies a condemnable utilitarian disregard for how public goods are distributed to individuals and minorities. I also argued that the deliberative model of democracy was too optimistic about democratic possibility: the nature of social disagreement, democratic history, and even the mechanisms of democratic practice all belie the notion that we can rely on democracy seu if our goal is communality and mutual concern.

While most democrats understand the Charter as a rejection of the vision of social value they proclaim, Patrick Monahan argues that “the best interpretation of the Charter is one which sees it as a reflection and a reinforcement of democratic ideals rather than as a negation of those ideas” (Monahan, 1987: 118). I argued that Monahan’s foundational conception of the Charter was not compelling; the document speaks substantively rather than procedurally and its text and structure suggest interpretation in favour of rights in their hard, rights liberal, sense rather than in the soft terms more amenable to democratic
theories of constitutional value.

In the section just concluded I offered a critical view of a number of democratic theories of legal description. I argued that neutralist theories of deference to democracy constitute an at least implicit endorsement of more controversial higher level constitutional values and that they were therefore subject to the same sorts of criticisms to which democratic theory is subject at the legitimative and foundational levels. Monahan's non-deferential reading of s. 15 as a broad guarantee of equality for discrete and insular minorities was criticized on the grounds that it was not in fact the sort of reading of the Charter's equality provision which the democratic theory of Charter foundationalism he argues for would support. And I argued that Christopher Manfredi's argument for greater use of the notwithstanding clause in the name of democracy and rights was problematic. It relies on the belief that legislatures seeking to invoke s. 33 will use it as a tool to substitute their own considered judgments about the appropriate scope and meaning of the Charter's rights for those of unelected courts rather than as a simple majoritarian veto. I suggested that this view was unrealistic.

My criticism of the democratic theory of constitutional value in this chapter has been in great part on the grounds that its understanding of the plasticity, reconstructability, and contingency of all standards of public value is problematic. I have suggested that the adoption of this sort of view by our constitutional judges is likely to contribute to the production of a social order which enshrines majoritarian and therefore potentially oppressive conceptions of public value. For society as a whole, the democratic conception of public value is objectionable because it diverts us away from rather than directing us toward the philosophically and morally desirable disposition to a presumption against our own self-interests and conventional collective wisdom in our consideration of public choices. And for democrats themselves, the adoption of the notion that all values are contingent is potentially self-contradictory since their own visions of public good seem to embody much that is not for them contingent. Both the deliberative and aggregative ideals suggest the importance of respect for individuals, yet democratic modalities of values identification under-realize this value. In the next chapter, I offer a consideration of communitarian responses to the Charter which are more unflinching in their commitment to real and mandatory standards of public value — those of Canadian cultural communities.
Notes

1 Among other Charter commentators whose work suggests a significant or primary valuation of democracy are Joel Bakan, Keith Banting and Richard Simeon, Scott Reid, and Peter Hogg. In *Just Words*, Bakan argues, for example, that desirable social progress has come more often from democratic legislatures than the judicial arena and we ought therefore expect social justice to come from democratic processes rather than through our rights charter (Bakan, 1997: 38). Banting and Simeon's 1983 evaluation of the *Charter* in *And No One Cheered* dubs the *Constitution Act, 1982* something of a dud because it failed to respond to significant Canadian problems -- federalism and democracy are the issues they see as central (rather than perhaps concerns about individual well-being in the face of state power, a problem rights advocates might argue to be at least as significant). Reid argues in "Penumbras for the People" for a more expansive use of the notwithstanding clause in the name of democracy (Reid, 1996). While Peter Hogg is a self-avowed positivist, his Charter theory at times seems to suggest that his legitimative standards may be more idealistic and democratically-oriented than his positivist credentials would imply. He argues for example in "On Being a Positivist" that the adoption of a natural law perspective by the judiciary "would pose a serious threat to democratic government because it would authorize judges to give legal force to values that had never been approved by any democratic process" (Hogg, 1991: 417).

2 Hotelling analogized the self-location of political parties in the middle of the spectrum to competing grocery stores in small towns. Invariably, Hotelling observed, the economic benefits of a centralized location (which minimizes the average distance shoppers in the town have to travel to reach the store's premises) led to the location of *both* major stores in such towns at their very centre, usually right across the street from each other (Hotelling, 1929).

3 For an example of a Charter case concerning this issue, see *Rodriguez v. British Columbia* ([1993] 3 S.C.R. 519) in which the Criminal Code's prohibition on assisted suicide was challenged by Sue Rodriguez, an individual who wished when her progressively worsening paralysis ended her ability to function for herself to be able to end her life with the assistance of a physician. While Rodriguez was a member of what might be considered a "discrete and insular minority" (the physically disabled), the interest she sought to secure is one which not all physically disabled would endorse nor is it one which only the physically disabled might desire to secure. For those reasons I would suggest that it is not one which could readily be secured through the protection of discrete and insular minorities.

4 Bruce Ackerman has argued in "Beyond *Carolene Products*" that the "discrete and insular" formula is problematic because it fails to recognize the interests of minorities which are "anonymous and diffuse" (Ackerman, 1985: 724). (It is the Supreme Court's *United States v. Carolene Products* (304 U.S. 144 (1938)) decision from which John Ely takes his inspiration in his advocacy of the "discrete and insular" standard). Ackerman has in mind small minorities which lack group solidarity. Black Americans represent a "discrete and insular" group, Ackerman points out; homosexuals, one which is anonymous and diffuse. Ackerman's apt critique is of the ability of the discrete and insular standard to protect small and private groups. My focus here is on another element of the problem -- the protection of individual interests which do not readily attach to defineable groups at all.

5 Michael Mandel suggests, for example, that "... though defenders of the Charter always extol it as a remedy for the socially weak against majority rule, it is the socially strong who have more to gain by opposing the egalitarianism of the rule of the majority" (Mandel, 1994: 69).

6 Neal Pierce, one of Proposition 13's critics, notes a number of the consequences of this
democratic California choice, none of which seem consonant with the halcyonic visions of deliberative democracy's promise proclaimed by socially conscious Canadian democrats like Mandel and Hutchinson:

Under 13, long-term homeowners (overwhelmingly older, Anglo and middle-class) enjoy a near-tax holiday, while recent buyers (including younger people, most Latinos and other minorities) pay taxes several times as high. Far-sighted policy for tomorrow's California would do just the opposite: encourage younger people and minorities in particular to become part of a stable, home-owning middle class. Or take education: Before 13, California was 10% above the national average in spending per school pupil; now it's 20% behind, with results to match.

(Peirce, 1998: 1)

7 Discussions of a number of historical oppressions and inequities in Canadian life can be found in F. R. Scott's "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms" (Scott, 1977[1949]) and Thomas Berger's Fragile Freedoms: Human Rights and Dissent in Canada (Berger, 1982).

8 See, for example, Allan Hutchinson and Andrew Petter, who argue in "Private Rights/Public Wrongs" that "[t]he platform on which the Charter is built is attached to nothing; it hurtles through the Arbuthnotian void, giving the appearance of support only to those who are perched precariously upon it and falling at the same rate of speed (Hutchinson and Petter, 1988: 279).

9 The Fifth Amendment guarantees that private property shall not be "taken for public use without just compensation". Article 1, s. 10 declares that "no state shall . . . pass any . . . Law impairing the Obligation of Contract". The former would seem to suggest a substantive valuation of the right to private property and the latter of the freedom of contractual agency.

10 Anthony Peacock's response to Hogg's defence of democracy is pertinent:

Independently of the question of whether judges should apply the natural law in their decisions, why need values be approved by the democratic process? Are these not value judgments that require us to transcend the positive law, to go beyond positivism to defend democracy?

(Peacock, 1996: 146)

11 Irwin concerned the Quebec Consumer Protection Act which prohibited commercial advertising directed at children under 13. Irwin, a significant producer of such advertising as well as of toys, objected, claiming such prohibitions contravened the Charter's guarantee of freedom of expression. The Supreme Court held the provisions of the Consumer Protection Act to constitute a reasonable limit under s. 1.

12 RJR-MacDonald concerned the federal Tobacco Products Control Act which instituted a broad prohibition on cigarette advertising and required tobacco companies to place large unattributed health warnings on their packages, presumably in order to protect the public from being persuaded to use tobacco. Most of these measures were declared unconstitutional by RJR-MacDonald's majority.
13 As Andrea York suggests, this statement seems to indicate that LaForest failed "to consider that this objective might be discriminatory in itself" (York, 1996: 358).

14 The majority's decision in *Hardwick* suggests that a reading of Georgia's traditions, conventions, and expectations or social norms would be likely to lead one to think that the statute *was* an accurate reflection of their mandate. As Justice Blackmun points out in his dissent in the case, the majority concluded that the law was valid "essentially because 'the laws of... many States... still make such conduct [homosexual sodomy] illegal and have done so for a very long time'" (*Hardwick*: 199, Blackmun, citing *Hardwick*, White: 190) and because such laws seem "natural and familiar" (*Hardwick*: 190). It is hard to determine from whence such legislation and the state's determination to defend it *could* come if not from the democratically-sanctioned local expectations and norms which Sandel seeks to invoke *in opposition* to the law.

Chapter 4: Culture, Community and the Charter

I. COMMUNITY AS A PRIMARY VALUE

One of the most vigorous intellectual debates in recent years has been that between communitarian and liberal political philosophers. Where liberalism in most forms aspires to a more or less universalist political theory which takes the good of individual autonomy as its central value, the focus of communitarianism lies between these two points, on the social, cultural, or moral communities which humans inhabit. For much of our history, Canadians have for understandable reasons been particularly pre-occupied with questions about the role and place of culture and community in our constitutional order, and much of our political thought therefore shares the communitarian emphasis on the centrality of community to human life. Perhaps the most fundamental of our constitutional ideals has been that of intercultural amity, the idea that the Canadian state should be understood as having as its essential end the creation of a *modus vivendi* between our different cultural communities. Our political arrangements reflect this value, particularly our federalized recognition of provincial communities and the Canadian system of aboriginal rights and reserved aboriginal lands. In turn, our necessary recognition of and predisposition to communitarian forms of value have informed to a large degree our intellectual responses to the coming of the *Charter* to the Canadian scene in 1982. While our emphases have been on community and culture in Canadian life, the *Charter*, particularly to the extent it has been understood as a proclamation of culturally-transcendant individual rights, stands in opposition to many of the values and premises implicit in our culturo-centric political theory. In this chapter, I offer a critical response to theories of the *Charter* which derive from what I believe to be the most “primary” of our primary values -- culture and community.

While communitarian theory is diverse, and not all of those whose work emphasizes the community dimension in Canadian political life necessarily subscribe to the communitarian vision in its entirety, it is nonetheless useful to set out briefly some of the more central philosophical claims associated with this philosophical perspective. Among communitarianism’s more noted expositors are Michael Sandel, Michael Walzer, Charles Taylor, and Alasdair Macintyre.

At the core of communitarian thought is a denial of the validity of comprehensive or
universalist claims about moral or philosophical knowledge. “Knowledge” of what is good or right cannot be reached through abstract and “objective” reasoning, but in fact is a product of our situation in a particular and delimited reasoning community. No one engaged in moral or philosophical endeavour begins with a blank slate; reasoning about such matters of necessity begins in reference to the moral resources which have been made available to us by the primary moral or cultural community which we inhabit.¹ Our moral intuitions, implicit prioritizations of conflicting social goods, and even the paths of reasoning available to us in our pursuit of philosophical knowledge are products of our location in a particular cultural milieu, and therefore the sorts of conclusions we can reach about moral matters is demarcated by the formative community in which we live.

But the communitarian claim is not simply a claim about limitations on the pursuit of moral knowledge. It is also the claim that communities provide authoritative moral horizons for their members. Community is central in this view for two reasons. First, communitarians understand humans themselves as products of community; our understandings of self, of our values, desires and ends in this view are not understandable as derived from isolated and self-determined introspection, but rather from the influences, direction, and underlying values of our local culture. What is the good in a particular place depends therefore on the sort of people who live there. As Alasdair MacIntyre notes, “what is the good life for a fifth-century Athenian general will not be the same as what it was for a medieval nun or a seventeenth-century farmer” (MacIntyre, 1981: 204-5). Secondly, reference to the shared values of a moral or social community is necessary if we are to have something recognizable as morality at all. Communitarians reject the notion that moral theory can be derived from individualist assertions of value. What makes a claim a moral one is its transcendence of individual will or desire; otherwise, valuations are in essence indifferentiable from the sorts of self-interested or hedonistic claims which we generally understand as morality’s opposite (Taylor, 1991: 36).

Complementing these conceptions of the nature and source of moral knowledge are communitarian claims about human nature. Community is important not just as an authoritative source of moral valuation, but is essential as well to human well-being. To flourish, we require connection to others in our society; to be fully human, we must be part
of a coherent and mutually-regarding community that shares more than just geography.\textsuperscript{2} Shared values and a shared sense of purpose are central to our good. In their absence, we feel rootless and disconnected, a condition Canadian communitarian Charles Taylor identifies with the foundationless societies of much of the western world and which he evocatively describes as giving rise to the “malaise of modernity” (Taylor, 1991).

Some important ideas about the shape and nature of good or legitimate social order follow from these views. Since our conceptions of what is the good are of necessity local, there is no universally applicable set of values which identify the best social arrangements for humans. Theories of the good society are local and can therefore be expected to differ in different places, and it is therefore communities themselves which must provide the source of legitimative morality to be used in setting out and evaluating the social arrangements which govern those who live within them. Despite the locality of legitimative conceptions, however, some common attributes are likely to characterize the sorts of communities which contribute most fully to human well being. Such communities possess the means and mechanisms necessary for the development, furtherance, and expression of the community’s important values (Maclntyre, 1988: 390). Successful communities in this sense will be marked by an interconnectedness and mutual regard among members. And important social values and moral predispositions will be shared across the community. In such a place, one will more often than not be able to refer meaningfully to “the people” in the collective sense.

These values in turn suggest the merit and importance of recognizing existent, already constituted communities in our political theory. In part, of course, we cannot avoid acknowledging such communities because their presence and centrality constitute the most important feature of the political landscape. But we also must recognize communities in this form because to fail to do so is to risk destroying for the people who live within them the fundamental source of valuation which provides for them the moral foundations necessary to a good life well lived. To fail to acknowledge such communities is to deny their valid claims to recognition and to disrespect institutions and ways of life which have their own innate value.

The conflict with liberal theories of values here, then, is clear. As I have suggested, communitarians in general reject liberalism’s universalist aspirations, which suggest that we
can reason abstractly about the realm of the “right” in a way which directs us to conclusions about just political order applicable to all human communities. Different communities embody different moral theories, different conceptions of the good life and justice, and there can therefore be no interculturally valid model of the ideal. Liberals fail to recognize that the validity of their system of valuation is local, dependent on its audience sharing with its advocates the pre-existent and culturally-delimited set of norms which favor liberalism's individualism and autonomy over the alternatives of connectedness and mutual regard.

But many communitarian critiques of the liberal world view go beyond a simple condemnation of liberalism's failure to acknowledge its own limited applicability. Much communitarian philosophy in fact suggests that the liberal model is not simply a localist theory of value like all others, but that it may indeed be a model which is categorically different from and inferior to its alternatives. These communitarians suggest that the liberal emphasis on individual autonomy results in orders in which it reigns in the creation of a form of community which is contrary to human good. It promotes solipsism, self-interest, and selfishness, perspectives which undermine and make real community impossible (MacIntyre, 1988: 338). The liberal denial of the existence or value of moral standards other than individualistic ones in regard to the realm of the “good” makes liberal individuals incapable of recognizing shared moral standards and connection to others. In this view, then, liberal theory is seen as not simply inapplicable outside of its own cultural milieu, but as undesirable and contrary to human well-being even within the communities in which it has its genesis.

The resonance of the liberal-communitarian debate in regard to the Charter is similarly clear. The Charter is, first of all, a rights document, and as such it is viewed by many as placing an undesirable and unwarranted emphasis on the central value of liberalism — the good of individual autonomy — at the expense of the more collective and communal goods communitarians value. But there is an important added significance with which the Charter is imbued given its location in the Canadian political and social context. Communitarians focus here on what they perceive as the Charter's “imposition” on important Canadian cultural communities which either expressly rejected it (Quebec) or might have been expected to have done so had they had the opportunity (Canadian aboriginal communities, for example). The Charter in this view, then, is a paradigmatic
example of liberalism’s illegitimate universalist aspirations. Its dominant underlying valuation and theory of human life is Anglo-American and individualistic, and its norms therefore are alien to cultures which do not share these ideals. Its rights mechanisms represent serious impediments to the ability of local Canadian cultures to develop, further, and give expression to their members’ important collective values. And its imposition through the events of 1981 represents a failure to acknowledge, account for, or respect the legitimate, even primary, claims to recognition of cultural communities outside the Canadian mainstream. This is an attitude expressed in claims like that of former Quebec premier Lucien Bouchard that quebecois were “humiliated” by the events surrounding the country’s rejection of the Meech Lake Accord, a constitutional project whose aim was a mediation of the impact of the Charter’s individual rights regime on the ability of Quebec government to preserve the province’s French language and culture.\(^3\)

As I suggested in the introduction to this work, communitarianism represents perhaps the most influential of our primary constitutional values in Canada. There is therefore an abundance of political and philosophical commentary upon which one might draw in exploring communitarian responses to the Charter, but I focus in this chapter on the works of Guy LaForest, Mary Ellen Turpel, Charles Taylor, James Tully, Patrick Monahan, and Avigail Eisenberg.\(^4\)

Perhaps the strongest reaction to the Charter and the Constitution Act, 1982 of those whose works I explore here comes from Guy LaForest. He argues in Pierre Trudeau and the End of a Canadian Dream that the events of 1982 “have marred the legitimacy of Canadian government institutions” and that “for the people of Quebec, April 17” -- the date of the Constitution Act, 1982’s formal enactment -- “marks another day of defeat” (LaForest, 1995: 44). LaForest’s constitutional theory follows from two premises. First, it suggests a conception of Quebecers as a sovereign “people”, indeed a nation with a shared history and important collective goals and values (LaForest, 1995: 192). LaForest’s conception of a Quebec people is a particularly strong one; he speaks in his introduction to The End of a Canadian Dream, for example, of “[o]ur ancestors” whose lineage traces back in North America for “nearly four centuries”. In accord with this is the view LaForest contends is “just about unanimous[ly]” shared by French Canadians -- that the Canadian constitutional
order is a pact between two founding nations, two peoples, two distinct societies...” (LaForest, 1995: 7). Secondly, LaForest argues for a Lockean conception of the source of political authority in constitutional order. Authority derives from the consent of the governed conferred upon political leadership as a trust. Breach of this trust ends any valid claim to authority or allegiance which a political order might make upon those whom it is to govern. LaForest’s argument, then, is that the Constitution Act, 1982 represents a fundamental breach of the trust of the Quebec people in the Canadian federal order:

Changes to the constitution without prior consent from (or later ratification by) the people of Quebec, an intervention in the areas of language and education..., and modification of the National Assembly’s powers -- according to Locke’s principles, all this should lead to the dissolution of government and the people’s reappropriation of this authority, which they can only delegate.

(LaForest, 1995: 49)

As a consequence, then, LaForest concludes that “the Constitution Act of 1982 is tainted by its relentless obstruction of Quebec society’s national vision and aspirations”, and it should, therefore, be “reject[ed] as a whole (LaForest, 1995: 190, quoting Dion, 1991: 274).

Charles Taylor and Mary Ellen Turpel share LaForest’s rejection of the validity of the Charter in strong rights terms (at least as regards their own communities), but their reasoning speaks more to the question of its cultural appropriateness than its genesis. Taylor is Canada’s most noted communitarian philosopher, and his scholarly work has been of much importance both in the larger theoretical realm of communitarian thought as well as within the narrower confines of Canadian constitutionalism. Taylor’s arguments about the Charter proceed from the identification of two central models of “citizen dignity” which he suggests underlie political and social life in modern western societies. One is the idea of rights. In this model, citizen dignity is understood as deriving from the recognition that all members of a polity are possessors of rights which protect them from injurious collective decisions by their society. This form of citizen dignity has a special place in American political thought, and it is this model upon which the Charter is based (Taylor, 1993: 92). The second model of citizen dignity is that embodied in the idea of participation; here, what is important is that “we as a whole, or community, decide about ourselves as a whole community” (Taylor, 1993: 94). This model is more authentically Canadian (although,
Taylor suggests, it is waning in importance in English-speaking Canada with the advent of the *Charter*, and it is, in Taylor’s view, significantly more compatible with the underlying conceptions of community and social life in Quebec and similar communities than is the rights model. The participatory model “presupposes a strong sense of community identity” which exists, Taylor suggests, “where the common form of life is seen as a supremely important good, so that its continuance and flourishing matters to the citizens for its own sake and not just instrumentally to their several individual goods” (Taylor, 1993: 97). The participatory model is more relevant and compelling to Quebecers than is the rights model, for it speaks both to their collective ethnic or national sense of identity and provides the means for preserving the French language community which is central to this identity. The *Charter* is in this view, then, alien to Quebecers and potentially destructive of their ability to realize their collective end of preserving the French language community to which they belong.

Turpel argues that the *Charter* represents for aboriginal Canadians, much the way it does for the quebecois in Taylor’s view, an alien cultural imposition. She characterizes the *Charter* as dependent on a Lockean and European conception of social life which is inapplicable to aboriginal societies. The *Charter*, in Turpel’s view, is an embodiment of a selfish and self-interested worldview which is incompatible with the more collectively oriented values of aboriginal societies such as “trust, kindness, sharing and strength” (Turpel, 1990: 29). She calls into question, then, the extent to which “Aboriginal peoples [should] have or want to fit their aspirations into the dominant and imposed constitutional framework of the *Charter*” (Turpel, 1990: 21).

While James Tully seeks in *Strange Multiplicity* to address the topic of contemporary constitution-making generally, his work has much to say that relates specifically to the *Charter*. Tully’s argument is that constitutions are to a great extent about how groups of people relate to each other. He suggests that

A constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time.

(Tully, 1995: 30)

In amending our constitution in 1981, then, he suggests that it would have been more just to
have begun with a greater emphasis on the viewpoint of the relevant groups affected by the changes, rather than proceeding in what might be called top down fashion he feels characterized the passage of the *Constitution Act, 1982* (Tully, 1995: 7). Tully endorses the constitutional conventions of “mutual recognition”, “continuity” (a convention which mandates that prior existing arrangements between societies cannot simply be declared null and void), and “consent” (Tully, 1995: 140). The difficulty with the *Charter*, he suggests is that it represents “Esperanto constitutionalism”, “an illusion which hides from view the imperial culture embodied in most liberal constitutions” (Tully, 1995: 7). He laments that “[r]ather than uniting citizens on a constitution that transcends cultural diversity, the *Charter* has fostered disunity” (Tully, 1995: 7).

I discussed the democratic aspect of Patrick Monahan’s *Charter* theory in the previous chapter, but Monahan’s constitutional vision also incorporates a significant community-oriented component as well. He argues that the *Charter* can and should be understood in a way which takes seriously the value of community (Monahan, 1987: 105). This value should be recognized because of its importance of community in the Canadian political tradition — “Canadian politics has always placed particular emphasis on communitarian values” Monahan notes — and because of “the intrinsic value of community itself” (Monahan, 1987: 105). Monahan suggests that

> The conception of community I have in mind ... is an ideal which claims that individuals are themselves constituted, in an important if not exclusive sense, by their membership in community.

*(Monahan, 1987: 105)*

In “The Politics of Individual and Group Difference in Canadian Jurisprudence”, Avigail Eisenberg suggests that constitutional adjudicators might depart from the “individual versus collective rights perspective” in favour of an alternative conception she calls the “difference” perspective, which attempts to account for and reconcile both individual and communitarian goods in the task of *Charter* interpretation. This approach to the *Charter* offers a means, Eisenberg suggests, of “adjudicating, on a principled as opposed to arbitrary basis, claims that are presented in terms of [the] conflicting rights” (Eisenberg, 2001: 163) of individuals and communities.


The Appeal of Communitarian Theory

It need hardly be noted that debate about the role and place of culture and community in Canada did not arrive with the Charter itself. Conflict about and between cultural communities pre-dates the very existence of our country, and these issues have coloured virtually every salient constitutional debate Canadians have experienced (Russell, 1993). Perhaps the central appeal of community as a Canadian value is therefore its relevance and resonance given the diversity of our society. Canada is a nation comprised not of a single people, but one often understood, to use the words of former prime minister Joe Clark, as a "community of communities". The lack of a singular Canadian national mythology, and our bilingual and multicultural character have made it unavoidable as well as desirable that Canadians acknowledge the claims of community in our constitutional discourse. This is an observation made by students of the Confederation pact. George Stanley has argued, for example, that

[i]t is the racial aspect of the pact of Confederation which gives the pact its historicity and confirms its continued usage. If the population of Canada were one in race, language, and religion, our federation would be marked by flexibility; amendment would be a comparatively easy matter where there was agreement upon fundamental issues. Since history has given us a dual culture, with its diversities of race and language, we must maintain a precarious balance between the two groups. . .

(Stanley, 1974: 287)

The mechanisms of federalism established by the Constitution Act, 1867 as well as the Canadian system of aboriginal rights and reserved aboriginal lands reflect these sorts of realities.

The influence of community as a constitutional force in Canada is perhaps expressed as fully in the Charter as in any of our constitutional arrangements. The Charter represents an at times unusual marriage of the competing liberal and communitarian visions of social life I discussed above. While many of the Charter's provisions speak in the language of individual rights, many others seem to speak to an understanding of community as the central organizing feature in human life. The inclusion of s. 33, the notwithstanding clause, in the Charter, for example, seems premised on an understanding that the claims of our federalized communities might ultimately take priority over those of their individual
citizens, since the provision enables governments to exempt themselves at will from the application of many of the Charter's rights. Former prime minister Brian Mulroney has noted the potentially paradoxical character of such an arrangement, suggesting that the notwithstanding clause makes the Charter "not worth the paper it is written on" (Hansard, 6 April 1989: 153). Yet it seems likely that there would be no Charter at all had not some means been found to accommodate the demands for something like s. 33 by representatives of provincial communities like Alberta's Peter Lougheed and others. The Charter, then, like other Canadian social arrangements, reflects the necessarily recognized influence of community-oriented thought in Canadian life.

Of course, the appeal or influence of the values of community in our constitutional discourse need not be attributed simply to the necessities and realities of Canadian society. There is much about communitarianism which has its own philosophical merit.

Communitarian constitutional philosophy argues for a recognition of communities because by doing so we recognize their "integrity" and value, and the dignity of those persons who belong to them. Communitarianism also seems clearly to proceed from an understanding of human good as rooted not in banal self-interest, but in mutual connection. These are powerful and appealing claims about the ideal, and it is worth noting that even some philosophers identified with liberal opposition to more extreme versions of the communitarian thesis have in recent years sought to incorporate a fuller picture of community in their works. John Rawls, for example, has in publications subsequent to A Theory of Justice sought to refine the theory of individuals and society he offered in that work. While the legitimative model offered in A Theory of Justice seems premised on a conception of persons as free, autonomous, and rational choosers of "life plans", Rawls notes in a later work that we must recognize the limitedness of this depiction. People have ties to others "in their personal affairs, or in the internal life of associations to which they belong" which may not be subject to internally-directed rational revision:

Citizens may have, and normally do have at any given time, affections, devotions, and loyalties that they believe they would not, and indeed, could and should not, stand apart from and objectively evaluate from the standpoint of their purely rational good.

(Rawls, 1985: 214)
Rawls' later works therefore suggest to a greater extent the value of community and mutual connection than does the hallmark *A Theory of Justice*.

Similarly, Canadian scholar Will Kymlicka has in recent works argued that liberals must recognize the importance of community to liberal political theory. "The liberal value of freedom of choice has certain cultural preconditions", Kymlicka suggests in *Multicultural Citizenship*, and the central of these is access to what he calls a "societal culture",

\[\ldots\text{a culture which provides its members with meaningful ways of life across the range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.}\]

(Kymlicka, 1995: 76)

Kymlicka concludes that in order to provide this good in a meaningful way, countries must recognize and protect the cultural independence of "national minorities" -- a category which includes groups like Canada's quebecois and aboriginal populations. Kymlicka's adoption of some of the central values of communitarian thought in his "liberal conception of minority rights" (the sub-title of *Multicultural Citizenship*) evidences how important and influential these values are in Canadian political thought. Indeed, few Canadian political thinkers deny at least some place for community in their work, and it is therefore fair to conclude, I think, that the communitarian vision represents perhaps the most "primary" of our primary values.

But while the importance of community cannot and should not be denied, I argue here that we should have second thoughts about letting our esteem for this value direct us away from a recognition of the importance and merit of the *Charter* in its strong rights form.

II. COMMUNITY AS A THEORY OF LEGITIMACY AND SOCIAL VALUE

I offer here an exploration of what I understand as three of the most widely embraced communitarian legitimative perspectives underlying critical responses to the *Charter*. Each suggests either that the *Charter* is illegitimate, or that its legitimacy can only be preserved by seeking an understanding of it in terms considerably narrower and more deferential to the values of the community than it is now generally given. The first of the perspectives I examine here might be called a theory of cultural "personality" or "cultural consent". It suggests that constitutional arrangements which involve multiple constitutional
communities require the consent of the cultural “parties” involved. The Charter in this view is illegitimate because it did not receive (nor would it be likely to receive) the consent of important identifiable Canadian cultural communities. These arguments often invoke Quebec specifically, but numerous scholars argue for a similar understanding of the constitutional status of Canada’s aboriginal communities as well. The second perspective — community as a moral matrix — suggests that cultural communities constitute the central authoritative source of legitimative and social morality for their members. The Charter in this view is understood as illegitimate because it mandates a set of constitutional goods which conflict with more authoritative local values. The third perspective — community as an end — suggests that the creation or preservation of communities is our highest constitutional goal. In this view, the Charter is illegitimate because the forms and processes of social life it endorses — rights claiming — impede our ability to recognize and construct the mutually-regarding and intimate forms of real community necessary to human well-being.

Cultural “Personality” and Consent, and the Dilemma of Community Intermediacy

In Pierre Trudeau and the End of a Canadian Dream, Guy LaForest argues that the passage of the Constitution Act, 1982 (and with it the Charter) without the consent of Quebec constituted what he calls a “Lockean breach of trust” of sufficient magnitude that Canadian constitutional arrangements have as a result lost any claim to their moral obligatoriness for Quebecers (LaForest, 1995: 49). In Strange Multiplicity, James Tully argues that “a contemporary constitution can recognize cultural diversity if it is reconceived as what might be called a ‘form of accommodation’ of cultural diversity” (Tully, 1995: 30). This requires recognition of three constitutional “conventions” — “mutual recognition, consent and cultural continuity” (Tully, 1995: 30). Unfortunately, for many Canadians, including quebecois and aboriginal peoples, the Charter represents “the imperial imposition of a pan-Canadian culture over their distinct cultural ways” (Tully, 1995: 7). He argues therefore that its imposition on such communities is illegitimate, and that for communities such as Quebec, the passage of the Charter

...violated the convention of consent and ... the convention of continuity, the very principles on which the federation and the consent of the Quebec people to it, rests. If these violations
are not rectified and Quebec's co-ordinate sovereignty recognised through constitutional negotiation, then Quebec has the right to secede.

(Tully, 1995: 163)

LaForest and Tully can be taken, I think, to be offering a conceptualization of the relationship of Canada's cultural collectivities to the federation as a whole which is premised on the notion that such communities have a moral claim to recognition as, in effect, consenting parties to the constitutional arrangements of the whole.

Both LaForest's and Tully's arguments suggest, I would argue, an understanding of the cultural communities to which they refer as possessors of what might be described as a "moral personality". They suggest that in our consideration of the validity of constitutional arrangements concerning those who live within Quebec's and our aboriginal peoples' territories, our central focus is appropriately on the group understood in collective terms. LaForest argues, for example, that a central question that must be asked of Quebec's Canadian partners if they wish to continue the Canadian state is "[a]re you prepared to live within a constitutional framework that recognizes that Quebec is a distinct society — an autonomous political entity, a people, a national community..." (LaForest, 1995: 192). In a metaphor I discuss below, Tully offers a characterization of constitutional arrangements in terms of a canoe containing a variety of animals standing in for various Canadian cultural groups, questioning, contesting, and renegotiating their cultural identities (Tully, 1995: 25). His argument for the value of recognizing the constitutional conventions of "mutual recognition, continuity and consent" flows from his belief that we must respect the ability of "peoples mutually to recognize and reach agreement on how to assemble or federate the legal and political differences they wish to continue into the association" (Tully, 1995: 140).

These are, of course, not uncommon means of characterizing such aggregations. In our everyday discussion of political issues, we do, for example, often speak of such things as "Quebec's demands", consider the question of "what aboriginals want", and the like. LaForest and Tully, then, proceed from a widely held conception of the community as a constitutional actor, as the fundamental unit of constitutional personality. In this context, the ideal of "cultural consent" has some appeal. I wish to suggest, however, that there are some difficulties which arise from this conceptualization.

Let me begin in this regard by offering something of a schematic diagram of what I
would argue the idea of constitutional consent implies. A valuation of the ideal of consent suggests that the shape and nature of constitutional arrangements is something to be worked out through the inter-play of the independent and not always mutually amenable preferences, values, and goals of those who are to be bound by the order. To endorse the ideal of "consent" is to endorse what I think can be taken to be two opposite yet complementary norms concerning the relationship of the "whole" to its constituent parts. First, the endorsement of the value of consent suggests an argument for a minimalist yet real norm of an objective, transcendant, and a priori type. To argue for consent is to argue that there is a duty or obligation on the part of the whole (in our case, Canada) to recognize what might be called the "agency" of constituent parts (Canadian cultural communities). By agency, I mean that the constituent parts are understood as participants in the process of determining what values are to bind them, and it is their own reasoning about their ends and aims which informs the decision-making process in such a case. This recognition of the consenting status of the constituent parts is a "ground rule" which applies to the whole in its relationship to those parts.

This norm is, however, realized in consent theory by recognizing its opposite as the operative norm in regard to the relationship of the parts to the whole. The agency of the parts is recognized by making their obligation to the whole dependent on their consent, an idea which suggests that their obligation to the whole is a matter to be assessed from the agent's own, subjectivist perspective. The evaluative norm which determines the agent's obligation is not a transcendant, objectivist norm — like, say, some overarching conception of "the good life for man". The norm is, rather, a more personal and potentially idiosyncratic one which the agent himself endorses — what do I understand as the good life for me? In the case of community consentors, the relevant question might be something like, "what is our culturally-derived conception of what is best for this community?". In the case of a society like Quebec, one important subjectivist answer is "preservation of quebecois culture", a goal which entails such things as laws aimed at preserving the province's "French face" or "visage linguistique".

These complementary norms suggest that consent theory implies a valuation of two sort of overarching goods or values. It suggests a valuation of criticality, in the sense that the norms which are to bind members of the whole are subject to the evaluation and
consideration of those to be bound. And it suggests a recognition of the agency, dignity, or integrity of the constituents of the whole; the arrangements are understood as illegitimate unless they are accepted by the members. These conceptual ideas suggest to us some explanation for the appeal of an inter-communal theory of consent in the Canadian constitutional context. Consensual constitutionalism is a means of responding to intercultural conflict and disagreement about the norms of our larger order by recognizing the right of cultural communities to determine for themselves the extent of their obligations to that order, or by tailoring the norms of the whole to accommodate the values of communities which would otherwise be unable to give their consent. By so doing, one arguably is recognizing the dignity and integrity of the cultural communities which make up the constitutional whole.

Unfortunately, the ideal of inter-communal consent is not an unproblematic one. While there is much appeal in a conception of communities as the fundamental units of constitutional obligation, that premise obscures an important reality. Cultural communities cannot, I would argue, be reasonably understood as standing in regard to constitutional matters only in their stead as the constituent parts of the larger whole. While they are parts of the larger whole, they also have a significant relationship as a whole to their own parts—that is, to the individual human persons of which they are comprised. The reason this is problematic is that it requires some consideration of the question of what norms of obligation can viably be understood as applying to the relationship of the community as a whole to its constituent parts. Is the community as a whole bound by the objectivist norms it seeks to invoke in aid of its own recognition as an agent in relationship to the Canadian whole? Or is the community bound by the subjectivist norms to which its representatives are expected to refer in determining whether the community ought give its consent to the larger arrangements? We might describe this conundrum as the “dilemma of community intermediacy”. Since the community occupies a position between the larger whole and its own constituent parts, some theory as to which set of obligations it must recognize is required.

We might consider first the idea that the community, as a whole, is bound to recognition of the objectivist norm mandating that the whole recognize the agency and integrity of its constituent parts by acknowledging their place as something like consenting
citizens. This would suggest, then, that such persons might be understood as bound by obligations which they themselves endorse, or at least, that their ongoing obligations would be subject to a significant degree of personal choice. But two difficulties arise from this proposition. First, such an idea suggests that communities may be bound by obligations which do not arise from their own, subjectivist consent. If there are norms associated with recognition of citizens as consenting agents, these would be binding on the community even in the face of conflict with its own subjectivist values. One might in turn suggest that a bill of rights like the Charter might quite reasonably be understood as an expression of just these sorts of norms of criticality. Secondly, if this is the case, then the recognition of such values might be expected to have the potential of imperilling just those subjectivist values of community which the ideal of inter-communal consent is intended to protect in the first place. To the extent that the citizens of Quebec, for example, are understood as consenting agents whose obligations are subject to their own critical assessment, it becomes difficult to justify the imposition of, say, a law mandating French unilinguality in public signage on behalf of “quebecois cultural values” if many of the constituent elements of that society (many of its anglophone citizens, for example) reject that holistic, cultural theory of the good for their own internal, personal, subjective reasons.

In part, this is a problem which communitarian legitimative claims often tend to obscure, because the theory of community “personality” upon which they are premised fails to account for or recognize the community’s intermediate position. Perhaps the loveliest trope in all of Canadian political thought is James Tully’s metaphorization of constitutional interaction through the “Spirit of Haida Gwaii”, a work by Canadian artist Bill Reid. The Haida Gwaii is a sculpture of a Haida longboat, whose occupants include “mousewomen”, a “bear mother”, a beaver, a wolf, a frog, and a raven. Tully suggests that Reid’s sculpture represents the ideal form of constitutional discourse. While the “voyageurs”, who Tully assimilates to the diverse cultural personalities of Canadian constitutionalism, are all on the boat, they retain their independent identities and their fellow travellers recognize their claims to independence:

No matter from which direction you approach the canoe, the crew members manifestly seem to say that, after centuries of suppression, they are here to stay, in their own cultural forms and ways. Hence, if there is to be a post-imperial dialogue on the just constitution of culturally diverse societies, the dialogue
must be one in which the participants are recognized and speak in their own languages and customary ways.

(Tully, 1995: 24-5)

The difficulty with Tully's metaphor one is that it implies what is arguably a false holism to the "passengers" on the boat. The frog, ("appropriately enough, partially in and out of the boat" says Tully), the bear, the beaver, and most other of Tully's metaphorical cultural constitutional personalities on the Haida Gwaii are, in the non-metaphorical world, not in fact singular creatures. Tully's voyageurs are in fact made up of the individuals who embody cultures and of individuals whose cultures are quite different (one might say that the frog is made up of millions of other frogs and more than a few bears and beavers too!). The ideal of community consent in the name of subjectivist cultural values fails to recognize that communities, to use Tully's metaphor, are canoes as well as voyageurs.7

The second potential answer to the problem of the consenting constitutional community's intermediate position is to embrace the idea that the norms which tie community to the whole and those which tie individual person to the community are indeed different. In this view, the obligation of individual persons to the community in which they live is not seen as that of subjective consenting agents to the whole, but in different terms. The internal ties of those who belong to cultural communities is seen in this light in more organic, familial, perhaps "pre-critical" terms. Both Tully's and LaForest's theories are consonant with such a conception. Tully's metaphorization of constitutional communities as singular entities suggests an essentially organic vision. And LaForest argues that "Quebec is a distinct society, an autonomous political entity, a people, a national community... (LaForest, 192, emphasis added). The subjectivist values of the community are in this light claims of the heart which are not appropriately a matter for re-evaluation or the consent or non-consent of parties, just as one's ties to one's wife and children are not in the everyday world. But this too is a problematic position. To the extent that the valuation of consent derives from a recognition of the dignity and integrity of consentors, to imbue cultural communities with such a status while denying it to the individuals who live within them would seem to be imputing a greater integrity to what is undeniably the "virtual" or synthetic personality of community than one is allowing to the very real individual human persons who make up such communities.8
This is particularly problematic for a theorist like LaForest, whose analytical framework is self-avowedly Lockean. One would arguably attribute to Locke at least two important values or ideas; (1) an endorsement of the value of criticality in regard to the obligations of obedience to legal order, and (2) a recognition of the individualness of persons. LaForest's theory understandably advances a version of Locke in which Locke's individualistic conceptions of the person have been excised. It is, after all, his rejection of Pierre Trudeau's individualistic vision of constitutional value expressed in the Charter of Rights which underlies LaForest's efforts in The End of A Canadian Dream. But while we can perhaps imagine a less individualistic Lockeanism of the sort LaForest's theory implies, it is difficult to see how we can discard in regard to individual obligations to the constitutional order the criticality that Locke endorses without losing what would seem essential both to Locke's and to LaForest's legitimative claims. If it is the valuation of criticality which justifies invoking the objectivist norms of consent on behalf of communities in inter-communal constitutional discourse, then one would wonder why the same valuation would not justify a similar recognition in regard to the relationship of individuals to the community in which they live.

The difficulty with the communitarian conception of cultural communities as the fundamental consenting (or non-consenting) parties to the Canadian constitutional order is, I would argue, that it fails — in both Tully's and LaForest's offerings at any rate — to offer a convincing account of the relationship of individuals to such communities in a way which recognizes not just the "personality" of community, but of individual persons as well.

The Cultural Community as a Moral Matrix

One means of avoiding the difficulties associated with the dilemma of community intermediacy is provided by the second conceptual theme associated with communitarian Charter theory. This is the argument that at least some cultural communities constitute something like a "moral matrix" for their inhabitants. The social matrix conception is premised on the idea that individuals are not "prior to society", but that they are products of the society in which they live. Stephen Mulhall and Adam Swift have suggested that communitarians "insist on recognition of the necessarily social or communal origins of the individual's self-understanding and conception of how she should lead her life" (Mulhall
and Swift, 1992: 15). Furthermore, most communitarians make the

... sociological-cum-philosophical point that people necessarily derive their self-understandings and conceptions of the good from the social matrix. Whether this is put as a quasi-empirical claim about socialization processes, or as a conceptual claim about the impossibility of language, thought, or moral life outside a social setting ... the emphasis here is on ... the way in which the individual is parasitic on society for the very way that she thinks, including the way that she thinks of herself as an individual. (Mulhall & Swift, 1992: 15)

In this view, there is seen to be a deep and natural accord between authentic forms of community and individual members of cultural societies. The moral order, social structure, and concept of rationality of such communities are not constructs imposed upon more and less willing individuals, but rather the formative influences which determine for individuals who they are and what they might wish to be. To the extent we find such a view compelling, there may be no dilemma of community intermediacy -- at least for tradition-oriented cultures like those of Quebec and aboriginal Canadians -- because the distinction between individuals and their cultures is not definable or understandable in such places in the sense that liberal thinkers like John Locke would suggest. There is an essential unity between the two. If so, there is reason to suggest that those standards which are "subjectivist" when they are asserted by a community at the inter-communal level are objectivist -- that is, they are understandable as capable of binding all who live in the society -- when they are expressed internally in a cultural society. The social matrix conception suggests that there is something inherently authoritative about a culture's overarching values within the culture itself.10

This is an idea with which a number of Canadian communitarians might be identified. Charles Taylor's argues in Sources of the Self, for example, that we have reason to lament the "widespread 'naturalistic' temper" of our modern times which denies the validity of the moral "frameworks" of our past (Taylor, 1989: 22). We live in a time when

... the developing 'disenchantment' of modern culture ... has undermined so many traditional frameworks and, indeed, created the situation in which our old horizons have been swept away and all frameworks may appear problematical. (Taylor, 1989: 26)
But the naturalistic understanding of the world is, according to Taylor, a misguided one. There can be no morality without such horizons. Taylor's conception of morality is built around the idea of "intelligibility": to be capable of construction as "moral", he argues, statements and actions must be understandable and capable of explanation to others in moral terms. The source of morality cannot sensibly therefore be the individual, for what is morally significant is not up to individuals to determine. Taylor argues in *The Malaise of Modernity* that individuals themselves cannot

... determine what is significant, either by decision, or perhaps unwittingly and unwillingly by just feeling that way. This is crazy. I couldn't just decide that the most significant action is wiggling my toes in warm mud. Without a special explanation, this is not an intelligible claim.

(Taylor, 1991: 36)

By way of illustration, we might imagine our response — nausea for example — to something we find repugnant. Our instinctive response in such circumstances is on the surface little different than our response to, say, some food we disliked: a matter of "taste", not readily explainable to others (Mulhall & Swift, 1992: 102 - 3). What makes such a response and the attitude underlying it a moral one is its connectedness to a moral schema that we share with others. Through reference to such a scheme, our reactions "make sense" and can be explained and justified to our fellows. Only then, against what Taylor calls a "background of intelligibility" (Taylor, 1991: 37), do our responses take on a moral significance. What provides intelligibility in such a background is our location in a moral community with a language of discourse shared by others like ourselves (Taylor, 1989: 35). As Taylor notes, "to study persons is to study beings who only exist in or are partly constituted by a certain language" (Taylor, 1989: 34 - 5). And a language:

... only exists in and is maintained within a language community.

One is a self among other selves. A self can never be described without reference to those who surround it.

(Taylor, 1989: 35)

In short, the source of moral authority — of objectivist standards — is the community itself.

These are values which underlie Taylor's conception of the place of Quebec in
Canada and his views on the Charter. In “Shared and Divergent Values”, for example, he suggests that

[t]o build a country for everyone, Canada would have to allow for second-level or ‘deep’ diversity, in which a plurality of ways of belonging would also be acknowledged and accepted. Someone of, say, Italian extraction in Toronto or Ukrainian extraction in Edmonton might indeed feel Canadian as a bearer of individual rights in a multicultural mosaic. His or her belonging would not ‘pass through’ some other community, although the ethnic identity might be important to him or her in various ways. But this person might nevertheless accept that a Quebecois or a Cree or a Dene might belong in a very different way, that these persons were Canadian through being members of their national communities.

(Taylor, 1993: 183)

What does it mean to be a member of this sort of “national community”? In the case of Quebec, Taylor suggests an understanding of the group in terms of a nation — “la nation canadienne-francaise” or “la nation quebecoise” (Taylor, 1993: 13). Such societies are “organized around a definition of the good life” (Taylor, 1993: 176) and as a consequence, their members can be understood as sharing substantive “collective”, even “axiomatic” goals (Taylor, 1993: 175). The difficulty with the Charter in this view is that it articulates a theory of connection to society which takes the individualist notion of “the human agent as primarily a subject of self-determining or self-expressing choice” (Taylor, 1993: 175) as its fundamental value, a model alien to the more collective self-perception of Quebecers.

Mary Ellen Turpel argues for a similar understanding of the social order in “Aboriginal Peoples and the Canadian Charter”. She suggests, like Taylor, that the Charter embodies a set of values which are alien to her own cultural community — that of aboriginal peoples in Canada. While Taylor suggests that the Charter is Anglo-American in its cultural valuations, Turpel describes its premises as “European” (Turpel, 1990: 15). The Charter, in her view, represents a Lockean and “liberal conception of social life where the maximization of wealth and happiness through self-interest is the guiding creed” (Turpel, 1990: 16). She contrasts this system of values with that of aboriginal peoples, where “social life is based on responsibilities to creation and to the Creator”, on such values as “trust, kindness, sharing and strength” (Turpel, 1990: 29). A more authentic source of aboriginal values can therefore be found in statements like these by the Mohawk women Osennontion and
Skonaganichira:

We have a law that came from the creator and in that law was absolutely everything that we needed! Kanien'khe:ka call it the KAIANERE'KWA. Some people call it the Great Law, or the Great Law of Peace, and it is. This law, our law, does not define 'rights'; it does not defend 'rights'. In our ways, there are no 'rights', only responsibilities: to observe the clans, to bring honour, trust, friendship and respect; to share; to be kind, honest and knowledgeable; to maintain a relationship with all of the natural world.

(Turpel, 1990: 29)

As a consequence of this cultural divide, Turpel argues, the rights paradigm must be taken as representing the "projection of an exclusionary cultural or political self-image" (Turpel, 1990: 10).

Like Taylor, Turpel here seems to be endorsing the idea that those who inhabit a cultural community can be understood as sharing collectively an identifiable and substantive set of values which derive from the community itself. Standards of this type, then, are not "subjectivist", but are in fact understood as having an extremely strong claim to the recognition and allegiance of all those who belong to the local culture. There is in these views an understanding of community and culture as the ties that bind the heart, and a corollary conception of the persons who belong to such communities as sharing in a deep and real way a set of standards, values, and goals which bring them together in ways which those in more liberal and individualistic cultures have lost the ability to comprehend.

This is, undoubtedly, a beautiful and intriguing vision of the social possibilities of human life. It is unfortunately, however, a problematic thesis upon which to build a critique of the Charter in the Canadian context for a number of reasons. We might note, first of all, that the rights of the Charter are not rights against community or society, but against governments. Unless an improbable contiguity of the moral and political elements of cultural communities can be made out, one might argue in defence of arrangements like the Charter that rights perhaps have a place and value even in societies founded on "responsibility" and "kindness and sharing", because there are no guarantees that the political actors in such communities will necessarily abide by such values. As Judith Shklar suggests, we have particular reason to be concerned about governmental powers:

While the sources of social oppression are indeed numerous,
none have the deadly effect of those who, as the agents of the modern state, have unique resources of physical might and persuasion at their disposal.

(Shklar, 1989: 21)

Tom Flanagan's recounting of abuses of power (notably, nepotism, corruption, and embezzlement of band funds by band council members (Flanagan, 2000: 89 - 94)) by a number of aboriginal governments in First Nations, Second Thoughts suggests that there is indeed even in the most cohesive of cultural communities sometimes a disjunction between the moral values of culture and the political actions of local government. Indeed, Turpel herself notes that aboriginal women have from time to time been “forced to go outside the the community to resolve the injustices of gender-discrimination” (Turpel, 1990: 43). So too have some aboriginal self-government initiatives themselves included recognition of the utility of rights. To the extent that we recognize the potential necessity of rights -- derived from our recognition of the possibilities of human oppression and marginalization by governments -- one might argue that some particular rights content might be taken to flow from such recognitions. The Charter's valuations of freedom of expression and equality are potential examples.

But while my argument here focusses on the potential disunity between governments and their local societies, we might also ask whether Canadian cultural societies themselves can necessarily be understood in the cohesive and unified terms suggested by the social matrix thesis. If these sorts of characterizations of contemporary communities are accurate, one might wonder why it is that the critiques of the Charter which are built upon them are necessary, even if they are valid. To the extent that a cultural community shares an at least roughly unified commitment to a particular set of collective cultural values which conflict with the rights individualism of the Charter, from whence come the concerns of critics about rights claimants seeking to invoke the protections of that document? Surely in such a society, such claims are likely to be few and far between, since the premise of the communitarian argument here is that there is in such places a real collective conception of value which denies the validity of the ideals of the Charter. If criticism of the Charter's rights regime is necessary on the other hand, then there is some argument to be made that the unity of values which the advocates of this view attribute to local communities is perhaps not in fact present.
In fact, many communitarian claims seem to be founded on what one might call a nostalgic conception of cultural independence. Communitarians like Alasdair MacIntyre advocate a return to the unitary societies of the past in which a “great tradition” provided an overarching set of values to which citizens could refer in ordering their society and their lives (MacIntyre, 1988: 349). In the modern world, certainly in Canada, there no longer are such communities. Societies like Quebec are multicultural in a real and significant way. Even aboriginal societies, where the social matrix thesis might seem more plausible, are in no way culturally unitary. Like people all over the world, aboriginal Canadians are exposed to the diversity of a world culture, including the cultural valuations of the non-aboriginal Canadians with whom they share their country, and Americans, whose cultural productions—movies and television in particular—are omni-present. The conception of the persons of such societies, then, as sharers of a limited and culturally-defined set of social values is problematic, for neither Quebec nor Canadian aboriginal reserves are assimilable to medieval Europe or countries like Saudi Arabia.

Finally, there is reason to argue, I think, that the very identification of community with groups like the quebecois or those of other Canadian provinces, or with aboriginal societies, is dependent to some degree on conceptually or politically stipulated rather than empirical identifications of community. The community values which are being invoked in such instances as counters to the Charter may therefore have less claim to authority than is sometimes attributed to them. At the conceptual level, we might note that the advocacy of a conception of community based on these delineations may under-recognize the extent to which other forms of community may be important. The arguments for a social matrix conception of value and therefore for the validity of limitations on or denials of the legitimacy of the Charter in the strong rights form are premised it might be argued on the recognition and privileging of a particular definitional cleavage in regards to culture. While it is self-evident that the quebecois and aboriginal identities are highly salient, it is by no means the case that we can understand the possessors of such identities only in those terms (an idea suggested, for example, by Taylor’s argument for the identification of Quebeckers with Canada through their “national identity”). The invocation of the Charter by aboriginal women, for example, suggests that there are aspects of the identity of members of cultural communities which distinguish their preferences, goals, self-conceptions and the like from
those of their fellows. Denials of the legitimacy of the *Charter* in the name of more locally authentic sources of value fail to fully acknowledge these possibilities.

At the political level, we might note that the cleavages of identity expressed through such mechanisms as federalism do not just "recognize" communities, but also contribute to imbuing such identities with perhaps greater than normal importance. One such example in Canada is the recent dispute between the government of Alberta and the federal government over the passage of the international Kyoto environmental accord. Concerned about the potential negative effects of the accord on the province's energy industry, Alberta's premier and other local opponents of the Kyoto agreement have suggested extensively that the passage of the accord reflects the federal government's disdain for Alberta and Albertans. These sorts of claims, I would argue, have the effect of furthering the stipulative definition of persons within Alberta's boundary as "Albertans" rather than, say, environmentally concerned persons, citizens of the world, Canadians, or possessors of some other form (or forms) of identity. Similarly, when Lucien Bouchard decried the "humiliation" of Quebec through the defeat of the Meech Lake Accord, his suggestion seemed to be that Quebecers ought understand themselves as offended by the rejection of greater powers for their provincial government rather than by, say, the potential impediments to their and their fellow citizens' rights which some worried the passage of the Meech Accord might bring with it.

This sort of phenomenon is the subject of Alan Cairns 1977 paper "The Government and Societies of Canadian Federalism". Cairns suggests there that while conventional wisdom perceives provincial communities as foundations for and progenitors of the claims to authority of their governments, the reverse may be the case. The "sociological perspective", which seeks to explain federalized conflict in Canada as a product of the clash of differing provincial cultures, Cairns argues,

\[\ldots \text{pays inadequate attention to the possibility that the support for powerful, independent provincial governments is a product of the political system itself, that it is fostered and created by provincial government elites employing the policy-making apparatus of their jurisdictions.}\]

(Cairns, 1977: 699)

One might suggest similarly that the claims of the representatives of cultural (and provincial)
communities that the *Charter* represents an “alien” set of values depends to no small extent
on the invocation of these sorts of stipulatively defined identities and a denial of the
importance or value of other potentially cross-cutting forms of identity.

When such definitions require denial of rights such as those to freedom of
expression or equality, they have some important effects. They potentially contribute to
denying to members of such communities the conceptual means by which to reconsider
their identities or to consider critically the attributes of identity that the values of their
culture proclaim as mandatory. Extreme examples of this can be seen in the cultural
communities of countries beyond Canada’s borders. The denial to women of the
opportunities for education by Afghanistan’s former Taliban regime, for example, was a
measure premised on a cultural belief about the place of women, but its effect was
additionally to make critical responses by those within the culture to such values difficult or
impossible. By denying women education, the culture’s values denied to women the
intellectual resources necessary to challenge such values. Less extreme examples of the
same problem are also available within Canada. In *Chamberlain v. Surrey School District No. 36*
([2002] 4 S. C. R. 710), for example, the Supreme Court was called on to decide whether a
British Columbia school board’s decision to prohibit a homosexual teacher from using
teaching resources depicting homosexual couples in spousal relationships contravened the
*Charter*. In promoting the particular cultural value which seems to have been at stake here —
a condemnation of homosexuality — the Surrey board was not just giving expression to its
community’s theory of the good, but at the same time creating conditions which enhanced
the authority of that system of values. It seems clear that societal discrimination against
homosexuals will be likely to be seen as more valid by students who understand
homosexuality as peculiar and aberrant than by students who have encountered
homosexuals as everyday persons like themselves. Some denials of rights also have the more
direct effect of making the expression of alternative forms of identity difficult or impossible.

Quebec’s prohibition in the 1980’s of commercial signs in languages other than French might be argued, for example, not just to have recognized the “French face of Quebec”, but in fact perhaps to have contributed as well to the public *creation* of that face. Thus, while such policies are in part expressions of what are argued to be locally “objectivist” values, they are also in part efforts to create, to stipulate, the unity required to make such values locally
What all of this suggests, then, is that the social matrix claim is a problematic one. Advocates of the theory imply that we can understand the values of cultural communities as locally objectivist facts which therefore need to be acknowledged as the authoritative source of public values in such societies. But there is in even the most cohesive of Canadian communities considerable diversity of thought, belief, and identity. The idea that one particular attribute of individual personality is so fundamental as to establish the authority of a comprehensive or “axiomatic” set of public values such as those associated with culturally-derived rejections of the individual rights of the Charter is in this context difficult to justify. To the extent that the identities associated with such cultural claims are products of an at least partly stipulative definition, the factual claim is in such cases, unfortunately, either a false or misleading one.

Community as an End

The final communitarian legitimative perspective which I wish to address here is one which relies not on claims about the local objectivity of cultural values, but instead on a more culturally transcendant theory of the good. It suggests that we should understand community as an “end”. Advocates of this legitimative value argue that we ought to recognize, support, and strengthen community in the Canadian context because community is a good which is necessary to human well-being. In the absence of some form of real community -- a place in which people feel connection, a sense of mutual responsibility, and share at least some important values -- people become socially unhealthy or lose the opportunity to live lives which are rich in human value. There is clearly no little appeal to such a view, and the importance of at least some form of community in this sense is one which, as I have noted, even liberal thinkers like Will Kymlicka and John Rawls have emphasized in their more recent works. The work of Charter theorists such as Charles Taylor and Mary Ellen Turpel suggest the importance of this form of communitarian justification, as does Patrick Monahan’s Politics and the Constitution. Taylor and Turpel suggest that the Charter is a problematic intrusion in existent communities because it makes difficult or impossible the necessary self-definition and self-expression of communities required to ensure their continued existence. Monahan argues for an understanding of the Charter in a way which contributes to protecting local cultural values.
from too intrusive a review by Charter jurists.

Two central arguments can be associated with this perspective. Communitarian responses to the Charter which proceed from a claim for the value of creating community or recognizing the value of existent forms of community sometimes suggest that rights are in authentic communities largely unnecessary. Local valuations of communality and local remediatory norms offer the sorts of protections of individuals which the Charter seeks to offer in a culturally-intrusive form. This is in essence Mary Ellen Turpel’s argument. And communitarians — like Charles Taylor — sometimes suggest that individual rights, or too expansive a notion of their value, are impediments to the communal or cultural expression of local values and corrosive of the sorts of attitudes of mutual connectedness and inter-responsibility associated with real community.

The first of these arguments is one which is central to the liberal-communitarian debate I discussed earlier in this chapter. What is at issue here are competing claims between rights liberals and communitarians about the nature of human life in collectivity. The liberal claim suggests that rights are necessary because in any human society persons face the perils of hierarchy, marginalization, unjust inequality and the like. The communitarian claim suggests that these are in fact products of social life in which community is lacking. Within a society in which values are widely shared and in which there is some significant sense of mutual connection, these are problems which are mediated in less intrusive ways. While this is not the sort of debate which is amenable to a dispositive solution, I have suggested that we have reason to be skeptical about communitarian optimism about collective life. As I suggested in regard to Mary Ellen Turpel’s characterization of the values of aboriginal life as embodying such things as “kindness and sharing”, there is not always an identity between what we might call a society’s “aspirational” and its “realized” norms. While I would in no sense deny the validity of Turpel’s characterization of the aspirational values of aboriginal life as kindness and sharing, I would suggest that the realized values of aboriginal life (and, indeed, life in all communities) might often be expected to fall short of such lofty aims. One also wonders to what extent it is the case that communitarian optimism about human collective life is founded on a falsely nostalgic perception of the human past, a point Amy Gutmann makes in “Communitarian Critics of Liberalism” (Gutmann, 1985: 319). I have noted that Alasdair
MacIntyre's highly influential communitarian work takes as its model societies of the past in which a singular great tradition held sway. MacIntyre discusses in *Whose Justice? Which Rationality?* a number of such societies and traditions, including Athens of Aristotle's day. Yet a consideration of such times and places would surely seem to suggest some significant shortcomings if our goal is mutual connection, human well-being, and the like. Women, slaves, and barbarians were non-citizens in Aristotelian Athens, and the place of such persons defined in reference to the traditions and values of citizens -- men, non-slaves, non-barbarians. A consideration of the societies to which MacIntyre directs us suggests that perhaps the happy communality he and other communitarian theorists perceive in such places may have been a product at least as much of silence and largely unconsidered social norms as feelings of well-being and mutual responsibility.

The second of the communitarian theses associated with a legitimative valuation of community as an end is that idea that rights are (a) impediments to the communal or cultural expression of local values and (b) therefore corrosive of the sorts of attitudes of mutual connectedness and inter-responsibility associated with real community. I would argue that the first of these propositions is true; the second, false. Indeed, I believe that the second proposition here is false in large part because the first is true. Rights and rights claiming do constitute an obstacle to the straightforward expression of cultural values because these mechanisms offer to the marginalized citizens of local communities a means by which to subject the values of their community to critical consideration (Sunstein, 1996: 208). In turn, this criticality requires cultural communities to reconsider the validity of their values claims and their definitions of authentic membership in the community.

We have reason, it might be argued, to value rather than deplore the effect which rights claims have on the expression of local values. There is, for example, a long line of political philosophy dating back to Socrates which suggests that criticality is of value because it directs us toward a realization of deeper truths. When Socrates was charged with "corrupting the morals of the youth of Athens", what was at issue was his propensity to encourage his youthful followers to question their elders (and, of course, through this, to question the received values upon which their community was built). In his defence, Plato records Socrates as claiming not that he did not have this effect on young people, but rather that he was doing good:
That is why I still go about seeking and searching in obedience to the divine command, if I think that anyone is wise, whether citizen or stranger, and when I think that any person is not wise, I try to help the cause of God by proving that he is not.

(The Apology)

This valuation of criticality is also evident in John Stuart Mill's work. Mill argued that the good of criticality expressed through such things as the free expression of opinion was to be valued whether an idea advanced in dissent was right or wrong:

... the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error

(Mill, 1993 [1859]: 85)

As Mill suggests, the good of criticality might be thought to contribute to our understanding of norms which would otherwise be taken for granted. Even if such favoured values are ultimately compelling, a consideration of their validity and value will presumably reinforce rather than undermine their hold on the imaginations of a cultural community. I argued in the previous section that the "factual" claims for the authority of particular cultural values are potentially subject to question, and rights claims in part offer a means of putting such claims to the test. To the extent that the pervasiveness of rights claiming becomes an impediment to the expression or realization of a local cultural value, there is, one would think, reason to doubt the breadth or depth of local commitment to the value at stake. Rights claims are also a means for encouraging or permitting dissent to "come out of the closet" (a not inapt cliché in this regard). In a milieu without rights, there is a certain illegitimacy about particular claims. The era before widespread recognition of homosexual rights was, for example, one in which such claims and claimants were viewed as perverse or offensive. Yet since the making of such claims has become less risky for claimants, and therefore more common, they are at the very least now understood as serious and worthy of consideration. Rights can also be understood as a means by which to provide for the revision of community norms. Communitarian theorists like Alasdair MacIntyre argue that communities have their
own remediatory and revisionary mechanisms and norms, and this is in large part true. The difficulty with these sorts of mechanisms, however, is that they are likely to privilege and enshrine the *status quo* to a far greater extent than are mechanisms like rights which can be understood as placing local norms on a more equal footing with their counterclaims.

It is interesting in this regard, I think that the preservation of the *status quo* sometimes seems to be presented in communitarian theories as a goal in itself. While James Tully's endorsement of the constitutional value of "continuity", for example, derives from his desire to ensure the recognition of local cultural communities in our constitutional discourse, one must surely recognize that if we place an especial value on such a good we place ourselves in a position of disadvantage if we also recognize one of the tasks of society as the *revision* of previous norms and values. Surely the realization of some human goods may require a valuation of *discontinuity* rather than continuity. This is something that Tully and other communitarians perhaps under-recognize. Tully not only endorses "continuity", but he also somehow associates values with it that seem on examination extremely difficult to reconcile with that ideal. In illustrating his constitutional principles -- including that of continuity -- Tully offers as exemplary the constitutional discourse that went on around section 28 of the *Charter*, the guarantee of gender equality (Tully, 1995: 180). Tully notes that the original *Charter* package did not include such a guarantee, but that the work of women's groups in lobbying the federal government ensured the ultimate inclusion of that right. Yet while s. 28 certainly represents the federal government's acknowledgement of Tully's constitutional values of "recognition" and "consent" as regards women, the right to gender equality would seem difficult to understand in terms of *continuity*. Recognition of the rights of women to equality would seem a significant *discontinuity* with the prior norms of most Canadian constitutional communities and the constitutional community as a whole. Indeed, one wonders why women's groups recognized the need to fight and fought so hard for s. 28 if it was merely more of the same.

My argument, then, is that rights are corrosive of the existent normative schemata of the societies in which they are recognized. But this corrosiveness may be constructive as well as destructive, contributory to the reconstruction and revision of community in a way which recognizes that good more completely and authentically than is possible in forms in which cultural values are given greater protection. The difficulty with communitarian
conceptions of community is perhaps in part that they offer what might be called a “top down” vision of community identity. Membership of persons in such communities is dependent on the extent to which they fit within the lines of culturality and its associated norms. This is ultimately an exclusionary vision of community, and it is one which is arguably widely prevalent in Canadian life.

It is embodied I would argue, for example, in Justice John McClung’s 1996 judgment at the Alberta Court of Appeal in *Vriend v. Alberta* ((1996) 132 D.L.R. (4th) 595). In discussing the constitutional validity of the Alberta government’s refusal to include sexual orientation as a prohibited ground of discrimination in the *Individual Rights Protection Act*, McClung asserted that “I am unable to conclude that it was a forbidden legislative response for the Province of Alberta to step back from the validation of homosexual relations, including sodomy, as a protected and fundamental right”, relying in part on the fact that

> [f]or many people in Western societies, and most others the sexual and emotional entanglement of two people of the same gender is a moral enormity. They find such behaviour abhorrent, even threatening.

(*Vriend*: 609, quoting Sullivan, 1995)

McClung’s suggestion seems to be that the Alberta community acted appropriately in defining itself in light of these emotional and exclusionary responses to homosexuality. This exclusionary conception of community might also be said to have been expressed in the objections in 1994 of many Canadians to the RCMP’s altering of its dress code to permit Sikh members to wear their religiously-prescribed turbans as part of the Mountie uniform. Arguments for the identification of the RCMP uniform with the traditional stetson and only the stetson to the exclusion of members of religions like the Sikhs’ seem, I would suggest, to imply a particularistic and exclusionary definition of who Canadians are. Similarly, when Premier Parizeau of Quebec angrily complained on the night of the 1995 sovereignty referendum that “money and ethnics” were to blame for the vote rejecting separatism from Canada, his suggestion seemed to be that the ballots of ethnic Quebecers were as illegitimate in their influence on the outcome as the financially-derived effects on the vote. Each of these sorts of claims represents, I would argue, a top down and exclusionary rather than inclusionary conception of community membership.
But there is an alternative, more bottom up, vision of community available to us. It suggests not that the community ought define its membership, but that the community ought to be defined in terms of its membership — that is, all those who live within a territory which is to be governed by a set of law-making institutions. In this view, the idea is that the norms and values of such communities must account in a meaningful way for the actual inhabitants — not just the idealized ones — of a given place. H. N. Hirsch has argued that "[f]rom the point of view of practical politics, the 'decision' to 'include'" the marginalized in an exclusionary community can

... only come about in one of two ways. Either the community itself would reconsider the basis of its exclusion, and decide that it has been in error ... or the community would be told, in effect, that it has no choice. ... The first alternative -- spontaneous generosity -- will not often take place in the real world..."  

(Hirsch, 1986: 441)

The argument, then, is that rights might be understood as a means to such an end, because they provide mechanisms by which the top down valuations of community might be critically reconsidered in light of the realities of bottom up community membership. I am suggesting that rights need not be understood as corrosions of community, but as contributions to recognizing and recreating it in a more authentic and inclusive form than can be achieved through the more exclusionary norms of communitarianism.

Communitarianism and the Charter

Communitarian responses to the Charter invoke long held Canadian views that our most important constitutional values are intercultural amity and the accommodation of collective cultural difference. The focus on such goods is of course understandable: it is in Canada impossible to deny the necessity of accounting for and responding to cultural claims, and the nearness of constitutional breakup in Canada in the Quebec referenda of 1980 and 1995 attests to this fact. What is more, there is indeed much that is good in recognizing and respecting the importance of community expressed in constitutional arrangements like federalism and the Canadian system of aboriginal rights and reserved lands. The recognition of these goods makes Canada a country worthy of praise for its toleration and respect for others. There is much to be esteemed in our acknowledgement
of the importance of accounting for something beyond only a single group's culturally-defined morality and interests in working out a just constitutional order. The problem that arises from our focus on communitarian values in the Canadian context is that it may lead us, however, to associate too much of the realm of human good with collective life and cultural recognition. To the extent the communitarian vision directs a rejection or narrowing of the Charter, it runs the risk of mistaking the necessarily recognized goods of community in Canada with the entirety of constitutional value. If there are, on the other hand, important constitutional goods beyond those of culturally-focussed amity, tolerance, recognition and the like which we might wish to embrace, then it may be necessary, I would argue, to depart, at least to some extent, from our longstanding Canadian valuation of community for its own sake.

These are ideas which I think Alan Cairns has eloquently recognized in his considerations of post-Charter constitutionalism in Canada. As early as 1989, Cairns was arguing — contrary to much of Canadian scholarship of the time — that the Charter needed to be understood not as “a minor addition to the Canadian constitutional system”, but as “a profound, wrenching transformation” (Cairns, 1991: 179). This transformation has taken at least two forms. First, the Charter’s emphasis on individual rights makes or has the potential to make some forms of political order in Canada no longer tenable. Recognizing a realm of individual rights means governments can no longer do some things they might wish to do in the name of community. Secondly, the Charter has transformed the very legitimative climate in Canada by broadening our understanding of the “parties” whose interests and well-being are involved in constitutional decisions. As Cairns notes, the Charter has ushered in an era of “new diversity”, in which the old two and three nations views of Canada must be broadened to account for other forms of diversity such as that embodied in the cultural communities of non-founding ethnic groups (Cairns, 1993: 208). And it has changed our perspective on the relationship of individuals to the Canadian constitutional order. Many Canadians no longer find it acceptable for our constitutional values to be defined simply through negotiations between elite representatives of governments and cultural groups whose aims are primarily the preservation or enhancement of the corporate interests of their collectivities (Cairns, 1992: 109). The regime of individual rights embodied in the Charter presupposes, suggests Cairns, “that the citizen-state axis is no less
fundamental than the federal-provincial constitutional axis" (Cairns, 1992: 7), an idea whose time perhaps has come in our country. In this view, the Charter has made Canadians aware of themselves and others as individuals as well as members of particular cultural collectivities.

These are insights whose value is highlighted by a consideration of the Meech Lake and Charlottetown constitutional accords offered to the Canadian public under the auspices of Brian Mulroney. While these were masterpieces of Machiavellian accommodation of the central constitutional forces at the constitutional bargaining table, what these arrangements arguably lacked was an accounting for goods and values which transcend or speak contrarily to our primary valuation of intercultural amity in Canadian life. The Mulroney “deals” can be understood, I think, as having been founded on a theory of value which took the longstanding goods of community and intercultural amity as the fundamental ends of Canadian constitutionalism. But, as Cairns has suggested, the deals ultimately failed, despite their widespread endorsement by Canadian elites, because these groups were “insensitive to the new role of the constitution” in Canadian life” (Cairns, 1991: 246) established with the coming of the Charter. What distinguishes the Charter from those proposals which followed it was not, I would argue, so much its transcendance of Machiavellian necessity (Pierre Trudeau’s complaints about the necessary inclusion in the Charter of the notwithstanding clause are in essence complaints about the exigencies of Machiavellian necessity), but its commitment to other goods as well. The rejection by Canadians as a whole of the Mulroney deals which would have had the effect of undercutting the Charter suggests (to those who value the Charter in strong rights form at any rate) that the Canadian people recognized in a way which their political leadership of the time did not the authority of a set of constitutional goods and values which are derivable independently of, and least partly in opposition to, the processes of intercultural accommodation which communitarianism endorses. As Cairns argues, “the Charter has taken root and is now part of the civic identity of many Canadians” (Cairns, 1992: 5). Its influence suggests that we must now therefore recognize the value and importance of individuals as well as community in our constitutional thinking.

III. COMMUNITY AS A THEORY OF CHARTER FOUNDATIONS

As I suggested in the previous chapter, Patrick Monahan’s influential Politics and the
Constitution offers a foundational characterization of the Charter which sees the document as a fundamental expression of two important and related Canadian values: democracy and community. I considered in the previous chapter the democratic aspect of Monahan's Charter theory; I focus here on the communitarian aspect of his claims. I have suggested that communitarianism is perhaps the most influential of our primary values, and Monahan’s arguments underscore this point. While his democratic characterization of the Charter relies heavily on American constitutional theories like that of John Hart Ely, Monahan suggests that the communitarian aspects of the Charter are more purely Canadian in their orientation. They derive from the “Canadian political tradition itself” (Monahan, 1987: 105).

Monahan’s arguments in regard to the communitarian character of the Charter are premised on the idea that the task of the constitutional interpreter is to attempt “to make sense of the document as a whole” (Monahan, 1987: 114). Given that community is a meritorious and fundamentally Canadian ideal (Monahan, 1987: 105) and that the Charter speaks in a large number of places in language which emphasizes community, Monahan suggests that characterization of the Charter in community-oriented terms is both desirable and valid:

interpretations of the Charter must seek to make sense of the document as a whole. The fact that the document is replete with references to community ought to make a difference in the interpretation of provisions which are ostensibly wholly individualist.

(Monahan, 1987: 114)

Among the provisions which suggest to Monahan the viability of a communitarian characterization of the Charter are the language rights of ss. 16 to 23, s. 25’s guarantee that the rights of the Charter should not be construed so as to derogate from aboriginal and treaty rights, s. 27’s recognition of Canada’s multicultural heritage, and s. 29’s acknowledgement of the continuing validity of previous Canadian constitutional arrangements securing separate schools for Christian religious minorities in Canada (Monahan, 1987: 114). These are all clauses which can be taken as speaking to collective rather than individual forms of identity. Monahan argues therefore that the “post-liberal” conception of the relationship between individual and community embodied in these sorts of provisions “must be taken into account in the interpretation of the fundamental freedoms
found elsewhere in the document” (Monahan, 1987: 114).

In advancing this theory, Monahan rejects approaches such as that of Justice Jean Beetz in *La Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education* ([1986] 1 S. C. R., 549) which proceed from an understanding of the Charter as an aggregation of diverse and potentially conflicting values. He argues that the holist approach, which seeks to read the Charter as a single document, is preferable to the approach endorsed by the Supreme Court of Canada in *La Société des Acadiens...* (Monahan, 1987: 114)

While the facts of the *Acadiens* case ([1986] 1 S. C. R., 549) are not important to our discussion here, the interpretive thesis adopted by Justice Beetz is one which is of relevance to our consideration of Monahan's foundational characterization of the Charter. Beetz's thesis is that the rights of the Charter can be understood in different lights because different rights have different geneses. The right to a fair hearing, for example, is of a significantly different character in Beetz's view than are rights such as those contained in ss. 16 to 23 of the Charter:

This right belongs to the category of rights which in the Charter are designated as legal rights and protected at least in part by provisions such as those of ss. 7 and 14. It would constitute an error to import the requirements of natural justice into language rights, or to relate one type of right to the other. Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. . . . This essential difference between the two types of rights dictates a distinct judicial approach with respect to each.

(*Acadiens*: 552, emphasis added)

In essence, Justice Beetz suggests two things. First, that we should recognize a distinction between rights “rooted in principle” like those in ss. 7 to 14 of the Charter, and those, like the language rights, which are products of “political compromise”. Secondly, and following from this distinction, we should recognize that different approaches are warranted to the construction of rights of these different origins. Beetz's arguments suggest that rights rooted in principle are appropriately given constructive interpretation in reference to some broader, deeper investigation of the more essential values at stake. Rights which are the
products of political compromise on the other hand, should be construed in reference to the political facts which necessitated their inclusion in the constitutional arrangements of the order.

With respect, I would argue that Justice Beetz's approach is for a number of reasons a more compelling and appropriate conception of the *Charter* than that endorsed by Professor Monahan. It would seem an uncontroversial observation that the provisions of the *Charter* do differ, sometimes fundamentally, in their valuations and orientations. At least two examples suggest themselves. First, there would seem to be a clear conflict between the *Charter*’s endorsement of individually-oriented rights such as s. 2’s guarantees of fundamental freedoms like those of expression and conscience, and the document’s concurrent incorporation of s. 33’s licence to governments to deny those rights at will. Provisions like s. 2 would seem to have their justification in some underlying valuation of the importance and centrality of individual freedoms to human well-being or dignity. The guarantees offered by section 2 of such goods as freedom of conscience are, to use Ronald Dworkin’s phrase, “trumps” against governments acting contrarily to them on behalf of conflicting collectively held valuations. To the extent we understand such rights as fundamental – a quality which the *Charter*’s text certainly attributes to them – they would seem then to be unamenable to significant abrogation by the larger collectivity. Yet the *Charter*’s notwithstanding clause appears to trump this trump. Section 33 gives to Canadian governments the power not to amend or alter rights like those of s. 2, but in fact to deny them in their entirety. The justification for this provision would seem to depend on a valuation of such goods as collective decision-making, or on parliamentary or legislative supremacy, the ideal endorsed during the negotiation of the *Constitution Act, 1982* by Canadian premiers like Manitoba’s Sterling Lyon. There is a conflict of values here which is clear and fundamental, as is evidenced in the fact that even former prime ministers Brian Mulroney and Pierre Trudeau — whose constitutional visions seemingly generally have little in common — have both through their comments on the *Charter* indicated that they share such a view.¹⁵

We might also consider what would seem to be a conceptual conflict between something like s. 29 – the *Charter*’s acknowledgement of the continuing validity of the *Constitution Act, 1867*’s arrangements for separate Protestant and Catholic schools in
Canadian provinces — and ss. 2 and 15 of the *Charter*. Section 2 suggests that Canadians have freedom of religion — a value which in effect denies to the state the authority to establish publicly mandated religious institutions. Section 15, the *Charter's* guarantee of equality to Canadians, including religious equality, would seem to deny the validity of governmental actions which favour one religious group over another. One might suggest that the guarantee of denominational schools to Protestants and Catholics in Canada would seem to give to Christians some constitutional opportunities — state-funded religiously-oriented schools — which are unavailable to non-Christians.

These, then, would seem to be fairly manifest internal conflicts in the *Charter's* attributes of foundational character. While one might devise some innovative means of reconciling such differences, of finding an interpretive unity in the *Charter*, such a task would seem more than a little difficult. In fact, of course, the variegated character of the *Charter's* provisions reflects the realities of the constitutional circumstances in which it came into being. The *Charter* is not the product of a single mind, or a single school of thought. Its provisions reflect the diversity of values of those at the constitutional tables in 1981; from Pierre Trudeau's orientation to individual rights, through the desire of many or even most premiers to retain the legislative powers of their governments in the name of such goods as parliamentary sovereignty, to Quebec's representatives' desire to preserve what they understood as their province's longstanding constitutional prerogatives and collective values. What is more, the *Charter* not only reflects these sorts of conflicts, but more longstanding ones as well. Indeed, most of the provisions which Monahan understands as indicative of the *Charter's* communitarian character are not "*Charter" provisions at all, but pointers to constitutional commitments which long preceded the decisions of 1981. The language rights in ss. 16 to 23, as Justice Beetz notes, have their genesis in s. 133 of the *Constitution Act, 1867*; that is, in the original Canadian constitutional compromise. Section 29 is similarly a reference to the denominational schools provisions of the 1867 Constitution. And section 25 is an acknowledgement of constitution-like agreements dating back to 1763 between Canada or its predecessor, the British Crown, and Canadian aboriginals.

In distinguishing this sort of content from other *Charter* provisions like the individual rights guarantees in ss. 2 to 15, Justice Beetz describes the former as "political compromises", and the latter as "rooted in principle". Beetz's distinction respects, I think,
the reality that the inclusion of provisions like ss. 16 to 23, 25, and 29 in the Charter reflects less a coherent and identifiable theory of human value endorsed by the authors of the document than the political necessity of acknowledging constitutional conversations of the past. The inclusion of such provisions in the Charter derives at least as much from their prior recognition in the Canadian constitutional order as parts of the necessary project of seeking to integrate and accommodate the most resonant and constitutionally salient forces at the conference tables of the past as it does from their expression of a contemporary theory of Charter value. This is not to say that such provisions are invalid or even necessarily objectionable. Nor is it to say that they are even simply “unfortunate necessities”. As I suggested in the previous section, these sorts of arrangements do speak to human values such as intercultural amity, tolerance, and other objectively desirable constitutional goods. In this sense, Justice Beetz’s description of these Charter rights as “political compromises” and his distinction of them from more principled Charter values is somewhat misleading. There are principles -- albeit of different types -- involved in both sorts of provisions.

But while we might wish for a more nuanced form of description of the differences between these types of provisions, the distinction is nonetheless an important one in our consideration of the foundational character of the Charter. To the extent that the communitarian provisions of the Charter have their source in prior constitutional arrangements, they are problematic as guides to characterizations of the document’s “new” content. They are reflections of the necessity and value of recognizing the ongoing obligations of past constitutional commitments, but they need not and perhaps should not be taken as definitive indicators of the nature and character of the new commitments the Charter arguably embodies, unless we wish to invoke “continuity” as our fundamental constitutional value. I would argue that most of the provisions which Monahan cites as exemplifications of the Charter’s community-oriented character are better understood as means by which to recognize prior constitutional commitments in the face of the Charter’s new regime of individually-oriented rights than as contemporary commitments to “more of the same”. They are in this view more appropriately understood, I would suggest, as exceptions or caveats to the Charter’s rights regime than as paradigmatic expressions of Charter value.

One exception to my argument that the Charter’s community-oriented provisions are
“old” rather than “new” constitutional content is the multicultural right in s. 27. It seeks to ensure that the *Charter* is “interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada”. This represents a departure, I think, from prior formalized Canadian constitutional values, for little in the *Constitution Act, 1867* or other pre-Charter constitutional agreements would seem to have necessitated the recognition of multiculturalism in the *Charter’s* denomination of values.\(^6\) Does s. 27 therefore perhaps represent new *Charter* content that would support Monahan’s characterization of the document in communitarian terms?

While I think that s. 27 can viably be understood in this light, the provision is also, I would argue, characterizable in a way which is capable of undercutting such understandings. The consequence or aim of a communitarian characterization of the *Charter* is, I think, among other things, the mediation of the document’s guarantees of individual rights in the name of recognizing or promoting more communal or collective ends. By softening our reading of individual rights against governments, we leave greater room for the expression of community values. I take this to be Monahan’s end, given his valuation of the collective decision-making processes of democracy which I discussed in the previous chapter and his arguments that the *Charter’s* references to community “ought to make a difference in the interpretation of provisions which are ostensibly wholly individualist” (Monahan, 1987: 114). It is, however, somewhat problematic to attempt to ground this sort of reading of the *Charter* in s. 27. A communitarian characterization of the document would have the effect of enhancing the powers of Canadian governments to give voice to collective expressions of value, but these bodies are, unfortunately, more clearly identifiable with cultural groups whose powers and authority s. 27 was arguably aimed at reducing, rather than enhancing, than they are with the sorts of cultural groups to which s. 27 seems to speak.

One of the underlying logics of a federal system of government, one particularly evident in the Canadian context, is that by federalizing a nation, one creates local communities by turning what are minorities at the national level into majorities at the provincial level. There is, then, inherent in a federal society, a certain culture or community-creating impetus which derives from an understanding of community as the expression of a particular cultural group — a national minority turned into a local majority. In Canada, Quebec is the clearest exemplar of this phenomenon. But the association of provincial
governments with particular cultural identities has also been historically evident in Ontario (as a representative of the Anglo side of Confederation's bi-cultural divide), and, although now diminishing, in the culturally fairly homogeneous Atlantic provinces. To the extent that these governments seek to speak in communitarian terms, the cultures to which they are likely to give expression are, one would think, those of our "founding nations". Yet the genesis of s. 27 was not in the desires of these dominant Canadian cultural groups, but in the demands of groups representing what might be called "ethnic" Canadians — that is, persons whose cultural heritage was not of the founding nations. I would argue that a clear reading of the history of s. 27 and of the connotations of the term "multiculturalism" in the Canadian context suggests that this is a provision more reasonably understood as a recognition and acknowledgement of Canada's "ethnic" populations rather than of the cultures of the founding peoples.

Since, however, we have no provincial governments associated with ethnic minorities — no provincialized Lithuanian or Jamaican identities, for example — it is difficult to see how endorsing a larger sphere for the governments of Canadian federalism to give voice to collective expressions of cultural value could be thought to be consonant with the implicit ends of s. 27. To the extent that s. 27 is understandable as a protection for ethnic populations, it is more viably understood I would argue as a limitation of governmental powers — a denial of the tools of culture creation in the name of a singular local community — than as an aid to them. In turn, if this is the case, it would seem to suggest that s. 27 is more compellingly characterizable as one of the Charter's recognitions of individual value rather than as one of its references to more communitarian theories of the person. In this view, the provision suggests that individuals should not be made the subject of obligations which derive from some overarching cultural community to which they owe their obedience, but rather that they are entitled to give expression to those values which are meaningful to them as persons distinct from the collectivity. The multiculturalism right in the Charter might be understood in these terms, then, as an expression of what I have argued to be the "bottom up" rather than "top down" conception of community. To the extent we understand s. 27 in this light, it does not offer a justification for the sorts of community-oriented readings that communitarian foundational characterizations of the Charter would recommend to us.
IV. COMMUNITY AS A THEORY OF LEGAL DESCRIPTION

Much of the Charter speaks in the language of individually-oriented rights; all but a few of its specific provisions are, for example, guaranteed to “everyone”, “every citizen”, or “every individual”. Yet a number of its characteristics leave room for more community-oriented approaches to defining its applicative legal meaning. The frequently noted indeterminacy of Charter rights, for example, makes plausible a variety of different applicative interpretations of their guarantees, including those which favour communitarian values. The Charter is also given some specific limitation by s. 1, which provides that the rights and freedoms set out in the document are subject to reasonable limits which can be “demonstrably justified in a free and democratic society”. Former chief justice Brian Dickson has suggested that this invocation of the “free and democratic society” implies a valuation of, among other things, “respect for cultural and group identity” (R. v. Oakes [1986] 1 S. C. R. 103: 136). The presence of s. 33 in the Charter, which empowers Canadian governments to override many of its guarantees of individual rights, has been suggested to give credence to arguments that the document’s rights and freedoms need not be understood by adjudicators as final and ultimate “trumps” of community proclamations of value (Monahan, 1987: 118). The Charter also contains some internal mechanisms which suggest the plausibility of reading it in a way which might exempt at least partially our most recognizable cultural communities from its application. Section 25 asserts, for example, that

The guarantees in this Charter of rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.

And s. 35 of the Constitution Act, 1982 in which the Charter is embedded also indicates that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognize and affirmed”. There is considerable theoretical dispute about the implications of ss. 25 and 35, but the existence of the provisions does suggest the potential validity of more communitarian-oriented readings of the Charter on behalf of aboriginal groups and governments (Macklem, 2001: 209).

These, then, are at least some of the attributes of the Charter which might be thought to support efforts to interpret and apply it in a way which seeks to accommodate
communitarian values. It is perhaps one of the more interesting characteristics of the debate between Canadian liberals and communitarians about the *Charter* that such efforts are at least implicitly endorsed, albeit to different extents, by scholars from both groups. Both sides seemingly endorse the notion that the correct or most desirable solution to the individual-collective conflict is one which seeks to give due weight to both the claims of individuals and communities. Canadian liberal Will Kymlicka’s work, as I have noted, suggests a large and important place for community in our understanding of liberal values; Canadian communitarian Charles Taylor’s work in turn suggests an acknowledgement of individual as well as collective claims in our public life.\(^1\)

These values are reflected in a variety of interpretive theories which seek to reconcile the individualistic *Charter* with more communitarian conceptions of collective life. In criticizing universalist rights discourse in *Reasoning with the Charter*, for example, Leon Trakman argues that

> Judicial attempts to construct a universal discourse about rights is not *per se* bad or wrong. However, it is bad insofar as it leads inevitably to sameness of treatment. One cannot expect English and French speaking Canadians to agree upon common norms to govern language usage. However, one can expect Canadian courts to develop proactive conventions by which to govern such differences. Rather than treat everyone the same, the aim of these conventions is to accommodate disparate conceptions of rights, including challenges to the rights discourse itself.  

(Trakman, 1991: 82)

Similarly, in “Regimes of Tolerance: A Communitarian Approach to Freedom of Expression and its Limits”, Mark Crawford argues for a conception of the *Charter* in the legal context which “attempts to provide a communitarian justification for [rights such as] free speech that avoids the worst features of both liberalism *and* its critics” (Crawford, 1990: 3).

But among recent efforts to reconcile individualist *Charter* values with communitarian counter-claims, perhaps the most respectful of both sides of the debate is that of Avigail Eisenberg. It is her work which I focus on here in my consideration of communitarian-oriented theories of *Charter* meaning in the legal context. In “The Politics of Individual and Group Difference in Canadian Jurisprudence”, Eisenberg suggests that constitutional adjudicators might depart from the “individual versus collective rights perspective” in favour
of an alternative conception she calls the “difference” perspective. Her alternative

... is founded on the observation that often individual and collective rights are and ought to be viewed as servants to a third value, namely, the value of protecting differences that are closely related to the identities of individuals and groups.

(Eisenberg, 1994: 4)

It is the recognition of this third value which enables us to reconceive Charter disputes between communities and individuals in terms which make a more conciliatory approach possible. Eisenberg suggests that her work is not only normative — that is, an argument for the adoption of the “difference” perspective — but in fact descriptive as well. She argues that in a number of cases “the difference perspective accurately retrieves the courts’ reasoning by framing it in terms of the values actually at stake” (Eisenberg, 1994: 5) and suggests therefore that this approach offers a more accurate characterization of Canadian jurisprudence on these issues than do commentaries which conceptualize such disputes in terms of the dominant individual versus collective rights perspective (Eisenberg, 1994: 4). Because Eisenberg's perspective is founded on a recognition of the validity of individual as well as communitarian claims, it offers the promise of what seems to be a realistic communitarian approach to questions of the Charter's legal meaning.

I begin here with a brief outline of Eisenberg's theory. I then discuss what might be called the “success” of the difference perspective as a tool of Charter interpretation. Eisenberg's interpretive theory does in many instances meet its promise and in these regards it is a helpful contribution toward a judicial theory of Charter meaning and interpretation in individual-community conflicts. Unfortunately, the difference perspective becomes increasingly problematic as a guide for judicial decision-making as cases get “harder”. I conclude this section with a discussion of these problems, which I argue are representative of difficulties which are likely to arise in other communitarian-oriented theories of Charter interpretation as well.

Eisenberg's theory is premised on the notion that one of the central ends of social and political institutions is protecting identities, and the difference perspective suggests that one important means of so doing is by protecting “difference” itself. Difference in this view can and should be protected by creating or recognizing mechanisms that enable or
allow difference to be expressed. In the individual context,

[pro]tecting individual difference means allowing individuals the opportunity to voice their opinions, to choose their beliefs and generally to be the authors of their own lives and identities so long as these choices do not cause harm to others. A politics that values individual differences may set parameters to community decision-making by employing rights as devices to protect the interests which are crucial to the preservation of individual identity.

(Eisenberg, 1994: 11)

But not all goods of identity can be attained through an individual-oriented “politics” such as that expressed by mechanisms like Charter rights. “[S]ome identity-conferring characteristics . . . require group or communal contexts to flourish”, Eisenberg notes, and therefore “[pro]tecting group differences will require protecting communities in certain ways” (Eisenberg, 1994: 10-11). Eisenberg has in mind here mechanisms of cultural protection which enable cultural self-expression and self-determination, or which seek to preserve goods such as a common group language.

The problem, as Eisenberg acknowledges, is that both group and individual forms of identity can be understood as fundamental, and therefore as having the character of “rights” (Eisenberg, 2001: 164). The task of a court in such circumstances is to find a “means of adjudicating, on a principled as opposed to arbitrary basis, claims that are presented in terms of conflicting rights” (Eisenberg, 2001: 163). The difference perspective offers a means of responding to this difficulty:

A judicial method flows from the difference perspective, and it asks that the courts first determine whether both sides in the conflict can base their arguments on claims to preserve individual and/or group difference. If both sides invoke such claims, the decisive question becomes whether the claim of each disputant is equally central to preserving or nurturing their identity.

(Eisenberg, 1994: 21)

What the difference perspective suggests, then, is that courts seek to “balance” individual claims with those of community (Eisenberg, 1994: 12), “weigh[ing]” (Eisenberg, 2001: 165) and “comparing their respective importance” (Eisenberg, 1994: 14) to those on each side of the dispute. Eisenberg illustrates the utility of the difference perspective by examining in
some detail two cases in which its application is particularly apt: \textit{R. v. Sparrow} ([1990] 1 S. C. R. 1075), and \textit{Thomas v. Norris} ([1992] 2 Canadian Native Law Reporter: 139 (B.C.S.C.)). While neither \textit{Sparrow} nor \textit{Thomas} is a \textit{Charter} case \textit{per se}, both address the meaning and ambit of s. 35 of the \textit{Constitution Act, 1982} in a way which is highly relevant to the question of resolving individual-community conflicts in \textit{Charter} litigation more generally.

\textit{Sparrow} concerned a member of the Musqueam aboriginal band of British Columbia who had been charged for fishing in the Canoe Passage of the Fraser River using methods outlawed for conservation purposes by the federal \textit{Fisheries Act}. Sparrow’s counsel argued that his client had a claim to fish the Canoe Passage unhindered by federal fishing regulations because his activity was an expression of the Musqueam band’s existing collective right to the use of this region to gain a livelihood, a right implicitly guaranteed by s. 35 of the \textit{Constitution Act, 1982}. In considering whether fishing in the Canoe Passage constituted a right of the Musqueam, the Supreme Court considered what Eisenberg calls “identity-related arguments”. In their judgment, Chief Justice Dickson and Justice LaForest noted, for example, that “[t]he evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day” \textit{(Sparrow: 1094)}. The Court concluded that

\begin{quote}
[t]he constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. . . [with] the brunt of conservation measures [to] be borne by the practices of sport fishing and commercial fishing.
\end{quote}

\textit{(Sparrow: 1116)}

Eisenberg reads \textit{Sparrow} as suggesting in broad terms that the collective aboriginal right in question here is in this instance superior to something like the \textit{Charter’s} guarantee of individual rights to equality under the law in s. 15. As she suggests,

\begin{quote}
The Court understood that its decision discriminated against non-Musqueam individuals who fish in the area. But this discrimination was not viewed as unfair because the identity of other groups was not intertwined with fishing in Canoe Passage as was the Musqueam identity.
\end{quote}

\textit{(Eisenberg, 1994: 15)}
By assessing the importance of access to Canoe Passage as an expression of or protection for the Musqueam cultural identity and at least implicitly weighing that against the importance of access for non-Musqueam in the area, the Court was able to offer a principled means of recognizing the collective right as the superior claim in this case.

In *Thomas v. Norris*, it is not the group, but the individual rights claim which prevails. *Thomas* concerned a member of the Coast Salish band of British Columbia who was kidnapped and held against his will by a number of his fellow band members with the aim of "initiating" him into full membership in the band through "spirit dancing", a days-long process of ritual dancing, fasting, and sweating. Thomas sued Norris and others for assault and false imprisonment. In his defence, Norris' counsel argued that the kidnapping and subjection of Thomas to the ritual forms was in keeping with the Salish's long-held and long-practiced cultural traditions in that locale, and therefore that

... the plaintiff's civil rights against assault, battery and false imprisonment are subordinate and must give way to the collective right of the Aboriginal nation to which he belongs and which is protected by s. 35(1).

(*Thomas*: 151)

Again, Eisenberg suggests, the difference perspective can be used to clarify and explain the judicial ruling in this case. In deciding the case, Justice Hood of the British Columbia Supreme Court heard evidence as to both the importance of the initiation measures to the cultural life of the Salish and to questions about Thomas's personal sense of identity. Hood held that "evidence suggests [that] spirit dancing has been performed or practised by Coast Salish people, ... for some time" and "that it is considered to be a tradition as well a a religion" (*Thomas*: 153). However, evidence did not show that "forcing an initiate to participate" (Isaac, 1992: 621) was an "integral part of native life up to this day" (*Thomas*: 158). As for Thomas, "although he was a member of the Coast Salish people, he knew little about the religion, he was not interested in learning about the culture, he was not brought up in the culture and he lived off the reserve" (Eisenberg, 1994: 17 - 18). Eisenberg's summary suggests a close fit of *Thomas* with the values of the difference perspective:

In comparing the conflicting claims of the group and the
individual, the Court found that the Spirit Dance, and more specifically the involuntary aspect of it, was not a central feature of the Salish way of life. Therefore, the group claim to involuntarily initiate participants into the Spirit Dance could not override Thomas' (or any other individual's) right to be protected from assault, battery and false imprisonment.

(Eisenberg, 1994: 18)

We might begin our critical consideration of Eisenberg's advocacy of the difference perspective by noting that in regard to both Sparrow and Thomas, the approach seems to offer positive results. It accounts for and takes seriously both individual and community claims, as is evidenced by its nuanced ability to direct courts toward either individual or community-oriented judgments depending on the circumstances surrounding the case and the differences in the values at stake in the conflicting claims at issue. What is more, in both cases, it provides what seems, to me at least, to be a fairly compelling justification for the differentiations it directs. It seems reasonable to conclude that fishing access to the Canoe Passage is more important to Musqueam cultural identity and therefore to members of the Musqueam band than it is for non-Musqueam individuals. And it seems reasonable to conclude that Thomas's right to what might be termed “security of the person” is more important than the Salish band members' claim to the expression or preservation of their cultural values through what the court identified as a fairly tangential form of that identity. Having said this, however, it must be noted that there are some important difficulties with the difference perspective which bear our attention. Because Eisenberg's approach mandates balancing conflicting individual and community demands against each other, a central task for judges making use of the difference perspective is the attribution of weight to the claims in question. By what means it might be asked is an adjudicator to determine how important or central to an individual claimant is, say, freedom of expression, or, to a community, the preservation of a given traditional practice?

One possibility is to refer to what might be called an “objective” or external standard, something like an index of values which placed various competing community and individual rights in an ordered hierarchy. The difficulty with this approach is that it would require recognition of some scale or scheme by which competing goods or rights could be definitively ordered. But Eisenberg's interpretive theory is premised on a desire to avoid endorsing such a standard. Instead, it seeks to treat conflicting claims independently of
comprehensive evaluative standards which might “appear to be arbitrary and have often been described as biased in favour of either individual or collective rights” (Eisenberg, 2001: 163). Instead, Eisenberg’s work suggests what might be called a mutually subjective approach to the assignment of weight to conflicting demands. Here, the value of the right claimed by each side is assessed in the context of each claimant’s views, standards, and desires. On the collective side, Eisenberg’s recounting of Sparrow and Thomas suggests that the courts assessed the importance of the collective rights in question by a consideration of the bands’ valuations of their challenged practices, through a consideration of historical and present day evidence of the practices’ “centrality” to the groups.

Similarly, the value of a particular rights claim under the difference perspective is seen by Eisenberg as a question of its value to the claimant. She ponders, for example, how the Thomas decision “might have gone had Thomas been a full participant in the Salish culture?” (Eisenberg, 1994: 18), implying, I think, that such a difference in Thomas might have perhaps justified a less comprehensive endorsement of his claimed right by the court.

But while the subjectivist approach is an appealing response to the problem of conflicting standards, it is subject to a number of potential criticisms. One might note that to the extent one seeks valuation of claims in claimants’ themelves, there may be some encouragement for those on both sides of a dispute to “up the ante” in regard to their own claims. If it is the community’s understanding of its claimed right which sets its value, then perhaps there is some reason to fear that communities may be encouraged to assert that the broadest of measures are “central” to their identities; in turn, individuals may be inspired to claim the most extensive of personal rights as crucial to their own identities (the sorts of claims a philosopher like Robert Nozick might endorse!). This escalation would seem incompatible with the values of reconciliation which underlie the difference approach.

There are also difficulties with defining the rights of individuals as a function of the depth of their immersion in a particular community, a possibility suggested by Eisenberg’s musings on the possibility of different outcomes for Thomas had he been a “full participant in the Salish culture”. To the extent that this suggests a broad and substantive differentiation between the rights claims of, say, on reserve aboriginals and the rest of Canadian society, it suggests that the Charter may offer less protection to some individuals
than others. While Eisenberg suggests that her difference approach is "descriptive" of Canadian jurisprudence, this is a possibility which Justice Hood seems explicitly to reject in Thomas:

Placing the aboriginal right at its highest level it does not include civil immunity from coercion, force, assault, unlawful confinement, or any other unlawful tortious conduct on the part of the defendants, in forcing the plaintiff to participate in their tradition. While the plaintiff may have special rights and status in Canada as an Indian, the "original" rights and freedoms he enjoys can be no less than those enjoyed by fellow citizens, Indian and non-Indian alike.

(Thomas: 162; cited in Isaac, 1992: 623)

One might argue that if the difference perspective dictates a differentiation in individual rights based on an individual's connection to a particular cultural community, it might be criticized for countenancing a potentially problematic abandonment of persons like aboriginal Canadians to the relatively unchecked power of their local communities.

The problem of weighting conflicting rights claims using the difference approach becomes more profound for judicial decision-makers as cases get more difficult. Unfortunately, this potentiality is partly obscured by the central cases Eisenberg invokes in her explication of the difference perspective. In Sparrow, the collective right was in fairly clear terms understandable as more important to the Musqueam than was the conflicting individual interest in question to non-aboriginals. In Thomas, the individual right being claimed — to security of the person — was in fairly clear terms superior to the non-central collective practice of the Salish with which it conflicted. But in order to be useful as a prescription for judicial interpretation of the Charter, the difference approach needs also to have something to say about cases where the relative valuations of conflicting claims are not so disparate, where they coincide rather than diverge.

Indeed, there seems reason to believe that cases in which conflicting claims are capable of being given more symmetrical weight than is the case either in Sparrow or Thomas will arise with some frequency. Those matters that become the subject of rights disputes are by their nature frequently highly salient to both sides in a community-individual dispute. One might (if one can) imagine for the sake of illustration something like the Charter of Rights in operation in a uni-religious country like Saudi Arabia. It is clear that protecting a comprehensive expression of the Islamic faith is understandable as central to
the Saudi collective identity. Yet it is similarly clear that religious freedom expressed in the right to practice a non-Islamic faith — Christianity, for example — would be understandable as equally central to the identity of a religious dissenter in that country, given that some Christians have died for their faith there rather than give it up. There is in such a case no divergence in the valuations by the parties of their respective claims because the matter is equally important to both sides. Secondly, the fact that one’s community places great importance on some matter of identity underlying a group right or practice implies a strong likelihood — indeed, by the logic of communitarian theories of social life themselves — that a dissenting individual will also see the value or issue as important. If, for example, the government of a hypothetical community were to ban homosexual activities on the grounds of community values, it would be implying that the matter of sexual orientation was for that community a morally central issue. In such a locale, it seems likely that the homosexual individuals burdened by such a law would share or come to share that characterization of the salience of sexual orientation, although they would disagree with their community about what the implications of such a valuation ought to be.

These are the sorts of problems which I think show up in the case of *Ford v. Quebec* ([1988] 2 S. C. R., 712) which Eisenberg notes briefly in “Individual and Group Difference”. In *Ford*, the Supreme Court passed constitutional judgment on controversial provisions in Quebec’s *Charter of the French Language* which forbade non-French signage in public places such as stores and restaurants. The Court held unanimously that the language Charter’s provisions were contraventions of the *Charter of Rights*’ guarantee in s. 2 of freedom of expression. The impugned measures in *Ford* were advanced and defended on the ground that they were part of a regime aimed at protecting for francophone Quebecers the communal conditions necessary to securing for members of the collectivity a very important value — the continued viability of expressing themselves and communicating with others in the French language. The premise of the laws enacted under the *Charter of the French Language*, then, was that expressing oneself and communicating with others in one’s own language — in this case, French — was a highly valued good. It should be unsurprising, then, that the non-francophone Quebecers who bore the burden of those laws might object to expressions of that value which had the effect of impeding their self-expression and communication in their *own* languages. One might suggest that it is perhaps in part because
the societal culture in which anglo- and allophone Quebecers find themselves immersed values language as a means of cultural expression that many individuals from these groups have also come to value that good. Because what is at issue in Ford is a conflict between two symmetrically valued goods — the collective claim to cultural self-preservation through a linguistic ban and individual claims to free public expression in languages other than French (itself potentially understandable as an important matter of cultural value) — the case represents within the confines of the difference perspective a "hard case". What is in dispute is a matter whose resolution depends on a particularly finely tuned attribution of weight to the conflicting claims of community and individual.

The importance, and difficulty, of assigning a weight to the conflicting claims in Ford is evident in a number of commentaries on the case. In his discussion of a communitarian theory of free expression, for example, Mark Crawford rejects the Supreme Court's judgment, arguing that "Ford v. Quebec is probably a bad decision from the communitarian perspective in that it may have justified the use of s. 33 by the Quebec government" (Crawford, 1990: 19). Crawford complains that

The Court was unwilling, and perhaps unable, to weigh the asymmetries between French and English communities either subjectively, in terms of their common meanings, or objectively, in terms of their very different positions in the history, demography and political economy of North America.

(Crawford, 1990: 19)

It may be somewhat too extreme to suggest that the Court did not weigh the relative claims at stake here. It would be fair to assume, I think, that had the government of Ontario passed an English signs only law to preserve the English language or British heritage of Toronto, the Supreme Court might have been expected to summarily reject its validity. It is because the Charter of the French Language was aimed at protecting the linguistically vulnerable francophone community of Quebec that the laws here were given such a measured consideration by the Court. It is perhaps reasonable then to recast Crawford's critique. The problem his work raises is not so much that the Court was unwilling or unable to weigh the asymmetries between French and English communities in Ford, but that Crawford and other communitarians reject the weights which were ultimately assigned here.

Other commentators have criticized Ford for giving too much protection to what is,
in their view, the relatively trivial right to commercial free expression. In "National
Minorities, Rights and Signs", Claude-Jean Galipeau criticizes the Ford decision as
representing the Supreme Court's opting for a barren modernist viewpoint which values
expression as a tool for advancing "individual interests" rather than, as understood
classically, a concomitant of republican or civic virtue in which it is understood as a means
of giving expression to common social values. "Once put in this cultural context", Galipeau
argues,

the Supreme Court's views on commercial expression are understandable. The Court was reflecting the dominant trend in contemporary culture when it stated that commercial expression 'représente un aspect important de l'épanouissement individuel et de l'autonomie personelle'. This new juridical view of the individual, of politics and law, perfectly fits modern sentiments."

(Galipeau, 1992: 74)

Similarly, in his discussion of Ford in "Money Talk: Against Constitutionalizing
(Commercial) Free Speech", Allan Hutchinson argues that "commercial speech is
thoroughly undeserving of constitutional protection and should be democratically regulated" (Hutchinson, 1990: 14). On the other hand, one seeking to defend the Ford decision
might argue that the "commercial speech" at issue there merited the weight attributed to it
by the Court because it was serving more than mere commercial purposes. There is in this
view an important symbolic aspect to such laws. When restrictive laws coercively ensuring
the visage francais of Quebec are proclaimed (as they have been by parti quebecois
governments) as expressions of a collective national will by Quebecers, they have the
symbolic effect of delineating who authentically belongs and who does not in that
community. To have one's language banned from public display in this context might
suggest at least for some a denigration of their citizenship rather than simply the loss of their
ability to read the "on sale" sign at the local grocery store.

What is at issue in all these conceptualizations of Ford is differences about the weight
one might appropriately assign to the claims of the disputants. There is reason to be
concerned, I think, that the difference-perspective may be less helpful than one might wish
as a guide to judicial decision-making when the valuations by an individual and the
community with which he is in conflict are capable of being given similar weights, or when
the dispute is in fact about the weights themselves. The subjectivist approach seems to offer little in the way of the conceptual resources necessary to resolve this sort of hard case. I think that the problem arises because the difference perspective is premised on what would seem to be a desire both to evade commitment to a theory of community which transcends the particularity of any specific community, and to the recognition of a sphere of individual value which is contrarily taken as evaluable in many regards independently of the values of particular communities. But the two sides of this dyad are deeply connected. What is appropriately understood as the realm of rights or powers accorded to the community or collectivity depends to a great degree on a related theory about what is right or good or just for individuals. Our theory of the individual sets the boundaries for what the community might fairly claim of him or her. And what is appropriately understood as the realm of rights or freedoms for individuals similarly depends on a related theory of community. Our understanding of the role and value of community for the persons who live within its boundaries helps establish limits on the sorts of claims we recognize by dissenting individuals.

This is an idea which is illustrated in communitarian and other claims about social life. When Alasdair MacIntyre argues, for example, that allegiance to a collective tradition "requires the living out of some more or less systematically embodied form of human life, each with its own specific modes of social relationship" (MacIntyre, 1988: 391), he is suggesting that what is right for individuals cannot be defined by considering them apart from some conception of the community in which they live. Robert Nozick, on the other hand, argues that

Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. (Nozick, 1974: ix)

Like MacIntyre, Nozick is suggesting that his political vision depends in an important way on the identification of a theory of the relationship of the individual to the collectivity. While the two philosophers could scarcely be more different in their conceptions of what that relationship should be, they are united in their understanding that the rights or powers of individuals and the collectivity cannot coherently be treated as separate issues; our
conclusions about one depend on our beliefs about the other. The difficulty with the difference perspective is that it seeks to treat these issues separately. It offers no deeper underlying theory about where the rights of communities and individuals come from in the first place. What is so special about cultural identity that that we would seek to preserve it? What is so important about individual freedoms that we would desire to protect them? Without some answers to these sorts of questions, the difference perspective can offer us little in the way of the insights necessary to settling the more complex of individual-community problems.

This difficulty is apparent in Eisenberg’s outline of the sorts of resources we might seek in attempting to discern what aspects of individual identity are significant enough to warrant protection in the face a cultural community’s claim to the contrary. In a footnoted discussion in “Individual and Group Difference”, she acknowledges that a . . . crucial question is which differences ought to receive protection. On what basis, for example, are [cultural] identities that rely on sexism or notions of racial superiority denied recognition? . . .

With regard to the question of which differences ought to receive protection, refer to perspectives offered by Allen E. Buchanan, “Assessing the Communitarian Critique of Liberalism”, . . . and Will Kymlicka, Liberalism Community and Culture.

(Eisenberg, 1994: 10)

With respect to Professor Eisenberg, the question of “which differences ought to receive protection” would surely seem to be the essential one which an adjudicator seeking to interpret the Charter in the light of the difference principle would need to answer. A general reference to the claims and counter-claims of liberals and communitarians in the matter merely points out the two sides in this important debate. Although this is a valuable contribution, it does not explain by what means one attempting to offer an interpretation of the Charter might use such works in aid of his approach.

I suggested above that the difficulties faced by the difference perspective might be argued to be representative of difficulties likely to beset other communitarian-oriented theories of Charter interpretation as well. I would argue that this is the case, for example, with the communitarian-oriented approach to Charter interpretation Leon Trakman develops in Reasoning with the Charter. Trakman offers a conceptualization of rights claims
as embodiments of a clash of cultures, and he suggests that in defining their mandate in regard to the Charter, courts should recognize the inherent culturo-centricity of values claims (Trakman, 1991: 4). Like most theorists whose orientation is communitarian, Trakman's claims are premised on the notion that there is little in the way of a transcendant evaluative position upon which to stand in attempting to evaluate these sorts of conflicts.22

Given this reality, the judicial task is therefore appropriately understood as “mediating among differences” (Trakman, 1991: 49). The aim of the judicial reasoner is not to attempt to find some deep and implicit textually-defined meaning in the provisions of the Charter, for these are neither present, nor, because they represent the fairly culturally limited perspectives of the Charter's creators, fundamentally authoritative (Trakman, 1991: 3). The goal is, rather, to attempt to find some middle ground, some means of reconciling the larger conflicting values at stake when an individual makes a Charter claim. Trakman argues that courts should develop conventions by which to govern the differences that arise in such conflicts, with their aim being “to accommodate disparate conceptions of rights, including challenges to the rights discourse itself” (Trakman, 1991: 82). This would seem to be a tall order. What would such conventions look like, and how does one within a theory of the Charter develop a philosophy that not only accommodates “disparate conceptions of rights”, but indeed, even accommodates philosophical perspectives which reject rights?

The essential difficulty with a communitarian approach to the question of individual versus community rights is that communitarians in general deny that theories about such relationships can be discerned outside of a cultural or similar values community. If this is the case, it is difficult to make out what standards we might advert to in attempting to attribute to individuals like Ford those goods of personality which are necessary to assess whether their claim or their community's is in a given case more compelling. In Ford, the relevant cultural or communitarian standard to which one might refer in evaluating the claims at stake is one with which the claimant is either not culturally associated, or whose validity and compellingness he is challenging. It is in fact the community's standard itself which is in debate in these sorts of conflicts. It would seem problematic, then, to seek interpretive assistance in one's consideration of an individual's claim in reference to the very standard he is challenging, particularly if one's interpretive goal is the intermediation or balancing of the claims being made. The argument, then is that there are important and
controversial matters at stake in Charter interpretation, and some more detailed conception of how to strike one’s balance, how to reconcile or intermediate between the claims of the community and the claims of the individual is required. Some conception of the aims, ends, and value of individuals in society is necessary in order to determine what the community might validly ask of its members in the name of protecting or expressing itself. The community itself cannot be the unremediaged source of such a theory, because it is its claims which are in dispute. What is required if we are to balance in a coherent way these conflicting aspirations is a theory of the person or citizen who is to be bound by the constitutional obligations his community imposes upon him.

V. COMMUNITY AS CHARTER THEORY

I began this chapter with a discussion of the importance of community in the Canadian political and constitutional context. Much critique of the Charter as a claim for strong, individually-oriented rights derives from concerns that such values are alien to our Canadian constitutional sensibilities. In my discussion of theories of legitimacy and social value, I offered a critical consideration of three important arguments communitarians offer in their critical responses to the Charter. The first of these characterizes cultural communities as possessors of a “moral personality”, and therefore as something akin to consenting agents in regard to constitutional arrangements like the Charter. I argued that the “dilemma of community intermediacy” was unsatisfactorily resolved by such claims. The valuation of consent requires the invocation of an objectivist norm applicable to the relationship of larger aggregates to their constituent parts. Communities which seek to invoke such norms on behalf of their own subjectivist values must either recognize that the same norms bind them in their relationship to their constituent elements – in which case there is reason to argue that rights like the Charter embodies are defencible in these terms – or deny to individuals the recognition that they themselves claim in the larger realm. This paradox is avoided by the adoption of the second communitarian viewpoint I described. It suggests an understanding of communities as “moral matrices” informing the values and beliefs of citizens. To the extent that communities can be understood in these terms, they might be thought to provide an internally objective morality to their members which is independent of the locally-transcendant norms of criticality they themselves invoke in demanding an inter-culturally consensual constitutionalism. I argued that the difficulty with
the moral matrix view is that it is premised on an unrealistic conception of Canadian communities. The unity of belief attributed to such collectivities in communitarian theories under-recognizes the diversity of modern societies and the conceptually and politically stipulative aspects of the collective identities their advocates seek to defend. The third communitarian conception of the value of community — as an end in itself — offers a more compelling claim upon which to base a theory of constitutional value than do community consent or moral matrix theories. I argued, however, that if we value community as an end, rights in the strong sense might be thought to in fact contribute to realizing that good rather than detracting from it. Rights provide a means of ensuring that communities recognize all those who live within them.

In considering the idea of community as a theory of Charter foundations, a conception of the document offered by Patrick Monahan, I argued that the Charter's community-oriented provisions should be distinguished from its more individually-oriented ones. Most of the Charter's community-oriented rights reflect pre-Charter political arrangements. While such arrangements are valid, they should not be used as characterizations of the Charter's individualist provisions because by so doing we fail to recognize the document's character as a change or addition to, rather than simply a restatement of prior values of Canadian constitutionalism.

In the section just concluded I discussed Avigail Eisenberg's important community-oriented conception of the judicial task. Eisenberg's theory endorses an overarching conception of the judicial mandate as one of finding a "balance" between the valid aspirations of individuals to such goods as dignity and autonomy with the equally valid desires of communities to self-expression and cultural self-preservation. The problem, however, is that such an approach fails to provide the needed interpretive resources which would enable adjudicators to attribute particular weights to the interests and ends of communities or individuals. I argued that some "theory of the person" understood independently of particular cultural claims is necessary to assess what can reasonably be asked of individuals on behalf of communities, or of communities on behalf of individuals.

In the next chapter, the introduction to the second major part of this work, I attempt to offer a theory of this sort, as I explore the idea of a conception of the constitutional subject of the Charter as a "moral agent".
Notes

1 Michael Walzer argues, for example, that the meaning of social goods depends on a given community's "intellectual structure" and therefore that "there are no external or universal principles that can replace it. Every substantive account of . . . justice is a local account" (Walzer, 1983: 341).

2 Michael Sandel argues, for example, that the philosophy of a community in this sense . . . allow[s] that to some I owe more than justice requires or even permits, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am.

To imagine a person incapable of constitutive attachments such as these is . . . to imagine a person wholly without character, without moral depth. (Sandel, 1982: 172)

3 The Meech Accord would have, for example, added a clause analogous to s. 1 to the Charter providing that the document's rights be interpreted "in a manner consistent with . . . the recognition that Quebec constitutes within Canada a distinct society" and affirming the "role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec. . . ."

4 Among other noteworthy community-oriented works on Canadian constitutional philosophy in recent years are Jeremy Webber's *Reimagining Canada* (1994) and Kenneth McRoberts' *Misconceiving Canada* (1997). Webber suggests that the appropriate constitutional solution for Canada is the institutional accommodation of our diverse political communities. He argues that laws are best understood as a "cultural creation" (Webber, 1994: 237) and that therefore such things as Charter rights may differ in different communities. McRoberts laments the transformation of social attitudes in English-speaking Canada brought about by the Charter, arguing that the individualistic and rights-oriented political culture it has brought with it enhances the difficulties of working out a solution with a Quebec which remains tied to a more communalistic conception of society.

5 Taylor's emphasis on the value of "participation" bears much resemblance to the democratic valuation of this good I discussed in the previous chapter. It might be noted that there is considerable overlap between the ideas associated with democratic theories of legitimacy and those associated with communitarian theories. Both suggest the value of recognizing the contingent and local nature of social values. Democratic theories are of appeal to communitarians because they suggest a way of recognizing or realizing the values of cultural communities through debate and voting. Communitarian theories appeal to democrats because they suggest the importance of social connection and mutual concern, a vision of society emphasized for example by deliberative democrats.


7 Tully does in fact offer an attempt to account for individuals as well as cultural communities in his theory. He suggests that the raven in the Haida Gwaii represents the "individual" (indeed, Tully identifies himself with such a person) and envisions the raven as negotiating his status and place in the boat alongside the other travellers (Tully, 1995: 33).
The central difficulty with this conception is that individuals are hardly on an equal footing with their communities in “dialogue” about their obligations.

8 The inherent seductiveness of the theory of cultural personality for Canadians is evident in the fact that even a philosopher like Will Kymlicka — who understands himself and is generally understood as a liberal philosopher — seems to find it compelling. In *Multicultural Citizenship*, he asserts that

I believe that the most defensible liberal theory is based on the value of autonomy, and that any form of group-differentiated rights that restricts the civil rights of group members is therefore inconsistent with liberal principles of freedom and equality.

(Kymlicka, 1995: 165)

Yet he then goes on to note that “... that does not mean that liberals can impose their principles on groups that do not share them” (Kymlicka, 1995: 165). Kymlicka suggests, therefore, that it will in most cases be illegitimate for liberal states to impose prohibitions on the decisions of the governments of national minorities within their borders to restrict the rights of their members (Kymlicka, 1995: 165). The resonance of Kymlicka’s views in regard to the *Charter* is clear. To the extent that his claims are compelling, they offer substantial support for the arguments of those who subscribe to communitarian theories of cultural consent, and they suggest that the *Charter* may be an illegitimate imposition on groups like Quebec and aboriginal Canadians whose representatives have denied its validity. In essence, Kymlicka is suggesting that the collective, corporate identity of these sorts of groups is philosophically or morally prior to the identities of the marginalized or oppressed individuals who might be among those who live in such communities (Spaulding, 1997: 71).

Among the factors which Kymlicka suggests must be taken into account in making such judgments include the “existence of historical agreements” recognizing the sovereignty or self-government of the national minority, “the degree of consensus within the [minority] community on the legitimacy of restricting individual rights”, and “the ability of dissenting group members to leave the community if they so desire” (Kymlicka, 1995: 170). Each of these factors seems to imply a recognition of the “personality” of the community in a way that is prior to or more fundamental than those of the individuals who live within it. It is difficult to see, for example, how past agreements between representatives of the British Crown and elders of aboriginal bands could be understood as capable of binding their contemporary individual antecedents to the recognition or acceptance of social arrangements which restrict the rights of current persons unless one is attributing to such groups an ongoing, collective, corporate personality like that implied in communitarian theories of cultural personality. The idea that internal restrictions are defensible if many or most persons in a group endorse them seems to suggest a theory of the collectivity which ignores the individual elements of the community. Similarly, the idea that dissenting individuals might be expected to leave the community suggests a certain prioritization of the community’s artificial collective personality over the very real personalities of individual dissenters.

9 Locke’s work is generally understood as at least partly an intellectual response to Robert Filmer’s more organic theories of obligation; in this sense, its very genesis is in the desire to respond critically to these sorts of legitimative claims.

10 One clear expression of this idea in communitarian thought is offered by Alasdair MacIntyre. Although he does not use the term “social matrix”, MacIntyre’s work is suggestive of this view of the relationship between individuals and what he calls “great...
traditions”. MacIntyre notes, for example, that traditions are expressions of community life:

... tradition-constituted and tradition-constitutive enquiry ... [has] a history neither distinct from, nor intelligible apart from, the history of certain forms of social and practical life, nor are mere independent variables. Philosophical theories give organized expression to concepts and theories already embodied in forms of practice and types of community.

(MacIntyre, 1988: 390, emphasis added)

Such concepts and theories are expressed in and derived “from the beliefs, institutions and practices of [their own] ... particular community” (MacIntyre, 1988: 354).

11 Another Canadian constitutionalist who shares Turpel’s concerns that the Charter may be “alien” to aboriginal populations is Joseph Carens. He suggests in Culture, Citizenship, and Community that this may be one of a number of reasons to endorse granting the notwithstanding clause to aboriginal governments (Carens, 2000: 191).

12 Thomas Isaac notes, for example, the following presentation made by the Quebec Native Women’s Association to the First Nations Constitution Circle in Montreal in 1992:

It must be clearly understood that we have never questioned the collective rights of our Nations, but we strongly believe that as citizens of these Nations, we are also entitled to protection. We maintain that the individual rights of Native Citizens can be recognized while reaffirming collective rights. This is why we would like to be in a position to rely on a Charter guaranteeing the freedoms of all Native Citizens.

(Quebec Native Women’s Association: 1; cited in Isaac, 1992: 628)

13 These prohibitions were the subject of Supreme Court consideration in Ford v. Quebec ([1988] 2 S. C. R., 712), which I discuss below in the text in s. IV.

14 I discussed this case at the Supreme Court level in greater detail in the previous chapter.

15 Mulroney has suggested that s. 33 has the effect of making the Charter “not worth the paper it is printed on” (House of Commons Debates, 6 April 1989: 153 (Brian Mulroney)). Trudeau has criticized the Supreme Court of Canada for creating conditions in which s. 33’s inclusion in the Charter became, lamentably, inevitable (Trudeau, 1996: 258 - 9).

16 While one might suggest that something like the Constitution Act 1867’s guarantee of denominational schools for Catholic and Protestant minorities in the country’s provinces (affirmed, as I have noted, by s. 29 of the Charter) represents the seeds of multicultural toleration and accommodation in Canadian constitutionalism, s. 93 would seem in effect to be expressive of a decidedly bi- rather than multicultural conception of Canada. This reality is reflective, I think, of the perils of too great an emphasis on continuity as a constitutional value. To say that the emphasis of the Constitution Act, 1867 is bi-cultural is by no means a critique of its authors, since such arrangements reflected the more bivalent rather than multicultural reality of the Canadian state in 1867. The problem with continuity, then, is not that the values of the past were necessarily unmeritorious, but that at least some of them may derive from historical circumstances whose character and implications have changed with
the passage of time.

17 Taylor acknowledges, for example, the philosophical appeal of the idea of rights -- at least for Canadians outside Quebec -- as guarantees of "first level diversity" (Taylor, 1993: 182).

18 Eisenberg clarifies and elaborates on her claims in "Using Difference to Resolve Rights-Based Conflict: A Reply to Joyce Green" (Eisenberg, 2001). I refer to both articles in my discussion of her work above.

19 I note that this is a claim disputed by David Schneiderman in "Theories of Difference and the Interpretation of Aboriginal and Treaty Rights". He argues that Eisenberg's theory does not represent an accurate characterization of Canadian jurisprudence (Schneiderman, 1996: n14).

20 Eisenberg argues that analyses of competing claims should focus "on the role that competing practices play in the identities of the community and individual . . ." (Eisenberg, 1994: 21)

21 In regard to Sparrow, for example, Eisenberg notes that

   The difference approach is predicated on paying close attention to the role played by particular practices and by the histories of distinct groups. It is the means by which the distinctive claims and histories of peoples are assessed by the courts.

   (Eisenberg, 2001: 165 - 6)

22 Trakman argues, for example, that to construe the Charter as an expression of "self-creating rights" is to "foist upon ethnic, linguistic, and religious minorities one dominant unity based on one pervasive conception of human rights" (Trakman, 1991: 4).
Chapter 5: Moral Agency as a Legitimative and Constitutional Value

I. MORAL AGENCY AND THE SOURCES OF CONSTITUTIONAL VALUE

I have offered to this point in this work a variety of critical responses to the constitutional claims of the primary values. My intention has been to attempt to seek a deeper understanding of the implicit as well as explicit legitimative commitments and premises which inform the primary values, and to suggest that there are grounds upon which to call into question the prescriptive validity which we assign to them. We have reason, I have argued, to question the authority of the primary values and therefore perhaps reason to consider alternative premises by which to evaluate the legitimacy and define the meaning of the Charter. In the second part of this work, I turn to one such alternative perspective. I argue here that the legitimacy and meaning of the Charter should be evaluated and defined not by an assessment of its accord with our primary values, but by its recognition and realization of another constitutional value — “moral agency”. The value of moral agency directs us to an acknowledgement of two attributes of constitutional personality in the inhabitants of our state. It suggests that all individuals are possessors of an equal and centrally important moral status — that is, they should be understood as the subjects and not merely the objects of constitutional claims and state order. And it proceeds from an understanding of such persons as moral beings — persons who have a central interest in and desire to discern and act upon their moral duties. These values cannot be fully recognized, I would argue, in social orders which do not respect the role of persons as free participants in the discernment of their moral obligations or in which those obligations are established under the authority of evaluative standards which do not account for all.

While the legitimative premises of the primary values suggest either the illegitimacy of the Charter or the desirability of an understanding of it in a limited or constrained sense, recognition of the value of moral agency I argue justifies an understanding of the document in “strong rights” terms. In this view, the Charter is conceived of as an instrument which directs courts to the non-deferential review of laws in the name of broad and substantive human or individual rights defined independently of the primary law-creating sources of the constitutional order.

Of course, the first question likely to arise in response to this sort of Charter claim is
why moral agency and rights, rather than some other set of goods? Why is moral agency as fundamental a constitutional value as I suggest it is here? In *Social Justice in the Liberal State*, Bruce Ackerman suggests that the goods and values associated with liberalism can be recognized via “different paths” (Ackerman, 1980: 360), and I think the same can be said of the more specific liberal valuation of moral agency and rights as well. To this end, I would suggest that we might recognize two broad categories of argument one might invoke in a theory of constitutional value — “larger realm” and more “local” claims.

By “larger realm”, I mean thought which aspires to more universalist claims about human value. I have in mind here, for example, conceptions of the person which suggest that human flourishing depends on our capacity to understand ourselves as moral beings, directed not by necessity, coercion, convention, or culture, but by values and obligations derived from our own recognition or identification of larger moral principles. This is a conception of the person suggested in the psychological theories of both Lawrence Kohlberg and Abraham Maslow. Maslow’s description of what he contends is the highest stage of psycho-social development — “self-actualization” — suggests a view of human well-being as most fully realized when persons are able to act as authors of their own moral decisions (Maslow, 1954). Kohlberg suggests similarly that the higher stages of cognitive and psychological development bring with them an identifiable orientation to questions of obligation and morality (Kohlberg, 1984b: 35). Those who have reached these stages understand their obligations as deriving from their own assessment and consideration of claims made upon them. They understand their duties as established in reference to their own conscience and to moral principles whose validity does not flow from their mere assertion or their widespread social authority (Kohlberg, 1984b: 44). Kohlberg’s and Maslow’s work, suggests, therefore, the importance and value of social structures and political arrangements which provide the means and room for the expression of individual conscience and which recognize and respect such goods as “civil rights” (Kohlberg, 1984a: 238).

John Locke’s claims about political legitimacy represent another sort of larger realm theory suggesting the importance of values like moral agency and rights. David Richards has argued, for example, that Locke’s commitment to goods such as liberty derived from his belief in the importance of moral freedom. In discussing the idea of religious freedom in
Locke’s *Letters Concerning Toleration*, Richards suggests that

> Locke . . . linked a free conscience to the autonomous exercise of the moral competence of each and every person, as a democratic equal, to reason about the nature and content of the ethical obligations imposed on persons by an ethical God.  
> (Richards, 1988: 154)

These ideas are reflected in the theory of political legitimacy Locke erects in his *Second Treatise*. In reasoning from the position of men in the “state of nature” to a theory of legitimate political order, Locke offers a conception of persons as possessors of certain “natural” attributes. They are “free” “to order their actions, and dispose of their possessions and persons, as they think fit”, and they are “equal”, “there being nothing more evident, than that creatures of the same species and rank . . . should also be equal one amongst another without subordination or subjection” (*Second Treatise*, ch. 2). Such persons are, therefore, individual and self-determining. It follows from these natural characteristics, Locke suggests, that political arrangements — “civil society” — ought be understood as deriving from the consent of those who are to be bound. Since the first purpose of men’s uniting in civil society is to better realize and enjoy their natural rights, we must conclude, Locke suggests, that political arrangements in which such rights — to “life, liberty, and estate” (*Second Treatise*, ch. 2) — are not respected would not receive the consent of their inhabitants and therefore that they are illegitimate in these terms. We need not agree with Locke’s radically individualist orientation or with the specific content of his list of rights to comprehend the underlying logic of his theory. It suggests that individuals have a moral status, and that if we recognize this in our thinking about political order we must also recognize that certain legitimative consequences — the necessity of recognizing rights, for example — therefore flow from this status.

Where psychological theories suggest that a valuation of moral agency might flow from our desire to ensure human flourishing, and Locke’s work suggests its recognition as part of human nature, Immanuel Kant’s moral philosophy derives this value from a consideration of the nature of morality itself. While Kant’s arguments are complex, they underlie a great deal of contemporary liberal thought (including in a general sense the constitutional theory I seek to advance in this work) and they therefore merit our attention.

Kant begins his exegesis of his moral theory in *Fundamental Principles of the*
Metaphysics of Morals by arguing that the “common idea of duty and the moral laws” suggests that “if a law” (that is, a moral precept or dictate) “is to have moral force, i.e., to be the basis of an obligation, it must carry with it absolute necessity” (Kant, 1949 [1785]: 2), by which he means that its command must be understandable as directing us to a duty which we must recognize as superior to the sorts of obligations imposed by non-moral claims. In aid of this distinction, Kant suggests that moral claims are “categorical imperatives”; non-moral claims, “hypothetical imperatives”. The former are that which represent “an action as necessary of itself without reference to another end, i.e., as objectively necessary”; the latter, actions to which we are directed only in reference to some desired purpose (Kant, 1949 [1785]: 22). Categorical imperatives, suggests Kant, are therefore identifiable from principle, and, because rooted in principle, understandable as universal in their application. While Kant’s universalist aspirations are highly contentious in the contemporary context, his claim about the meaning of morality more generally seems nonetheless I would suggest to correspond to our general understandings of that idea. To suggest that “x’ is a moral duty” implies to most persons one would think that ‘x’ is a duty which we must observe whether or not we feel like it today or whether or not it happens to conflict with some more immediate, non-moral interest or preference we might hold. In this sense, whether moral claims are universal or not, they are categorical rather than hypothetical.

Unfortunately, suggests Kant, with one exception, all human attributes and assets are only hypothetically good; talents of the mind and riches can be used to bad ends as well as good, for example, and these are therefore good only if and to the extent that they are properly directed. The exception, however, is human will itself. Kant suggests that “[n]othing can possibly be conceived in the world . . .which can be called good, without qualification, except a good will” (Kant, [1785]: 5). Unlike other human “goods”, the goodness of a good will is not dependent on any other contingency: to desire to make the moral law the source of direction for one’s actions is to be good in a fundamental sense. The fundamental importance of Kant’s observation for liberals is this: it suggests that we must understand moralness as a quality which attaches not to specific goods, actions or observances of moral commandments, but rather, to human will and motivation.

We might illustrate this idea by considering, for example, a social order in which some religious observance -- perhaps something like the Judaic dietary laws -- is understood
as important because, according to the spiritual beliefs of the community, it has been prescribed by God. While such a community might seek to ensure complete observance of the kosher regime through punitive measures like imprisonment for those who fail to participate, Kant’s moral theory would suggest that such arrangements would be incompatible with the society’s implicit desire to create a moral order. For it is not kosherism for its own sake which has moral value in our example; the importance of that practice is, rather, as a signifier of its practitioners’ respect for God’s laws (that is, for what we can take here as the dictates of morality). Yet to the extent that the practice is observed through fear of coercion, its observation signifies not respect for and acknowledgement of God’s law, but rather concern for man’s and society’s laws. The motivation for obedience in such circumstances derives not from God’s categorical laws but rather from the hypothetical imperative implied in the society’s penal laws — “if you do not obey, you will go to jail”. As Kant would suggest, the “springs” such laws provide

for morality are such as rather to undermine and destroy its sublimity, since they put the motives to virtue and vice in the same class and only teach us to make a better calculation, the specific difference between virtue and vice being entirely extinguished.

(Kant, [1785]: 43 - 4)

Kant’s theory suggests that if we wish to recognize a realm of morality, we cannot but help recognize at the same time the status of individual persons — possessors of will — as moral beings. This in turn suggests the importance of recognizing a realm of autonomy for persons in social order. To the extent that we recognize that moralness resides in the discernment, recognition, and free decision of individuals to obey the dictates of morality, we are likely to recognize that just political order might be expected to seek to preserve such freedoms.

These ideas have a more contemporary reflection in the well known work of John Rawls. In A Theory of Justice, Rawls offers a conception of a just social order as one which is established by a consideration of the choices that equal and autonomous persons would make about the shape and nature of their society if they had no knowledge of their contingent and arbitrary personal attributes such as their place in society, class position, or social status (Rawls, 1971: 12). As Rawls suggests, his philosophical construct of the “veil of
ignore
ance” has its inspiration in a Kantian conception of the person as a moral being\(^1\) -- one whose choices are derived not in reference to contingent values ("what sort of social arrangements do I prefer given that I am a highly capable person fortunate enough to be a member of the upper caste of my society?") but to more objective, categorical standards. This conception of the choosers as “moral persons, as creatures having a conception of their good and capable of a sense of justice” (Rawls, 1971: 19) leads to their agreement on two principles of justice. The choosers, Rawls concludes, would opt for a social order in which each person was ensured “an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all”, and in which social and economic inequalities were arranged so as to maximize the well being of the least advantaged in society while ensuring that they were “attached to offices and positions open to all under conditions of fair equality of opportunity” (Rawls, 1971: 302). The implication of Rawls’ argument is both that we appropriately recognize those who live within a social order as moral agents, and that this recognition prompts us to acknowledge certain fundamental values in our society -- like the right to equal liberty -- if we seek just political order.

Of course, the connection of the idea of rights with the conception of persons as moral agents is not a uniquely Rawlsian idea. A number of American constitutional scholars attempting to make sense of their country’s *Bill of Rights* also make a similar connection. Both David Richards and Ronald Dworkin, for example, suggest that constitutional interpreters must account for the centrality of rights in the American constitutional order by recognizing the necessity of identifying or constructing as part of their practice some larger theory of constitutional value which explains the meaning and point of recognizing rights. As Dworkin notes,

\[(\text{Dworkin, 1977: 149})\]

Dworkin argues that rights should be understood as expressions of and assurances of the good of “political equality”, which requires that governments treat their citizens with “equal concern and respect”:
Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.

(Dworkin, 1977: 273)

In aid of his constitutional theory, Richards adopts a contractual conception of the American political order which suggests that rights have their genesis in a conception of the person which accords to a great degree with the ideas of Milton, Locke, Rousseau, Kant, and Rawls (Richards, 1977: 44). By adopting the contractual perspective, Richards argues, we acknowledge the "moral point of view", "a way of regarding human relationships in terms of a fundamental moral and human equality which transcends the fortuitous differences of person and circumstance" (Richards, 1977: 45). In turn, a recognition of rights flows from this conception:

The country's founders believed that certain constitutionally guaranteed rights . . . were natural moral rights which government had no moral right to transgress. People they supposed, are foremost moral persons, and secondarily members of a political union; once having joined such a union, they retain their moral status as persons and their moral immunity from legal claims that violate this status.

(Richards, 1977: 51)

While my discussion here of these philosophies associated with moral agency and rights is intended to offer an overview of what I am calling the larger realm of such ideas, we might note that as we come to the claims associated with American constitutional theory we begin to enter into a more local realm of valuation. When David Richards invokes Locke's or Kant's more general theories about human value he is referring to political philosophy which is universalist in its aspirations. But he also argues that

[the founding fathers believed some such theory. Thus, quite apart from the truth or falsity of the theory, the explication and clarification of the theory should be a central part of our theoretical understanding of the practice of constitutional law in the United States. The choice to adopt or reject such a theory is not an open question in the United States.]

(Richards, 1977: 44)
In this respect, Richards seeks his inspiration in local as well as locally-transcendental values. So too does Ronald Dworkin. When Dworkin considers in one of the final chapters of *Taking Rights Seriously* the question of “What Rights Do We Have?”, he is engaging in a form of reasoning about values which seems to speak beyond the American constitutional order. Yet Dworkin also seeks to connect his constitutional philosophy to that order in more specific ways, notably through his explication of his ideal archetypical constitutional judge, “Hercules”. Dworkin suggests that Hercules appropriately begins his task of interpreting the constitution not by elaborating or identifying a set of legitimative values apart from that constitution, but in reference to the existent constitutional order itself: “[t]he constitution”, he says, can be taken as “set[ting] out a general political scheme that is sufficiently just to be taken as settled for reasons of fairness ... at least until a new scheme is put into force” (Dworkin, 1977: 106). The task of Hercules, then, is to attempt to construct a theory “that justifies the constitution” in its entirety, with the desire being that that theory provide the “smooth[est] fit with the constitutional scheme as a whole” (Dworkin, 1977: 106). In these aspects of his endeavour, Hercules is trying to make sense of and find the connections between local as well as locally-transcendental constitutional values.

To the extent that the constitutional theories of philosophers like Richards and Dworkin are specifically “American”, we are right, I think, to follow Peter Hogg in rejecting their appeal or value in the Canadian context (Hogg, 1987). But while the localist character of the constitutional philosophies of Richards and Dworkin in a sense disqualifies them from a specific application in the Canadian context, that character in a more general sense offers a pointer to another means by which we might seek to recognize or identify moral agency as a Canadian constitutional value. This more locally-oriented consideration of value constitutes what might be understood as a second approach to the question of how and why we might recognize moral agency in our own constitutional order. This is the approach I adopt here.

In this chapter, I make the conceptual claim that the constitutional good of moral agency are necessarily or implicitly recognized at the meta-legitimative level in the claims of the advocates of our primary values. In essence, my argument is that participation in the legitimative endeavour in the form of advancing or recognizing a legitimative claim implies
particular commitments to participants which place limits on the sorts of constitutional or social order they can cogently endorse or recognize. The theory I offer is in this sense like that offered by Locke, Rawls, Richards, and others in that it suggests that important commitments flow from our recognition of the subjects of constitutional claims as possessors of a moral status. My claim is nonetheless understandable as local in character in that it suggests that we might recognize these commitments as identifiable from within the meta-legitimative presuppositions of our primary values themselves. The goods associated with moral agency are, I argue, central limitations on the sorts of constitutional order and form which can be cogently endorsed by those making legitimative claims like those offered by our primary values. They should therefore be recognized in the legitimative theory we seek to apply to the Charter and in the forms of social order we recognize as authoritative.

In chapter six, I offer a consideration of the role and place of the goods of moral agency in the ongoing forms of political order esteemed by the advocates of the primary values. My suggestion is that moral agency is a value which is unfortunately under-realized in the law-making and law-identifying institutions and practices they endorse. These conclusions suggest in turn, I argue, the relevance of a consideration of Pierre Trudeau’s political oeuvre in the Canadian context. Trudeau’s political philosophy and practice suggest the value and importance of a set of constitutional goods very much like those we are directed toward by our valuation of moral agency. Trudeau’s work might therefore be thought in this regard to represent an important contribution to explaining and justifying the Charter in the strong rights sense.

The arguments I advance in chapters five and six can be understood in a sense as mutually supportive. Our conceptual identification of the importance of moral agency suggests the relevance of Trudeau in our consideration of Charter meaning because his political philosophy and practice are identifiable with this value. And in turn, Trudeau’s philosophy and practice themselves constitute an important contribution to the identification and justification of moral agency in the Canadian constitutional context.

Of course, while there is some appeal in a conception of the Charter in terms of moral agency, some consideration of the textual and applicative validity of such a view is a necessary adjunct to this sort of constitutional claim. In chapter seven, I explore the connection between the values of moral agency and a number of the Charter’s central
provisions. I argue that the values of moral agency provide helpful insight and guidance to questions of the Charter's applicative meaning in the legal context, particularly as regards the document's most central provisions.

In the final chapter of the work, I return to Pierre Trudeau's political practice and philosophy in addressing an important concern voiced by many of the advocates of the primary values. Rights liberalism is often associated by its critics with an ethos of narrow and selfish individualism, and critics suggest therefore that a "strong rights" conception of the Charter commits us to a theory of constitutional value which is alien to Canadian sensibilities. The theory of rights embodied in the ideal of moral agency, in Trudeau's political philosophy, and in the Charter itself need not be understood in these terms. Rights in the Canadian context are more appropriately understood as means by which we recognize our duties to our fellow citizens than as rejections of responsibility to others.

My attempt here, then, is to a large extent to ground my claims about Charter meaning in local rather than locally-transcendant sources of value. That is not to say, I would emphasize, that I believe that we ought or indeed even can go forward in identifying the values of moral agency without some cognizance of or appreciation for ideas from the larger realm of philosophical value. Since the claim I make here is for the sorts of locally-transcendant values associated with rights, we might expect to find some enlightenment or assistance in explicating that theory in the larger, non-local realm of ideas. In developing the theory of moral agency as a Canadian and Charter constitutional value which I offer here, then, I make reference to and rely upon ideas from the larger realm when these are necessary or helpful to understanding. In a sense, the goal here is to connect, as Dworkin, Richards and others seek to do in their own constitutional context, larger to more local constitutional values.

II. THE PRIMARY VALUES AND THE PROBLEM OF "LOCALLY-TRANSCENDANT" CONSTITUTIONAL GOODS

I have suggested then that moral agency theory directs us to an understanding of the Charter in "strong rights" terms; that is, as an instrument which directs courts to the non-deferential review of laws in the name of rights defined independently of the primary law-creating sources of our political order. Rights in this conception are claims for the authority of what might be described as "locally-transcendant" values: social goods which are
understood as essential and inalienable, even in the face of conflict with more local values and preferences. To argue that there is a “right” in the strong sense is to argue that the social values associated with the right are such that good conscience requires their recognition even though one’s local culture or powers that be may deny their value.

An initial and formidable obstacle to a conception of the Charter as a guarantee of rights in this strong sense is that such a view conflicts not only with the specific legitimative theories of our primary values, but also with the more general doubts their advocates seem to share about the existence, extensiveness, and discernibility of locally-transcendant values. The recognition, for example, by positivist judges of existent norms and social values as the source of interpretive guidance in constitutional matters derives in no small part from the positivist denial of the discernability of a locally-transcendant “natural” law. As Peter Hogg has said, “I do not know how to identify natural rights, from where they derive their authority, or what the legal effect of their breach could be” (Hogg, 1987: 89). Similarly, communitarian legitimative theory suggests that social values are inherently and unavoidably “local”, as is evidenced in the constitutional theories of Canadian theorists like Charles Taylor and Mary Ellen Turpel, and in the more general communitarian theory of political philosophers like Alasdair MacIntyre.

Of course, democratic theories of legitimacy do endorse at least one locally-transcendant value -- that of democracy itself. Democratic theory suggests that the franchise and its related goods (political free speech, for example) are morally fundamental to legitimate order, and therefore not properly subject to abrogation or derogation in the name of local preferences which might happen to conflict with them. Apart from the goods of democracy itself, however, all else is considered by democratic theorists as properly subject to construction and alteration in the light of local norms. As Patrick Monahan suggests, “there should be no set of social or political arrangements arbitrarily or permanently insulated from democratic debate and argument” (Monahan, 1987: 104). Thus, questions such as whether or not employers ought to have the power to dismiss employees whose off-work life choices they dislike, whether or not women are entitled to access to abortion, what forms of expression are prohibitable as “obscene”, and the like are all understood in democratic theory as validly answered in reference to local theories of value recognized through voting and political representation. Democratic endorsement of local
solutions to the problem of values conflict is founded on questions about the existence of social “truth” (Bakan, 1997: 34), on a rejection of the validity of defining social claims as anything other than undifferentiable “interests” or “preferences” (as in the work of Rainer Knopff and F. L. Morton which I discussed in chapter three), and on denials of the viability of legal foundationalism (Hutchinson and Petter, 1988: 278).

This premissory skepticism about locally-transcendant values underlies in no small part the Charter critiques of the advocates of our primary values. And of course, it must be noted that part of the appeal of the primary values as constitutional theory derives from their accord with our general contemporary intellectual skepticism about such values and from the apparent aptness of such perspectives in the Canadian constitutional context. Our history and our national makeup are often seen as more compatible with an endorsement of local theories of value than with locally-transcendant ones. The “Confederation compromise”, the institution of federalism, the “Quebec problem”, and the ethnic diversity of our population are all in some sense arguments for the necessity of recognizing the locality of social value in Canada.

All this, then, suggests some difficulty in attempting to explain or justify a theory of constitutional value like moral agency which suggests a greater place be made for the recognition of locally-transcendant values like those embodied in strong rights. How, it might be asked, can such a theory be justified in the face of the implicit or explicit (and often persuasive) rejection by advocates of the primary values of the viability of claims for substantive locally-transcendant social goods? The claim I offer here takes the form of what philosopher Phillip Griffiths has called “transcendental argument”. Griffiths characterizes a transcendental argument

... as one to the conclusion that the truth of some principle is necessary to the possibility of the successful employment of a specified sphere of discourse. Its use will be to show the necessity either of accepting the principle on the part of anyone who claims seriously to employ locutions of the relevant sphere of discourse or of abandoning such a claim

(Griffiths, 1969: 167)

In effect, an argument of this type suggests that those who adopt a particular claim founded on some premissory assumption commit themselves logically not only to the conclusions they recognize and seek to promote through their endorsement of the premise, but to
whatever additional conclusions their adoption of the premise might itself suggest. I argue here that the legitimative claims of the primary values represent moral claims to obedience directed at constitutional obligees. Despite their rejection of an expansive realm of locally-transcendant values, then, my suggestion is that the moral character of their claims implies a meta-legitimative commitment on the part of the advocates of our primary values to a recognition of the moral agency of such persons. In turn, a limited but important set of locally-transcendant constitutional values are argued to flow from this recognition of the moral status of those bound by the constitutional order.

In rough outline, the arguments I seek to develop here in support of this claim are as follows.

1) Participation in legitimative endeavour which is understood in a non-coercive sense implies on behalf of those making or enforcing legitimative claims like those offered or implied in our primary values a commitment to a “moral” theory of legitimative obligation; that is, an implicit claim that those whom the claimant contends are bound “should” recognize themselves as bound and morally obliged to accept the authority of the order.

2) While the values skepticism of advocates of the primary values suggests that moral standards are primarily local and therefore that the accord of a legitimative claim with the dictates of “morality” is something that can only be cogently determined in reference to local standards, there are arguably some conceptual commitments associated with a “moral” claim that apply to all such claims and therefore apply to all legitimative theories.

3) One central such commitment necessarily recognized is the “moral agency” of those whom one purports to bind by a legitimative claim. To say one “should” recognize their obligation is to imply that the obligation must be one capable of being recognized and acknowledged by a person who desires to discern and act in accord with his or her morally obligatory duties.

4) This legitimative level commitment carries with it some implications about the shape and nature of the ongoing constitutional order which the claimant is asserting we should recognize. To the extent that the order which is being endorsed or recognized can coherently be understood as imposing a moral commitment to the acknowledgement of its
authority, it must be one whose ongoing obligations are capable of being recognized and acknowledged by someone concerned to discern and act upon his moral duty.

5) Two significant delimitations of “legitimate” constitutional authority are suggested by this requirement. Someone concerned to discern and act upon his moral duty could not coherently be expected to acknowledge the authority of an order in which (a) they or their fellows are subject to the imposition of morally-significant laws which are immoral or created in a way indifferent to their moral implications; or (b) their ongoing capacity to discern their moral duties is impeded.

(6) In turn, this suggests that orders which are legitimate in the sense I advance here must provide the mechanisms and modalities of values identification necessary to ensure that the important obligations the order imposes — its morally-significant laws and public values — are established in accord with evaluative standards reasonably understandable as morally binding on all those obliged, and that those obliged have the ongoing means by which to investigate and seek to discern their moral duties.

If these claims are compelling, they suggest that some forms of constitutional or social order may be less capable of legitimative justification than others, depending on the extent to which they acknowledge or provide the ongoing means for acknowledging these sorts of commitments. I suggest here that the forms of social order recognized by the legitimative theories of the primary values constitute only partial and insufficient recognition of these legitimative ends.

III. MORAL CLAIMS AND LEGITIMATIVE PERSONALITY

I begin, then, with the notion that participation in the legitimative endeavour — advancing or recognizing a claim for the legitimacy of a particular form or expression of political order — understood in the non-coercive sense implicates participants in a moral claim on behalf of the social or constitutional arrangements they propose or recognize. I take it to be clear that the primary values all represent non-coercive legitimative theories, if only in the sense that they would deny that the source of authority in the Canadian constitutional order is ultimately rooted in threats or acts of violence (the “gunman writ large”
as H.L.A. Hart would say). In contending that the implicit or explicit legitimative theories of the primary values represent moral claims, I mean that they in effect imply the statement "you should obey". My thesis suggests therefore (a) that the claim imputes to obligees a moral obligation to obedience ("you should obey"), and (b) that the expectation is that obligees can themselves recognize the validity of the source of moral obligation which mandates their obligation ("you should obey"). I note that my claim here is not intended as a factual one. I am not saying that participants in legitimative endeavour necessarily do hold these beliefs in specific form, but rather that a self-reflective consideration on their part of the implications of their participation would suggest to them the necessity of recognizing such commitments.

Since the notion that legitimative claims represent "you should" statements is perhaps a potentially controversial one, some further consideration of this idea is necessary. An initial objection to the idea that legitimative claims necessarily represent the statement "you should obey" might be expected, for example, from those who find compelling the sorts of legitimative claims offered by communitarians like Charles Taylor or Mary Ellen Turpel. Do I perhaps "smuggle in" some arbitrary or unjustifiable individualistic presuppositions in the legitimative argument I advance here by in effect proclaiming individuals as the addressees of legitimative claims? Might we not better understand legitimative claims, at least those offered by communitarians, as implying, if anything, the statement "we should obey"? I have little answer to this sort of objection except to suggest that even if persons in a community unanimously endorse or recognize a moral theory, even if such a theory is one which proclaims the essentiality of mutual ties and inter-subjective forms of valuation, it is nonetheless the case that the compellingness or bindingness of that theory is something that each individual must recognize or come to understand for him or herself. To suggest that a group of persons might share a moral theory is not and cannot be the same thing as saying they share a moral identity. Unless we deny the reality of individual will, consciousness, and self-awareness, it seems difficult to see how it can be denied that those offering answers to the legitimative question can evade addressing their claims to individuals. Of course, whether or not such claims therefore need to be "individualistic" is another matter.

The next question which might be considered is whether we appropriately
understand legitimative claims as “should” statements at all. This conception is not, I note, one that is likely to be reasonably rejected by democratic or communitarian theorists. The argument that a legitimate order is a democratic one is, for example, fairly clearly the argument that those who live under such an order should understand themselves as morally obligated to recognize the authority of democratic modalities of decision-making and authentically democratic decisions which proceed from them, even if such decisions conflict with the obligee’s personal preferences and desires. Similarly, the argument that a legitimate order is essentially communitarian is the argument that those who live under such arrangements should understand themselves as morally-obligated to recognize the authority of their society’s communal values and the appropriateness of their having a central place in determining the shape and nature of social life in the order.3

The conception I offer of legitimative claims as moral claims here is, however, potentially more problematic in regard to positivist legal theory. When positivists assert that “x” is the legitimate government of a given country, their intention is not to suggest necessarily that citizens should give their obedience to “x”, but merely that they do. When positivist judges define a given constitutional provision as meaning “y”, their self-understanding is not that the provision should mean “y”, or that “y” offers a morally compelling directive for human life, but that the provision means “y” in the legal context in which they are functioning, that the sources of legal reasoning which direct their interpretations mandate this particular interpretation of the provision. Positivist legal theory would seem therefore considerably less amenable to characterization in moral terms than its democratic and communitarian counterparts.

In responding to this objection, I return for a moment to the discussion of positivist legitimative theory I offered in chapter two. I noted there the importance of a distinction Ronald Dworkin offers in considering positivist legal thought, between internal and external perspectives on the law. This distinction suggests that we can understand well known positivists like H.L.A. Hart and Hans Kelsen as “sociological positivists”. By this is meant that the perspective of this positivist orientation is outside the legal order; its focus is on description of such orders rather than on claims about their moral cogency. Sociological positivism does not represent the attribution of moral character to an order deemed “legitimate” because it involves no “should” claim. Hart and Kelsen are not saying one
should give their allegiance to the given order, just that people do. In contrast to sociological positivism, however, stands legal positivism as an interpretive orientation embraced by constitutional judges. I suggested that in Canada this orientation can be associated with the interpretive perspective of constrained purposivism. As Dworkin suggests, the judicial perspective is necessarily an *internal* one; it suggests not simply a recognition of other peoples’ legal beliefs, but in effect a statement of one’s own as well:

> When a judge appeals to the rule that whatever the legislature enacts is law, he is taking an internal point of view towards a social rule; what he says is true because a social practice to that effect exists, but he goes beyond simply saying that this is so. He signals his disposition to regard the social practice as a justification for his conforming to it.  
> (Dworkin, 1977: 51)

For our purposes here we might refer to this orientation as “participatory positivism”, meaning a positivist perspective adopted in the course of *participating* in giving applicative definition to the terms of a particular legal order.

The distinction is an important one because while the claims of sociological positivism (“x” is the legitimate government *there*) do not imply a claim about the moral imperativeness of obedience to the laws of the particular order about which one speaks, participatorily positivist claims (“x” is the legitimate government *here*) arguably do. I contended that to adopt a positivist interpretive perspective is by necessity to adopt a contestable legitimative claim about the shape and nature of authority in the order in which one functions. One is endorsing a particular vision of social authority, and by transmitting that authority in the direct and unremediated manner of positivist legal interpretation, one is not only “recognizing” it, but in fact also conferring or reifying, it. Even if one finds this characterization uncompelling, it is difficult to deny the proposition that by voluntarily participating in making possible the furtherance of a particular authority, a constitutional adjudicator is by the nature of his decision at the very least giving it his ratification. In either case, by adopting in the interpretive task a positivist approach, one would seem to be making an implicit commitment to the idea that one *should* give the existent order in its established terms continuity and legal application through comprehensive judicial recognition of its mandate. One is saying, “I should enforce” this authority on these terms.

This belief about their own commitments would in turn seem to necessitate a co-
ordinate belief by positivist adjudicators about the obligations of those who are the subject of law -- private citizens. We would expect in most instances, I think, that the belief "I should give direct applicative enforcement to the laws of this order" would be matched by the belief that "you should give your obedience and allegiance to the order and to the laws I am choosing to help impose upon you". The duties here are two sides of the same coin.

Except in fairly unusual circumstances, it would be difficult to maintain the belief that it is right to make someone do that which one understand them as having no obligation to do. It is worth noting, I think, that this conception of participatory positivists as necessarily committed in moral terms to the legal order in which they function is one which a sociological positivist like H.L.A. Hart himself recognizes. For there to be "law", Hart notes, there must be a "critical reflective attitude to certain patterns of behaviour as a common standard" on the part of officials, "all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'" (Hart, 1961: 57).

Hart recognizes what I would suggest is under-recognized in positivist adjudicative practice -- the necessarily moral commitment of adjudicators to the authority they understand themselves only as finding or recognizing.

The argument, then, is that positivism in its participatory, interpretive form -- that is, as a value informing our beliefs about Charter meaning -- necessarily implies like our other primary values a moral or "should" claim about the obligations of those who live under the order. The implicit legitimative theory of participatory positivism suggests, as do the explicit legitimative theories of democracy and communitarianism, that the source of citizen obligation in legitimate constitutional order is moral, that those bound by the order should give it their obedience and cooperation.

Of course, the argument that participation in the legitimative endeavour implies the endorsement of a necessarily morally grounded theory of obligation by legitimative claimants does not without more suggest that such theories necessarily entail naturalist, idealist, or universalist moral theses. While endorsing or recognizing a particular legitimative claim implies a commitment to a particular moral theory, it is nonetheless still possible to argue within the confines of what I have presented to this point that different orders, peoples, or groups might embrace mutually exclusive and yet equally compelling or binding moral theories about the shape and nature of legitimate constitutional order. Indeed, the primary
values are to different extents all variations on this claim.

On the other hand, if the attribute of “moral-ness” itself brings with it some implicit and relatively immutable content, the necessarily moral character of legitimative claims will at least roughly delimit the sorts of theories that participants in the legitimative endeavour can cogently or self-consciously offer. To put it more directly: to say “you should” do “x” (in our case, “x” means “obey this authority”) commits one making such a statement not simply to the value of “x”, but to whatever additional values (if any) are implied by saying “you should”. To the extent that the “should” aspect of one’s claim commits one to certain values, it cannot coherently mandate “x” in any form, but only in forms which comport with the values to which one commits oneself by saying “you should”. These delimitations might be thought of as the necessarily recognized “locally-transcendant” content of constitutional orders for which morally-founded legitimative claims can viably be made. My suggestion here is that the moral character of the legitimative claims of the primary values does in fact commit their advocates to the recognition of at least some important values of this sort.

In advancing this claim I must first take a brief detour in order to introduce a concept — the idea of “legitimative personality” — which I hope will make my arguments in this regard somewhat clearer. By the phrase “legitimative personality” I mean the understanding of the nature, character, and attributes of legitimative obligees which is invoked or implied by a participant in the legitimative endeavour in the course of advancing his claim. In the everyday world, when we give someone an order, we are implying to ourselves an understanding of the person to whom we speak as properly the subject of our command; when we seek someone’s permission for something, we are implying an understanding of them as having authority over us in regard to the matter for which we are seeking approval. By one’s claims and actions, one is imputing a particular status to those to whom they are addressed.

The same might be said to be true in the realm of legitimative discourse. John Locke’s legitimative theory, for example, is premised on an understanding of its subjects as essentially and naturally individual in character. Karl Marx’s “proletarian”, on the other hand, is conceived of as a person who is communally and collectively-oriented. Nationalist theories of legitimacy implicitly point to citizens as persons whose values and identity derive in a significant way from their connection to the place in which they live. Each of these
perspectives is premised on an understanding of obligees as possessors of a certain legitimative personality, and the values and claims being made flow from this characterization. The legitimative claims of Locke, Marx, and nationalist theorists are internally coherent because the forms of order their advocates identify as "legitimate" accord with the legitimative personalities upon which they are premised.

A consideration of the legitimative claims of the primary values suggests similarly identifiable commitments to conceptions of the legitimative personality of their subjects. Democratic theory implies a conception of constitutional obligees as "democratic choosers"; communitarianism, of citizens as members of something like a community family. While positivists are less concerned with explicit delineation of these sorts of assumptions, we can infer in their theories a commitment at least to an understanding of obligees as, say, "Americans" or "Canadians" — that is, as persons identified with and bound by the legitimative grundnorms or collective social acceptance of their constitutional locale.

But in addition to these theory specific conceptions of the archetypical obligee evident in the legitimative claims of our primary values, we might also identify another set of premissory assumptions about obligees which I believe is implied by the moral form and character of these claims. These assumptions suggest, I will argue, a "meta-legitimative" understanding of constitutional obligees as possessors of the attributes of what might be called "moral agency". Two attributes are associable with this persona. To understand someone as a moral agent is to first of all recognize that they possess a "moral status", by which I mean that we understand them as the subject rather than the object of obligations we wish to impose upon them (from which derives the "moral" element of the phrase "moral agent"). And to understand someone as a moral agent is to recognize that they are participants in the task of discerning their obligations, that they are not mere order followers but persons capable of reasoning about and recognizing their duties (hence the descriptor "agent"). I argue here that the legitimative claims of the primary values appear to recognize both the moral and the participatory status of constitutional obligees, and they suggest therefore an understanding of such persons as moral agents. A valuation of theoretical consistency would suggest the merit, then, of advocates of the primary values recognizing in their theories of legitimate constitutional order not just the implications of their theory specific conceptions of the legitimative personalities of obligees, but also the implications, if
any, which follow from their meta-legitimative commitment to an understanding of obligees as moral agents.

We might turn first to the argument that the legitimative claims of the primary values constitute recognitions of the "moral status" of obligees. I have argued that the primary values are understandable as "should" claims, and in this character they can be contrasted with one important conceptual alternative — the sorts of claims which imply "must" rather than "should" as the source of legitimative obligation. In illustration of a legitimative claim in "must" form we might consider Niccolo Machiavelli’s advice to the "new prince" in *The Discourses on Livy*. There, Macchiavelli advises the ruler who wishes to consolidate his power to "... take as his model Philip of Macedonia ... [who] transferred men from Province to Province, as the Mandrians (Shepherds) move their sheep" (*Discourses*: ch. XXVI). There are, I would argue, two quite different conceptions of legitimative personality implied in "must" claims like that Machiavelli offers and the "should" claims embodied in the primary values. Machiavelli’s "must" standard attributes to obligees the status of mere objects — beings whose fate is understood as appropriately determined, like that of Philip’s "sheep", in reference only to their obliger’s ends or preferences and not in consideration of their own perspectives. This would not seem to be the status of obligees implied by legitimative claims in "should" form. To make "should" the foundation of obligation suggests a recognition of obligees not as mere objects to whom a "must" standard might apply, but, rather, as beings more appropriately understood as *subjects* in the legitimative endeavour. The "should" norm implies an understanding of obligees as persons whose constitutional-level obligations need to be established in reference to a moral standard, which applies to, accounts for, and binds them as well as the obliger himself. To the extent that they can be understood as making "should" the foundation of the claims they advance, the primary values are suggestive, I would argue, of an at least implicit understanding of the archetypical constitutional obligee as the possessor therefore of a "moral" rather than "object" status.

In addition to this moral status, the claims of the primary values might be argued to impute to the archetypical obligee a second attribute — what might be called a "participatory status". By this I mean that a consideration of such claims suggests an implicit recognition on the part of their advocates that obligees as well as legitimative claimants themselves are participants in the legitimative endeavour. Obligees can be taken to be understood as
having a participatory status because the legitimative claims of the primary values suggest both that obligees have a role in appraising the validity of legitimative claims, and that the order the legitimative theorist is advancing is made possible by obligees' recognition, endorsement of, and motivation to obey the claims being made.

Two propositions underlie my observations here. First, to the extent that the legitimative claims of the primary values are, as I have suggested, "non-coercively founded" in character, they are premised on the understanding that obedience to the constitutional order arises through the choices of citizens themselves to obey rather than from their responses to the sorts of incentives supplied by such things as sending tanks into the streets on a regular basis. If this is so, it suggests that such claims are properly understood as directed not at some heavenly jury of legitimative theorists or some other abstract group, but at obligees themselves.

Secondly, while I have suggested that the legitimative claims of the primary values can be understood schematically as implying the assertion "you should obey", the actual claims their advocates advance are considerably more elaborated than this. They include not just invocations to obedience, but some fairly significant justificatory or explanatory content as well. The advocates of democratic and communitarian values whose work I have explored in the previous chapters do not present the case for their legitimative claims as unsupported assertions or as constitutional commandments ordained by an inscrutable and all-knowing god of moral value, but as claims which involve a chain of reasoning and valuation which they make explicit and direct at their audience -- those, presumably, they purport to bind.

And while explicit and reasoned argument in support of its broader underlying legitimative theory is less immediately evident in postivist adjudicative practice than in the claims enunciated by advocates of the other primary values, there is in that approach to the legitimative question nonetheless an evident commitment to a similar form of explicit justification of the obligations adjudicators are imposing on those obliged by the constitutional order. This is evident in the practice and forms of judicial reasoning associable with constitutional adjudication. In general, judges take seriously the task of justifying a constitutional ruling. Constitutional judgments seek to make clear what authority is being invoked in deciding the issue (and the more uncertain is that authority, the more
comprehensive is the effort to explain) and the chain of reasoning used in discerning the applicative meaning by that authority is explicitly traced out. This is evidenced, for example, in the central judgment of the Supreme Court of Canada concerning the legitimacy of the Charter. The elaborate and extended consideration of the role of legality and convention in the Patriation Reference would seem, for example, to be suggestive of a desire by the Court's judges to explain and justify to the audience of their ruling — the Canadian public to be bound by the constitutional decisions which followed on the judgment — the grounds that the adjudicators were invoking in their attempt to discern the protocols of authority associated with constitutional amendment in Canada.

In briefer form, my suggestions here are that the legitimative claims of the primary values are understandable as directed to obligees, and that those claims include significant identifiable justificatory or explanatory content. A third proposition might therefore be argued to follow. To the extent that the claims to obedience of the primary values are understandable as directed at obligees, we might reasonably conclude, I think, that their justificatory and explanatory content must also be understood as directed at those who are expected to give their obedience to the constitutional order. But if this is so, it would seem to imply an understanding of obligees as more than just the subjects of authority. By making explicit the justificatory arguments and chain of reasoning upon which his claim is based, a legitimative claimant is implying the understanding that the obedience of obligees is not mandated simply by the claimant's recognition of the authority being invoked, but rather that it follows from the obligee's own evaluation of the claim being made. The obligee, like the claimant, is understood as a participant in the legitimative endeavour.

In turn, two implicit expectations might arguably be inferred in legitimative claims of this sort. By making a legitimative claim in should form and providing to its subject an explicit explanation of one's reasoning in support of the claim, one is suggesting that the obligee has the capacity to recognize a valid claim, and that he will be motivated to obedience by that recognition. In a larger sense, such claims would seem therefore to imply an understanding of obligees as persons who (a) are capable of discerning their moral duties (in this case, to recognize the authority of the order being advanced), and (b) are concerned to act upon them (by giving their obedience and allegiance to the order).

Since there is perhaps some complexity to the arguments I am offering here, it may
be helpful to attempt an illustration of the ideas of moral and participatory status with an analogy drawn from a field other than constitutional theory — the no less complex but perhaps more intuitively understandable circumstances of a family with children. We might first consider the case of a parent's relationship to an infant. If in determining that it is time for his six-month-old to go to bed the child's father bases his decision solely on his own preferences (perhaps he wishes the child would go to bed so he can get a break from his parenting duties), the child is being treated as someone without a moral status. He is, in such a case, an object whose fate is determined in reference to his father's rather than his own perspective. If, on the other hand, the parent bases his decision about the child's bedtime on a consideration of the child's well-being (“he is tired and needs his sleep” perhaps), then he is treating the child as a subject — a person whose value, importance, and perspective are understood as relevant considerations in the determination of the household's obligations. The standard the parent has invoked in determining the bedtime obligation in this case is a “should” rather than “must” standard. The parent's opting for the should standard in determining his child's obligation suggests his commitment to an understanding of his child as the possessor of a moral status.

Of course, it is clear that there would be little point in explaining to one's six-month-old that he should go to bed because he is tired and needs his sleep. The realities of human development are such that the infant cannot reasonably be understood to have a participatory status in regard to the question of his bedtime duties. But one might in fact attribute such a status to an older child in the same circumstance. If one is the mother of a ten-year-old, it is quite reasonable in determining whether it is bedtime or not to engage the child himself in the decision. One characteristically says in such a case: “you should go to bed now because you need your sleep”. By offering an explanation of one's judgment in the matter, one is in effect (as most parents will recognize!) inviting the child to assess one's reasoning. The child might say in such a case, “but, Mom, I can go to bed later tonight because tomorrow is not a school day and I can sleep in”. To the extent that the mother's offer of an explanation for her decision was a sincere one, she must recognize that the counter-argument is a compelling one, and her decision about the matter should therefore be revised. On the other hand, if a good counter-argument is unavailable, by virtue of the fact that she offered an explanation, the mother's expectation in this case would seem to be
that her child would recognize his “duty” and turn in for the night. In either case, the explanatory content of the directive suggests an understanding of the child as having a participatory status in determining his obligations here. In turn, her recognition of this participatory status suggests that the child’s mother understands him to be someone who is capable of discerning and concerned to act upon his duties.

The argument, then, is the same in the more rarefied air of the constitutional realm. The moral character of the legitimative claims of the primary values suggests a predicatory understanding on the part of those advancing them of obligees as possessors of a moral status — subjects, not objects in the legitimative endeavour — and therefore as beings whose obligations are appropriately established in reference to an evaluative standard which applies to and accounts for them as persons with their own moral significance and value. And because the legitimative claims of the primary values include significant justificatory or explanatory content understandable as directed at obligees themselves, they imply a conception of such persons as participants in the legitimative endeavour and through this as beings who are capable of discerning their moral duties and are concerned to act them. Taken together, the recognition of these attributes of personality is suggestive of a meta-legitimative commitment on the part of the advocates of the primary values to a conception of the archetypical constitutional obligee as a “moral agent”. My suggestion, then, is that this commitment brings with it the obligation to recognize its implications not just at the meta-legitimative level, but at the more concrete level of constitutional value as well.

IV. THE CONSTITUTIONAL VALUES OF MORAL AGENCY

I have argued to this point that the legitimative claims of the primary values can be understood as implicitly recognizing constitutional obligees as “moral agents”. The next question we might consider is whether or not the recognition of such a person as the archetypical obligee brings with it the necessity of recognizing the value of any particular sort of constitutional content. It does not follow, it must be acknowledged, that because we recognize the subject of our constitutional claim as, say, one of Jonathan Swift’s Yahoos, that we in turn must recognize that such persons should or must have the right, for example, to a state-funded education. While such a thing might be nice, its value is not established merely by pointing at our “archetypical Yahoo”. Is there something about “moral agents” as legitimative obligees which suggests to us that some sorts of constitutional arrangements are
more consistent with that status than others?

One might attempt to deduce a great deal of concomitant constitutional content from this sort of characterization of the archetypical obligee. The work of John Rawls might be taken as one effort in this direction. Rawls, for example, envisions his hypothetical "citizen as chooser" behind the veil of ignorance opting for a society governed by his now famous "two principles of justice" which commend to us constitutional arrangements which secure basic liberties and ensure the fairness of social and economic institutions. The two principles in turn suggest to Rawls that the ideal society would be administered by a government with four components -- "allocation", "stabilization", "transfer", and "distribution" branches (Rawls, 1972: 276 - 7) -- each with a fairly specifically defined mandate. (The allocation branch would, for example, be charged with the task of "keep[ing] the price system workably competitive and . . . prevent[ing] the formation of unreasonable market power" (Rawls, 1972: 276)).

While the legitimative theory I am advancing here shares an intellectual kinship with Rawls' work, my efforts to argue from a characterization of legitimative personality to a set of constitutional commitments are, I think, considerably less ambitious than are his. My claim is not on behalf of a provision-by-provision declaration of the ideal order, but one which encompasses only a more general set of limitations; ones more like Rawls' basic principles than his more extended deductions from those principles. The constitutional values which I argue can be derived from a recognition of legitimative obligees as moral agents are, it might be said, readily identifiable as liberal in their character (as might be expected in a theory of constitutional value which endorses strong rights), and they are in this sense, to use an apt analogy adopted by Stephen Macedo, more like "grammar" than "literature" (Macedo, 1990: 80). They are parameters which limit or shape what the state or its collective citizenship might say, not for the most part substantive statements of value in themselves.

The basic argument of the theory I offer here is this. A moral agent -- someone concerned to discern and act upon his moral duties -- cannot cogently be understood as prepared to forego that status in the ongoing constitutional order to which his allegiance is in effect being solicited by a given legitimative claim. To the extent one understands himself as a moral agent, he will be unable to acknowledge as obligatory a duty to accept the
authority of a constitutional order in which (a) his ongoing obligations — the everyday laws of the order — are determined in a way which denies his or others’ moral status, or (b) he or others are impeded in their ongoing ability to discern the content of their moral duties. To accept the former would be to put oneself in a position of being obliged to duties of obedience to laws which might potentially deny one’s moral status. To accept the latter would be to give up one’s ability to determine whether or not one is acting morally. I argue here that the first of these principles directs us to the recognition of the constitutional value of “inclusive justifiability”; the second, to the importance and value of preserving for citizens the “goods of moral exploration”.

Inclusive Justifiability

The first attribute of moral agency is the possession of “moral status”. My contention is that a moral agent could not cogently be expected to forego that status in an ongoing constitutional regime, and therefore that such orders must ensure (at least to the extent that this is possible) that the everyday laws of the order are determined in a way which does not deny that status to inhabitants. What sorts of constitutional strictures does this principle imply? One might begin by suggesting that this principle denies the validity of law making processes and institutions which produce outputs — legal obligations, laws — determined in reference to arbitrary standards of valuation. As an example of the sorts of limitations suggested here, we might conclude that one could not cogently endorse in “should” form an order in which morally-significant obligations are determined by a flip of a coin, because this modality of values identification is potentially productive of obligations which may have the consequences of treating some citizens as objects rather than subjects. If we imagine, for example, the “heads” side of the coin in a particular debate over public policy representing the idea that society should provide food to the children of the poor, with the “tails” side representing the idea that the poor cook and eat their excess children (to put the conflict in Swiftian terms!), it is clear that this sort of modality could not ensure morally justifiable decisions. The evaluative standard here is “chance” rather than the sort of more morally-explorative process one would suggest is necessary to ensuring morally justifiable treatment of citizens.

Another (more realistic) way in which standards can be understood as “arbitrary” is when they are not understandable as relevant, applicable to, or binding on those who are
expected to acknowledge them. When someone attempts to return a faulty purchase to a store, for example, the clerk’s refusal to accept the return on the grounds that “store policy is to not accept returns for any reason” is, as anyone who has experienced such an event realizes, unsatisfying. The managers of the store, for their own purposes and values, have established a policy which binds not only themselves, but us as well in our relationship to the store as customers. There is, we recognize, an element of the arbitrary in the invocation of the store’s policy as a determinant of our obligations as a customer. In such a case, the obligations have been established in reference to a standard which only accounts for the interests and preferences of the merchant. We are, in such a situation, being treated as objects rather than subjects in regard to the store policy.

In the constitutional realm, one might suggest that laws established for all which consider the standards or aims of only parts of a society have a similar arbitrariness. To the extent that we understand persons in our society as the possessors of a moral status, our expectation must be that their important or morally significant obligations should derive from standards which could reasonably be recognized as binding them as well as those who seek to oblige them. One statement of a principle which might respond to the problem of arbitrariness in this form is Immanuel Kant’s famous dictum that we should recognize our fellow men as ends in themselves, and not as the means to our own ends (Kant, 1949 [1785]: 37). To the extent that we recognize others as ends and not means, we will be mandated in our law-making (or our directives to law-makers) to attempt to account for those we seek to oblige in the same way we account for ourselves. Of course, the difficulty with the Kantian theorem as a specific constitutional principle is that in any cooperative society all persons are by the nature of human life unavoidably means to others’ ends. I cannot write this work without making the farmer supplying my dinner a means to my ends; he cannot produce his crops without making the providers of his farm equipment means to his end, and so on. A more precise stipulation of the question we must answer here might therefore be this: how can we ensure in a constitutional order that the unavoidable status of persons as means to others’ ends is assigned with due regard to their own more ultimate status as ends themselves?

One means of achieving such a goal is through the vision of a society founded on the requirement that obligees give their real, entire, and everyday consent to any potential
obligations. In such an order, persons would be able to avoid being treated as means
without regard to their status as ends because they would in effect have a veto over any
obligations another might propose to impose upon them. This is the sort of conception of
the ideal society which Robert Nozick offers in *Anarchy, State and Utopia* (Nozick, 1974).

Nozick's theory suggests that in order to recognize the individuality and independence of
human persons, we must avoid virtually all non-consensually imposed obligations. Taxes,
military service, public government, and laws of public morality are all in Nozick's state
forbidden by the fundamental requirement that obligations be consensual. Of course,
Nozick's solution is not one which many have found compelling. There is about the idea
that a society might be organized so as to ensure that all obligations are consensually
established something unrealistic one might suggest -- no human society yet created has
come in any way close to Nozick's vision of utopia. More importantly, most would suggest, I
think, that Nozick's vision is more fundamentally unsatisfying. It suggest a vision of
constitutional order in which deep mutual connections between citizens are denied and it
seems premised on a conceptualization of human beings as ultimately and deeply selfish.
Nozick's vision of life has found few takers among those who ponder the meaning and
purposes of human life.

Nozick's vision is also problematic as a constitutional solution because it appears to
deny that there may be important societal obligations which are non-consensual yet
nonetheless morally valid. Yet we can quite readily, I would argue, recognize the existence
of such obligations, even in our everyday lives. As one example of an obligation in this form,
we might consider an illustration drawn from a real world obligee-obliger relationship familiar
to us -- the customer-waiter relationship and the social convention of tipping. The
customer in this dyad stands as anobliger -- one whose decisions determine the parameters
of the relationship -- with the waiter as an obligee -- one whose fate is determined by the
"legitimative" parameters established by the obliging customer. This is a relationship whose
obligations are established in a way which is non-consensual and, indeed, even "coercive", at
least in a metaphorical sense. The waiter's tip is determined not by his agreement on the
standards the customer imposes in determining it, but on the customer's judgment alone.
Should the waiter fail to see his duty or fail to act on it, the customer will "punish" him by
withholding his tip. The standard is therefore coercively enforced and may be in a given
interchange non-consensual.

We can of course envision standards for tipping which would not succeed in making this non-consensual obligation imposed on the waiter a morally valid one. Should the customer make the waiter’s tip dependent on whether or not the customer’s hockey team won its game that day, or on whether the waiter has happened to make small talk about the customer’s favorite subject (say, constitutional philosophy), then he would be imposing coercively on his obligee duties derived not from a standard relevant to and binding on the obligee, but rather from a standard which accounts only for his own preferences, interests, and values. He would therefore be treating his obligee as an object, not a subject, as a means without regard to his status as an end in himself. On the other hand, we can also envision a standard for tipping which might be argued to morally bind the waiter even without his consent. The usual standard for tipping is based on the quality of the waiter’s service to the customer (was he polite?, did he get the order right?, and so on). This is a standard which might reasonably be argued to bind the waiter even without his consent, because it flows from the obligee’s recognizable role as a waiter. The server’s remuneration under this standard is not dependent on things he cannot be expected to care about or to be held accountable for, but rather on his performance in the role he might reasonably be expected to perform satisfactorily. While this standard is coercively enforced and may be in a given case non-consensual, it is therefore understandable nonetheless as one which binds the waiter, the obligee here, as well as his obliger, because it explains the duties being imposed in a way which accounts for the waiter as well as the customer.

The argument in the larger world of constitutional valuation is similar. Laws to which a particular obligee in a constitutional order has not himself given his consent are quite cogently understandable as capable of binding such a person as a moral agent, provided that they have been established in reference to an evaluative standard — like that of the customer-waiter relationship — which is capable of being understood as binding the obligee as well as his obligers.

While my waiter-customer discussion here is a metaphorical exemplification of this possibility, this idea can also be illustrated in regard to the substantive obligations of real world political orders as well. Most human societies recognize some substantive obligation
by the well off in society to the marginalized or underprivileged. The arguments I am presenting here suggest that to the extent that this sort of obligation in a given society is understandable as having been determined in reference to a standard which applies only to, say, the poor, and not to the well off, it would not represent the sort of non-consensual duty which could be taken as morally obligatory. The argument, for example, that the wealthy should be taxed in aid of the poor because the well off can “go to hell if they do not like it” would not, one would suggest, account for such obligations in a way which acknowledged the moral status of the well off. The argument being offered in such a case fails to explain or justify the more onerous obligations being imposed on wealthy persons here, and as a consequence it suggests that those advancing it are treating such persons as objects, means to their own ends, rather than subjects who are valuable and morally significant in their own right.

On the other hand, one can imagine and offer arguments for such obligations which do derive from a standard arguably binding the well off as well as the poor. One possible argument of this type would be the suggestion that since the well off receive greater benefits from the existence and operation of society than do the marginalized, the higher taxes they are being asked to pay in support of programs of social assistance to the poor are akin to a social rent paid by the well off for their advantaged position in society. My argument is not that this latter claim is one which we must take as necessarily mandating these sorts of programs, but rather that it is one which could quite reasonably be understood as capable of binding both obligers and obliged here. Its enforcement would not therefore, one would argue, conflict with the recognition of the moral status of those obliged by it, because it is a law arguably established in reference to an evaluative standard capable of being understood as binding all who are its subject. While in a given society such an argument might or might not be seen as sufficiently compelling to mandate the institution of such programs, the standard is such that a decision to institute such arrangements could not be objectionable to someone concerned to preserve his moral status, even if it was objectionable to him on more personal or self-interested grounds. The standard accounts for and explains the more onerous obligations being imposed on specific obligees through the invocation of a valuation which is capable of being understood as relevant and applicable to them as well as to those seeking to oblige them.
We can abstract from these arguments, then, a more generalized statement of principle. This generalized notion might be referred to as the constitutional value of "inclusive justifiability". In more formal terms, we might describe the value as follows:

Constitutional orders intended to bind moral agents must provide means and mechanisms of values identification (that is, institutions and processes of law-making) which seek to ensure that morally significant ongoing obligations in the order are established in reference to evaluative standards capable of being understood as accounting for, applying to, and binding all who are to be obliged.

We might further clarify the concept of "inclusive justifiability" here by considering two more general sorts of evaluative standards which the idea rules out -- those which seek public moral standards in religious text and belief, and those which determine social obligations based on human characteristics such as race. The value of "inclusive justifiability" as derived from our recognition of constitutional obligees as moral agents provides, it might be suggested, one means of explaining or justifying liberal rejections of these historically influential standards.

Those of religious persuasion sometimes suggest in their consideration of social values that the rules and laws of society should be determined in reference to a particular religious standard; the Christian faith and the Bible, Islam and the Koran, or some other form of spiritual inspiration. As an initial statement of principle, one would suggest that in societies in which only some persons are believers in the particular divinity whose authority is being asserted, the religious standard is by its nature not capable of being understood as applying to and binding all in the order. Mystical or religious standards are not in this light "inclusively justifiable" and they cannot therefore be understood as capable of binding moral agents who do not subscribe to the particular faiths being proclaimed. In turn, we would expect therefore that the modalities of values identification of constitutional orders intended to bind moral agents would not make religious or mystical standards the source of public laws.

Of course, one potentially powerful objection to this conclusion might be offered by those seeking to invoke such standards. Whether such claims are relatively minimalist -- an
argument for laws mandating the closure of stores and facilities on the advocate’s preferred sabbath day, perhaps -- or more comprehensive -- the integration of public and religious values systems as in, for example, Saudi Arabia, where the Islamic Sharia is enforced as law -- they share a similar premise. Those seeking to advance such rules suggest that the standard they are invoking is God’s standard, as expressed in the Bible or the Koran or whatever religious text the particular faith being invoked endorses. Those seeking to invoke such a standard might therefore argue that since it is God’s standard, it is perhaps the most fundamental of inclusively justifiable values. Surely God’s word binds all, whether they see it or not.

But while such a claim might be true in the heavenly world, it is not in our earthly realm. The reality of human life is that God’s standards (if there are such things) have been communicated in only two forms. They have been made available to some fortunate persons through “faith” or some similar means of communication where God speaks directly to the particular person invoking his values. Or they have been communicated through prophets coming down from the mountain or in from the desert after communing with God, bringing with them his directives. Unfortunately, in both cases, God, if he exists, has chosen to communicate via means which do not permit our verification of the authenticity of his communication. In attempting to discern God’s commands, most persons are placed in a position of having to take the word of someone else — another mortal much like himself — that the commands are indeed God’s and not simply the messenger’s. To require a person who has not felt the call of faith to take the word of or accept the spiritual vision of the mystically inspired as the source and determiner of his own obligations is to make the agnostic the object of another’s belief. To do so is to treat him as the object of a standard which cannot, from the obligee’s perspective, be seen as other than arbitrary, since it is both contentious and unverifiable. Recognizing this does not require a denial of the validity of any person’s religious faith or a denial of the validity of a particular person’s choices to make his own life decisions based on his own faith or his recognition of the authenticity of a particular prophet. But it does suggest that religious or mystical standards cannot be taken to be capable of providing the sort of inclusively justifiable, public standards of value necessary to justify legal obligations in a constitutional order which is intended to bind moral agents. Religious standards are by their nature in modern societies only partialist standards
of value. They cannot in this character serve as inclusively justifiable sources of obligation in religiously diverse societies.

Having said that, one might note a significant potential exception to the conclusion that the invocation of religious or mystical standards is incompatible with our recognition of constitutional obligees as moral agents. To the extent that a particular religious or mystical standard is one about which a community is in agreement, it would seem to have a very strong claim to inclusive justifiability. In a monastery, the argument that a particular policy is justified because God ordained it surely does constitute an inclusively justifiable evaluative standard. Communitarian philosophers like Alasdair MacIntyre have argued that we can understand many historical societies as possessing this sort of unity. To the extent this is a valid claim, it is reasonable to conclude that in such societies invoking religious sources of valuation would be entirely consistent with the recognition of those to be subject to them as possessors of moral status. The claim, however, that contemporary human societies (including those like Saudi Arabia where religious dissent is unseen only because it is suppressed) embody this unity of belief is unsupportable.

The second sort of evaluative standard which I would like to address here are those in which some marginal human characteristic such as race is used to provide the basis for distinguishing between obligees. One would suggest that standards of this type are incapable of binding all, like religious or mystical standards, because by their nature they speak to only part of a given population. A consideration of their historical usages (as justifications for such things as segregatory laws in, for example, the United States and South Africa) suggests that they are usually invoked by and on behalf of one social group against another. They are in this character therefore understandable only as the standards of their invokers, and not standards which could viably be understood as binding the obligees who must bear their weight. As such, they treat their victims as objects rather than subjects in the social orders in which they hold sway.

Of course, as a conceptual matter, it must be noted that racial standards might be imagined which could arguably be understood as capable of binding all in a society. To the extent that a decision to impose differentially onerous obligations upon or to deny the goods of citizenship to a certain racial group is founded on a racial standard which is capable of explaining such a decision, it might perhaps validly be taken as an invocation of a claim
which binds all. If, for example, Aristotle had been right about the intellectual inferiority he attributed to slaves in the *Politics*, his society of non-citizen slaves and citizen masters would perhaps have constituted an order in which the moral status of all was acknowledged, because the intellectual inferiority of slaves would arguably have justified the conclusion that they were unfit for the goods of citizenship. The standard being invoked would be understandable as binding both citizens and those relegated to non-citizenship. In such a case, however, the differentiation which is being proclaimed requires some justification. It is not enough that those seeking to invoke such a standard themselves believe it to be true. Some more critical means of evaluating the claim is necessary if it is to be capable of being reasonably understood as a valid standard. It need hardly be said that standards of this type are unlikely to be capable of passing a critical consideration in contemporary times: human knowledge of racial characteristics is sufficiently advanced that no one can reasonably argue that such things as skin colour signify differences in mental abilities. Race-based standards, then, are, like religious standards, illegitimate because they are not inclusively justifiable.

Of course, recognizing that the promulgation of laws founded on racial or religious standards is inconsonant with a recognition of their subjects as moral agents is not a difficult thing. My discussion here of these examples has not been intended to establish this relatively elementary proposition, but to suggest that the principle behind it — the idea that evaluative standards must be capable of binding all to be obliged — is one which follows from a recognition of obligees as moral agents. My hope is that recognition of this principle as an essential constitutional value may be of some use in considering more complex issues of this type.

*The Goods of Moral Exploration*

The second overarching principle of the moral agency theory of legitimacy which we might consider here is the idea that a moral agent cannot coherently be understood as recognizing his obligations of obedience to an order in which he or others are impeded in their ongoing ability to discern the content of their moral duties. I wish to suggest that this principle suggests that constitutional orders intended to bind moral agents must necessarily recognize the importance and value of what might be called the “goods of moral exploration”. These are the sorts of goods and freedoms associated with the task of
discerning one's moral duties. Perhaps the most obvious good associated with this value is freedom of speech in regard to political debate. It is widely accepted, I think, that it is necessary to hear and make argument and to participate in debate in order to ascertain one's moral duties. It would therefore be difficult to make out a claim that a constitutional order which is expected to be capable of binding moral agents could endorse a system of law creation in which this basic good is denied to the persons who live within it.

But while this might be taken as the basic value of a constitutional order capable of being understood as binding moral agents, I would argue that a valuation of moral agency in fact suggests a considerably more comprehensive vision of the goods of moral exploration than is represented in the ideal of free political debate alone. Indeed, this is a conclusion which might be derived from a consideration of the sorts of conceptions of social value which underlie the primary values themselves. Each of the primary values is premised on a denial of the existence of a broad range of immutable social “truths”. Many positivists argue, for example, for an understanding of law in amoral terms because they reject naturalist theories about moral value. Democratic theories of legitimacy are premised on the notion that values are either merely interests (as aggregative democrats like Rainer Knopff and F. L. Morton suggest), or appropriately worked out in accord with the unique mix of values in a particular community (as the arguments of deliberative democrats like Alan Hutchinson suggest). Communitarians like Mary Ellen Turpel deny the validity of “hegemonizing” claims about social value and argue for the inherent locality of social valuations. These are all “constructivist” theories of social value: they suggest that what is appropriately understood as authoritative in a given society is that which is widely believed to be true, not that which is true in a more ultimate sense.

But, perhaps somewhat paradoxically, this very rejection of foundationalism suggests some potentially foundationalist implications for legitimate constitutional order. It suggests, I would argue, some difficulty in endorsing or justifying strong limitations on the “moral freedoms” of constitutional obligees. The argument for such limitations cannot be, at least from the legitimative-level perspective adopted by the advocates of the primary values, that certain choices are “just wrong”. The legitimative premises of the primary values all deny that claims in this form are valid for any broad array of human possibilities. This is not to say that adopting the legitimative premises of the primary values disqualifies one from asserting
the “truth” of laws which prohibit such things as murder or genocide or the like. But it does
suggest that the less self-evidently authoritative laws of human conduct are understood by
the advocates of the primary values as derived not from immutable standards, but from local,
constructivist value preferences. If this is the case, however, it is difficult to see upon what
grounds a legitimative level claim might endorse forms of constitutional order in which
inhabitants are limited in their pursuit of the “moral knowledge” necessary in order to have a
constructivist preference in the first place. To the extent that a legitimative theorist is
indifferent to the question of whether, for example, homosexuality is or is not human
conduct appropriately subject to prohibition in a given order because he denies any sort of
fundamental moral validity or invalidity to such conduct, it is difficult to see how he could
argue for the validity of forms of constitutional order which deny to the constructing
members of the local society the means of discerning whether or not homosexuality is, in
their society, for them, good, bad, or indifferent. If the decision to penalize or not penalize
homosexuality is understood as a product of the aggregated or collective choices or theories
of value of those who live within a society, one might argue that some grounds for such
decisions, some process or means of acquiring the moral knowledge associated with making
such valuations is required. This suggests the importance of moral freedom, of access to the
resources of moral knowledge necessary to make informed “moral” decisions, to come to
conclusions about the sorts of public values to which one will, along with one’s fellow
citizens, commit oneself.

This would seem to suggest, then, some difficulty in turn in justifying social
prohibitions on forms of communication which might have the tendency to undermine
public consensus on particular moral values. These forms of communication are frequently
banned in societies on the grounds of “obscenity”. I have in mind here, for example, such
things as the controversial oeuvre of Robert Mapplethorpe, an American artist whose
transgressive photographic images often pursue explicitly sexual homo-erotic themes. In
recent years, some Americans have argued for the censoring of Mapplethorpe’s work on the
grounds that it contributes to the corruption of public morality. But, one would argue, such
works are an important contribution to the process of public values discernment or creation.
The implicit commentary on and the attitudes toward questions of human sexuality
embodied in Mapplethorpe’s art is in this sense a moral resource which contributes to the
determination of the personal values of Americans in regard to the question of homosexuality. Banning it would be to deny to the public at least one potentially important source of valuation contributing to the discernment of the moral validity or invalidity of homosexuality. A recognition of the goods of moral exploration suggests, then, a recognition of the importance of freedom of expression in a broad rather than narrow form.

Yet more far reachingly, it might also be argued that the goods of moral exploration can be understood as implying a significant preserve for the life choices and "lifestyles" themselves which are the subject of social deliberation. To the extent that we recognize constitutional obligees as moral agents, as persons concerned to discern and act upon their moral duties, we cannot viably expect them simply to take the word of self-asserted moral authority (even that of their "society" itself) about potentially controversial, problematic, or doubtful propositions associated with the sorts of life choices societies often condemn. In order to reach considered conclusions about their own moral obligations, human agents require the freedom to assess for themselves the validity of claims made against choices or alternatives they might otherwise wish to pursue.

This is an observation John Stuart Mill famously and eloquently makes in *On Liberty*. He argues there that

... mankind are not infallible; ... their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognising all sides of the truth, are principles applicable to men's modes of action, not less than to their opinions. As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments in living. ...  
(Mill, 1993 [1859]: 124)

Mill's suggestion, then, is that our very uncertainty about social value — the same sort of uncertainty implicitly recognized in the constructivist theories of the primary values — mandates a regime of freedom of choice and action because that freedom is necessary in order for us to ascertain the validity of the claims and counter-claims associated with "experiments in living".

This is a theory whose point which might be illustrated in contemporary times by a consideration of the moral claims associated in our and other societies with something like
the recreational use of drugs. The generalized public attitudes of moral horror expressed about drug consumption in the 1960s, 70s, and, at least by governments, in the 1980s, arguably had their genesis in such things as the 1938 film Reefer Madness and similar forms of public discourse which depicted marihuana use as destructive of peoples' morality and sanity (and, indeed, to the especial horror of some in film audiences of the time, of their chastity as well!). Yet these attitudes have been undercut in more recent decades in no small part because growing numbers of people (including a number of current 60s generation Canadian Cabinet members and at least one American president) have actually experimented with and experienced the effects of recreational drugs. Many or most of these persons have through such experiences presumably recognized that a few tokes on a joint do not result in personal moral destruction. One would suggest, then, that the opinions on drug use of persons in this latter group, informed as they are by real experience and knowledge, might be thought to represent more morally considered and substantiable views than those of people "informed" primarily by works like Reefer Madness. The formation of a moral opinion in such instances is made possible or furthered by one's opportunity to engage in the activity society seeks to condemn in a way which cannot be matched by reasoning in the absence of such experience. The goods of moral exploration must be understood as encompassing, then, I would argue, a substantive realm of personal moral freedom of choice and action. To the extent that we are skeptical about the existence of ethical truths as truths in the larger or more ultimate sense, if we understand social values as constructed rather than "discovered", we must acknowledge that ongoing debate and doubt about such values is warranted and legitimate. In turn, this suggests that the intellectual resources required to seriously participate in such debate may perhaps include "experiments in living" as well as freedom of expression.

The argument, then, is that a recognition of constitutional obliged as moral agents suggests that such persons cannot be expected to recognize constitutional obligations to an order in which they are impeded in the ongoing task of seeking to discern and act upon their moral duties. In turn, this suggests the importance in such orders of recognizing the constitutional value of the "goods of moral exploration", which I have suggested ought be understood in broad terms. In more formal terms, we might describe the second of the two constitutional values of moral agency as follows:
Constitutional orders intended to bind moral agents must provide means and mechanisms of values identification (institutions and processes of law-making) which seek to ensure that inhabitants of the order have access to the "goods of moral exploration" — the resources of moral knowledge necessary in order to discern and act upon their moral duties.

* * * * *

It should be emphasized that my arguments here are not intended to suggest that we might expect each and every law in a legitimate constitutional order to accord perfectly with the values of inclusive justifiability and moral exploration. To conclude on behalf of such a requirement, one would suggest, would be to impose a standard so high as to be unattainable. The nature of the principles of moral agency is such that their meaning and application are clearly subject to debate, and we might therefore expect good faith disagreement amongst those seeking to discern their requirements. The reality of life is that such debates must take place within the context of always limited human understandings of moral "knowledge". It is therefore unavoidable that disagreements and errors in any society may lead to uncertainty about whether a particular claim for the validity of a given legal obligation might or might not accord with the fairly abstract mandate of principles such as inclusive justifiability and moral exploration. It can also be suggested that the aspirational character one might attribute to these sorts of moral principles may have to give way in some instances to the more immediate demands of constitutional necessity. Some social demands may be sufficiently powerful that they require recognition in constitutional arrangements on that ground alone, whether or not they comport with the demands of moral agency.8

The argument here, then, is not for the radically naturalist claim that only that in a society which comports with some higher moral claim is "law". The argument is, rather, that the processes and modalities of values identification in a society intended to bind moral agents ought comport to the extent that these realities permit with the constitutional values of moral agency. The argument is about the institutions of constitutional order more so than it is about specific laws. But, of course, the corollary of this statement is that certain structures and institutions are more likely to ensure that ongoing obligations comport with
the values of moral agency than do others. In the next chapter, I offer a consideration of
the extent to which these constitutional values are recognized in the forms of political order
endorsed in the competing social and political visions of, respectively, the primary values,
and one of the Charter's most central advocates, Pierre Trudeau.
Notes

1 Rawls says, for example, that "[t]he notion of the veil of ignorance is implicit, I think, in Kant's ethics", and that "[i]f the original position is to yield agreements that are just, the parties must be fairly situated and treated equally as moral persons" (Rawls, 1971: 141).

2 Communitarian and democratic theorists can be understood as "advancing" such claims; positivist adjudicators would generally understand themselves as "recognizing" them.

3 This is a point Margaret Moore aptly makes about the legitimative perspective of a close relation of communitarianism -- nationalism. She suggests in The Ethics of Nationalism that "nationalist arguments are primarily normative", and notes that "[n]ationalists [rightly] see their arguments as arguments about what should be done, about what is legitimate state action"(Moore, 2001: 33).

4 An example of such a circumstances would be the issue of civil disobedience. One can imagine a judge enforcing a law against a defendant while nonetheless respecting that the defendant had a moral duty to disobey that law. This is an unusual circumstance because to the extent that an adjudicator believed that most of the laws in his society were of this character, he would not then be able to explain why he had chosen to participate in applying them to and enforcing them upon his fellow citizens.

5 In discussing the role of slaves, Aristotle considers the argument offered by some that "...the distinction of master and slave is due to law or convention; there is no natural difference between them; the relation of master and slave is based on force, and being so based has no warrant in justice" (Politics: bk. I, ch. III). Aristotle rejects this claim, arguing that "[t]here is a principle of subordination in nature at large" and that by "virtue of this principle", "the master, who possesses the rational faculty of the soul, rules the slave, who possesses only bodily powers and the faculty of understanding the directions given by another's reason" (Politics: bk. I, ch. V).

6 In chapter seven I argue, for example, that this principle places limits on the sorts of claims that can be made in the name of culturally "axiomatic" theories of value (to use Charles Taylor's phrase) as justifications for measures such as Quebec's Charter of the French Language.

7 Among the foremost of those advocating such measures was the noted conservative Senator Jesse Helms of North Carolina. Following a 1989 showing of the works of Mapplethorpe and the equally controversial Andres Serrano (known for his depictions of Christian religious symbols in offensively anti-Christian ways) at galleries supported by federal funds provided by the National Endowment for the Arts, Helms coordinated the passage of the following amendment to the Endowment's grant of authority, which was intended to have the effect of prohibiting it from providing future funding for displays of such works:

...artistic excellence and artistic merit are the criteria by which applications [for grants] are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

(20 U.S.C. § 954(d); emphasis added)

The amendment became the subject of a series of court challenges by other transgressive artists which culminated in the 1998 case of N.E.A. v. Finley et al (524 U.S. 569). There the
United States Supreme Court upheld the amendment.

8 Pierre Trudeau, whose constitutional philosophy I discuss in the next chapter, has noted such realities. In his discussion of bilingualism in *Federalism and the French-Canadians*, for example, Trudeau offers a Machiavellian justification for such arrangements:

If French Canadians are able to claim partnership with English Canadians, and if their culture is established on a coast-to-coast basis, it is mainly because of the balance of linguistic forces within the country. . . . In terms of realpolitik, French and English are equal in Canada because each of these linguistic groups has the power to break the country. And this power cannot yet be claimed by the Iroquois, the Eskimos, or the Ukrainians.

(Trudeau, 1968b: 31)
Chapter 6: The Primary Values, Pierre Trudeau, and the Idea of Moral Agency

I. COMPETING CONSTITUTIONAL VISIONS: THE PRIMARY VALUES AND PIERRE TRUDEAU

I offered two large claims about constitutional value in the previous chapter. I suggested that the primary values of Canadian constitutionalism can be identified with an implicit meta-legitimative recognition of constitutional obligees as "moral agents". And I argued that this conception of constitutional subjects in turn suggested the importance of recognizing two locally-transcendant constitutional goods. The ideal of "inclusive justifiability" suggests that constitutional orders intended to bind moral agents should provide means and mechanisms of values identification which seek to ensure that morally significant ongoing obligations in the order are established in reference to evaluative standards capable of being understood as accounting for, applying to, and binding all who are to be obliged. The ideal of access to the "goods of moral exploration" suggests that constitutional orders should ensure access for their inhabitants to the resources of moral knowledge necessary in order to discern and act upon their moral duties.

In the first part of this chapter I offer a consideration of the role and place of the goods of moral agency in the ongoing forms of political order esteemed by the advocates of the primary values. To what extent, it might be asked, do the political forms, structures, and institutions commended to us by the primary values accord with and ensure recognition of the goods of moral agency to which I have argued their advocates are committed by their meta-legitimative conception of constitutional subjects as moral agents? My general argument is that while the mechanisms of values identification esteemed by the primary values can be understood in many instances as embodying and giving expression to the values of moral agency, there are also important respects in which they fall short in such matters.

These conclusions suggest two observations. If our concern is to ensure the recognition of inhabitants of our constitutional order as moral agents, we may have reason to recognize, contrary to the primary values, the potential value of the mechanisms of rights review in the strong sense as a contribution to this end. If this is the case, we may therefore also have reason to recognize the value and importance of a closer consideration of the
political practice and constitutional philosophy of the Canadian Charterist perhaps most closely associated with a valuation of the Charter and of rights in the strong sense, Pierre Trudeau. In the second part of the chapter I suggest that Trudeau's personal and philosophical predispositions contributed to his recognition and advocacy of a set of social goods which has been under-recognized by our primary values; indeed, to a set of values very much in accord with the principles of moral agency. Trudeau's political practice and constitutional philosophy, I argue, provide an important and powerful explanation and justification for an understanding and valuation of the Charter in these terms.

II. THE PRIMARY VALUES AND MORAL AGENCY

My argument to this point has been that constitutional orders capable of being cogently understood as binding "moral agents" ought recognize in their processes and mechanisms of public values identification the norm of "inclusive justifiability" and the importance of ensuring access for their inhabitants to the "goods of moral exploration". I turn now to a consideration of the extent to which the sorts of constitutional orders endorsed or recognized by our primary values might be understood as recognizing or embodying these norms. In general, while the primary values do at least to some extent embody and give expression to the values of moral agency, there are also important respects in which they fall short in such matters.

Positivism and Moral Agency

As a general statement of its legal philosophy, we can understand positivism as directing us to a conception of the positive law of a social order as the legal prescriptions of government officials acting within the bounds of their socially recognized law-making authority. Positivist legal theory is agnostic about both the form of "legitimate" law-making institutions and processes and about the "morality" of specific laws and legal outputs in a given order. Positivism suggests that debate and voting may constitute legitimate law-making processes in one society, while the proclamations of a dictator or the casting of entrails may provide authoritative legal outputs in others. And positivists are prepared to recognize as law even legal outputs which embody partialist standards such as race or religion, provided that they have been enacted by law-makers acting within the bounds of their recognized legal authority. Yet despite these limitations, an initial consideration of
positivist conceptions of constitutional authority provides some resource for an argument that positivistically-recognized orders can nonetheless be understood as consonant with the first of the values of moral agency, inclusive justifiability.

In a constitutional context, the recognition of legal authority requires a step backward: the socially recognized authority which determines and delineates the powers of officials and institutions attaches not to law-makers *per se*, but to the constitution. H. L. A. Hart suggests, for example, that the authority of the “secondary rules” in a legal order which determine how to identify law have their ground in “social acceptance” (Hart, 1961: 105). Hans Kelsen argues similarly that legal authority in a functional political order can be understood as deriving from a legal “grundnorm”, a fundamental social belief in the authority underlying the constitution (Kelsen, 1949: 111). Thus, while positivism denies that particular laws need be inclusively justifiable, it does seem to suggest that in the constitutional context they might nonetheless be characterized as such because they derive from or have been established within the parameters of a standard which is potentially understandable as inclusively justified — the constitution and the public norms of social belief attached to it.

This conception of legal meaning and valuation is evidenced in positivist-oriented adjudicative practice. In his famed dissent from the majority’s “idealistic” reading of the Fourteenth Amendment of the American Bill of Rights in *Lochner vs. New York* ([1905] 198 U.S. 45), for example, Justice Oliver Wendell Holmes suggests two things. First, that adjudicators interpreting the American constitution act inappropriately when they assess the constitutionality of laws in the light of their *own* personal theories of value:

\[\ldots\] this case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.

(*Lochner*: 56)

Secondly, Holmes suggests that jurists therefore more appropriately interpret the constitution and its delineation of the ongoing laws of the American order in reference to standards which one would suggest are more broadly based and inclusive than those
embodied in judges' personal opinions:

> I think that the [meaning of the constitution] is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

*(Lochner: 56)*

Holmes' invocation of "the traditions of our people and our law" in the name of judicial neutrality suggests a conception of constitutional authority as derived from generally socially accepted values and not from the partialist philosophies of judges themselves.

These views are reflected too in the positivistically-oriented interpretive theories of Canadian judges like our own Supreme Court's Justice William McIntyre. In his own noted dissent from the majority's expansive reading of the Charter in aid of freedom of choice in the matter of abortion in *R. v. Morgentaler* ([1988] 1 S. C. R. 30), McIntyre notes that "... Courts should interpret the Charter in a manner calculated to give effect to its provisions, not to the idiosyncratic view of the judge who is writing* *(Morgentaler: 141). McIntyre argues that courts more appropriately interpret the constitution in reference to "the language, structure and history of the constitutional text, ... constitutional tradition, and ... the history, traditions, and underlying philosophies of our society" *(Morgentaler: 140). Again, the implication of the invocation of judicial neutrality here would seem to be that constitutional meaning, and through it the meaning and legitimacy of the laws of the order, derives from the standards, values, and traditions which society recognizes, rather than from sources which are perhaps recognized only by a particular jurist.

Positivist legitimative and interpretive theories might be taken therefore to suggest that the ongoing laws of constitutional orders meet the standard of inclusive justifiability not in their specific precepts, but through their authorization in the name of larger constitutional standards which accord with that value, because they are the standards of the society and its people themselves. The difficulty with such an argument, however, is that it depends on the attribution of an inclusionary quality to constitutional standards which may in fact be lacking in that regard. As I argued in chapter two, while there is some appeal to notions like a Canadian grundnorm, the applicability, validity, or compellingness of a foundational attribution of constitutional authority to Canada's British roots or to the 1867
compromise between Canada's "founding peoples" is questionable in the multicultural context of contemporary Canadian life. I also suggested that the positivist adjudicative practice of locating the constitutional values of the Charter in reference to Canada's "traditions" and long-held social values, as Justice McIntyre sought to do in Morgentaler, is similarly problematic. While there may once have been a consensus among Canadians about the social values related to (prohibiting) abortion, there clearly no longer is. In both these sorts of claims, what is being endorsed are standards which, while perhaps at one time of considerable inclusive validity, are no longer as inclusionary as they once were. The invocation of such sources of value might be argued therefore to privilege in a large way a set of evaluative standards which fail to account for all to the extent we might desire if our goal is the recognition of constitutional subjects as moral agents.

Positivism also represents a problematic perspective in regard to the second of the constitutional values of moral agency -- ensuring for citizens access to the goods of moral exploration. While nothing in positivist conceptions of constitutional order need be taken as denying the value of moral freedoms, neither can much be found there which would imply the importance of seeking to ensure this good. This is a problem which arises because positivist legal philosophy suggests that the source and definition of moral freedoms in political order is the order itself, rather than the more independently recognized value of such goods in their own right. As a consequence, positivist approaches to the task of legal interpretation may be incapable of assuring the recognition of moral freedoms when the political order is unamenable to such things.

Indeed, one might suggest that some of the most noteworthy recognitions of the value of moral freedoms and civil liberties in Canada have followed from what might be taken as rejections of positivist understandings of the law. The works of a number of scholars suggest that many of Canada's hallmark cases recognizing civil liberties can be understood as founded on departures from positivist interpretive theory. Paul Weiler, for example, has suggested that in a "long series of decisions emerging from Quebec in the fifties",

... several judges on the court transcended the legalistic and positivistic limitations which are too prevalent in the Canadian legal system and engaged in a real dialogue about the principles underlying a free society.

(Weiler, 1973: 343)
In support of his theory, Weiler discusses a number of cases which are generally taken to be among leading judgments in Canada defending civil liberties. These include *Henry Birks & Sons v. Montreal* ([1955] *S.C.R.* 799), which involved a statute which prevented commercial activity in Quebec on Catholic holy days; *Saumur v. Quebec* ([1953] 2 *S.C.R.* 299), legislation intended to prohibit the circulation of religious leaflets by the province's Jehovah's Witnesses; and *Switzman v. Elbling* ([1957] *S.C.R.* 285), Quebec's notorious "Padlock Act", which allowed the Attorney-General of the province to close premises which were used to "propagate communism".

Peter Hogg's critique of judicial attempts in the pre-Charter era to construct what he aptly calls a "surreptitious" or "implied bill of rights" from Canadian constitutional materials (Hogg, 1999: 630) might also be taken as suggesting a characterization of important civil liberties cases as embodying departures from positivist interpretive practice. The leading case in which such an approach figures is the 1938 *Reference Re Alberta Statutes* ([1938] *S.C.R.* 100). The Reference concerned legislation proposed by Alberta's Social Credit government which sought to limit freedom of the press by requiring the province's newspapers to publish rebuttals from the Alberta government of stories critical of its actions or policies. In his noted judgment, Chief Justice Lyman Duff held the legislation invalid as contrary to the *Constitution Act, 1867*’s mandate that Canada have a "constitution similar in principle to that of the United Kingdom". Duff reasoned from this that the constitution

\[\ldots\] contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals.

(*Alberta Reference: 132*)

Duff's endorsement of the value and importance of free public opinion and debate here is certainly compellingly stated. I am in agreement with Professor Hogg, however, that this doctrine is difficult to ground in the *Constitution Act, 1867*. As Hogg suggests,

\[\ldots\] the central feature of the Constitution of the United Kingdom and its Parliament, was in 1867, and still is, parliamentary sovereignty: any of the civil liberties, including freedom of political speech, can be abolished by the Parliament
of Westminster at any time. In the United Kingdom the tradition of respect for civil liberties is not reflected in the law of the Constitution. It therefore seems likely that a 'Constitution similar in principle to that of the United Kingdom' would not contain implied guarantees of civil rights.

(Hogg, 1999: 630)

Hogg's argument suggests, then, that Justice Duff's reasoning about and recognition of civil liberties in this important case derives not from positivistically recognizable sources of constitutional value such as text, precedent, and tradition, but from a more independently constructed valuation of free public opinion. These scholarly connections between civil liberties in Canada and the departure from positivistic adjudicative practice suggest, I would argue, that too strong a commitment to positivism may make it difficult to ensure a recognition of the goods of moral exploration in a constitutional order.

Communitarianism and Moral Agency

Like positivism, communitarian legitimative theory does not bring with it a commitment to specific political institutions, suggesting instead that different forms of political order may be appropriate in different societies. Unlike positivists, however, communitarians do endorse an overarching conception of what legitimate modalities of values identification should accomplish — they must provide means to give expression to and ensure the recognition of local community values. As a constitutional theory, communitarianism suggests therefore that legitimate political order is that which establishes legal obligations in reference to the authoritative social values of local community. This legitimative formula suggests some potential accord of communitarian forms of political order with the value of inclusive justifiability. Communitarians envision as the ideal society one whose members share to a significant degree a coherent and collectively recognized set of social values, such as those embodied in a common nationality or culture. These values, it might be suggested, provide evaluative standards for determining legal obligations which by their nature are binding on all in the social order — they are, in this view, the very standards of the local community itself.

The difficulty with such a vision as a claim to inclusive justifiability in the Canadian context is that it depends on a perhaps unrealistic conception of our local communities. As I suggested in chapter four, there is some reason to doubt that contemporary communities,
certainly Canadian communities, can be understood as quite so morally cohesive as communitarianism would have us imagine. This is evidenced by a consideration of the societies of Canada's foremost cultural communities — that of Quebec, and those of aboriginal Canadians. In large and diverse communities like Quebec, we must recognize, I argued, that there exists a significant discontiguity between the territory of the legal order and the society or moral community identified as the source of value in that territory. Even if there is such a thing as a *québécois* community with a commitment to a particular and identifiable set of social values, it is not the case that the province of Quebec is coterminous with that moral society. Even aboriginal communities, in which there is a more identifiable contiguity of the cultural community and its political territory, are problematic as models of communitarian moral unity. I argued that aboriginal societies, like other communities in the modern world, embody a diversity of public belief and social value. There is some difficulty therefore in attempting to characterize the members of such societies as sharers in the communitarian sense of a comprehensively recognized and evaluatively coherent moral standard. The problem in characterizing community or cultural norms as inclusively justifiable, then, is that those norms may be authoritative only for portions of any society in which they are invoked. To the extent that such norms are partialist, we might expect that they would be unable in at least some important instances to provide morally binding justifications capable of explaining the obligations of persons who are not members of the local culture or who reject its traditional values.

Communitarianism's conception of local communities as the source of moral valuation for their members also raises some difficulties in regard to the second of moral agency's values — the ideal of ensuring for citizens access to the goods of moral exploration. It must be noted in this regard that communitarianism cannot be characterized as a philosophy which disregards morality. Many communitarian critiques of liberalism are in fact founded on the concern that liberalism does not take morality seriously enough. Communitarians suggests that liberal agnosticism about personal or individual moral values results in a conception of morality which is foundationless and arbitrary, and the communitarian ideal of a societal morality is intended as an antidote to this problem. And because communitarianism takes morality seriously, the philosophers associated with its ideals suggest a significant place in society must be made for discussion and debate about
moral standards. Alasdair MacIntyre, for example, who posits as the ideal “local forms of community” built around the texts and precepts of a “great tradition” (MacIntyre, 1981: 245), suggests that in such societies moral debate is central:

... it is out of the debates, conflicts, and enquiry of socially embodied, historically contingent traditions that contentions regarding practical rationality and justice are advanced, modified, abandoned, or replaced. ... there is no other way to engage in the formulation, elaboration, rational justification, and criticism of accounts of practical rationality and justice except from within some one particular tradition in conversation, cooperation, and conflict with those who inhabit the same tradition.

(MacIntyre, 1988: 350)

The potential problem with communitarian theories of moral exploration is not then that they deny the importance of such endeavour, but rather that their tendency is to licence the construction of forms of community in which the pursuit of moral knowledge is understood as appropriately delimited within the range of the local society's dominant mores, values and traditions. Communitarianism bestows upon such sources a moral authority which suggests the legitimacy of measures aimed at ensuring their preservation in the face of critique or dissent in the name of alternative perspectives. My suggestion is that communitarian legitimative theory implies an endorsement of, or at least fails to provide the resources to deny the validity of, measures of culture-creation or values identification which are potentially inconsonant with a recognition of the importance of free moral exploration broadly understood.

Democracy and Moral Agency

There is perhaps some greater complexity in attempting to characterize the accord of democracy with the values of moral agency than there is in regard to the other primary values. Democratic forms of social order are in some respects considerably more amenable to those values than are those endorsed in positivist and communitarian theories. Indeed, democratic theories of legitimacy seem more explicitly than implicitly to recognize constitutional obligees as “moral agents”. The democratic conception of “citizens as choosers”, for example, would seem to represent a fairly clear understanding of obligees as persons with a participatory role in the ongoing political order and therefore as persons
concerned to discern their moral duties.

It is unsurprising, then, that democratic theories of legitimacy can be seen to recognize in important respects the value and necessity of ensuring for citizens access to the goods of moral exploration. This is particularly so in regard to those aspects of moral exploration associated with the democratic process. As Chief Justice Brian Dickson has suggested:

Democracy is the periodic determination of the common will by the free expression of the genuine and informed will of the individual. There must be freedom of thought, conscience and opinion, or there can be no expression of the genuine will of the individual. There must be freedom of information, assembly and association, or there can be no expression of an informed will of the individual. There must be freedom of speech, or there can be no “expression” of the will of the individual.

All of the above rights are prerequisites to the proper exercise of democracy.

(Dickson, 1984: 327; quoting the Committee of the Constitution of the Canadian Bar Association)

To the extent that Dickson’s enumeration here of the values of democracy is understandable in broad terms, it suggests a fairly significant accord of democratic forms of political order with the goods of moral exploration.

And while this is indeed the case for democracy in relation to debate and discourse about public values, it is, unfortunately, less clear that once we move away from the letters to the editor and podiums in rented halls which are connected with the democratic process that democracy can be associated unreservedly with such goods. I suggested above that the goods of moral exploration associated with moral agency must be understood in broad terms. I argued in this regard that such things as John Stuart Mill’s “experiments in living” and the art of Robert Mapplethorpe are included the realm of knowledge which moral agents would be concerned to preserve for themselves in order to pursue the moral knowledge necessary in order to discern their public duties. If this is a compelling conception of the requisites of moral agency, then it suggests that ensuring for citizens access to the goods of moral exploration requires something more than simply assuring their right to hear and engage in public debate. Yet many theories of democratic value suggest that while debate about punishments for or restrictions on personal decisions cannot be impeded, the personal
decisions themselves may be subject to punishment or restriction as a consequence of the judgments made by citizens collectively in the democratic process.

Any number of democratically-enacted laws might serve as exemplifications of this problem. The pre-Vriend Individual Rights Protection Act in Alberta, for example, which omitted sexual preference from its list of categories of identity protected from discrimination, might be taken as legitimating punitive and repressive responses to homosexuality by those inclined to such views in the Alberta public, and therefore as condoning efforts to suppress this form of human relationship. Laws against pornographic or obscene forms of expression similarly impose limits on these sorts of personal choices, as do such things as laws banning particular forms of sexual activity between consenting adults (such as the anti-sodomy laws still on the books in a number of American states). These are examples of laws in which I would argue the personal choices associated with free exploration of one's moral duties are impeded. The grounds invoked for banning or penalizing the activities associated with these laws are essentially moral, but the denials have the consequence of prohibiting citizens from seeking to establish for themselves the "morality" or "immorality" of the behaviours and choices being condemned. The problem with purely democratic modalities of values identification, then, is that they may have the tendency to countenance limitations on at least some of the sorts of moral exploration necessary to have a reasonable or informed opinion on the values which are to be identified. As I have suggested, democratic theories of legitimacy recognize a realm of locally-transcendant goods and freedoms — particularly political freedoms. My arguments here are intended to suggest that that realm is perhaps larger than democratic theory acknowledges.

Some initially appealing arguments are also available suggesting democracy's potentially strong accord with moral agency's valuation of the principle of inclusive justifiability. By its nature the democratic process can be understood as providing for citizens a significant opportunity to participate in the task of establishing the legal obligations of social order. Democratic theory suggests that this participation contributes to ensuring that the evaluative standards invoked on behalf of legal obligations are inclusive.

Deliberative democrats argue, for example, for a vision of democracy in which citizens come together in a spirit of cooperation and amity, and seek to work out their disagreements and find consensually satisfying solutions to their conflicts. Through such
processes, deliberative democrats believe, citizens come to understand and care about each other, finding a “common solidarity”, which Allan Hutchinson has described as the “social side of love” (Hutchinson, 1995: 102). To the extent that this conception of democracy is accurate or realizable, one might suggest that it is as fundamentally recognitive of the value of inclusive justifiability as any process one might envision. In the deliberative vision, citizen recognize each other as subjects, not objects, by virtue of their feelings of mutual connection. And the decisions they make are not simply “justifiable”, but, one might argue, the processes of debate and deliberation which deliberative democrats endorse actually constitute an ongoing form of active and explicit justification of public decision-making by citizen participants themselves.

But while the deliberative vision is an appealing one, it is, as I argued in chapter three, one which I believe we have some reason to conclude may unfortunately be too optimistic. It is expecting a great deal of any human society to anticipate that democracy might function in all important instances so as to produce “solidarity” and “social love”. Indeed, the fact that the deliberative model is still one to which democrats argue we must aspire rather than one whose everyday function in the world can be pointed to suggests perhaps the utopian aspects of the vision. This is not to claim, however, that democracy never functions in this way or that significant aspects of the deliberative vision might not be realized more than infrequently. The argument I presented in chapter three and which I repeat here is, rather, that, unless we are very optimistic, we must realize that even an order in which deliberative democracy is widely practiced there will nonetheless be instances and occasions in which social decision making falls short of the laudable goals of the deliberative vision. Some means or mechanisms of rectifying these sorts of decisions might therefore be recognized as valuable perhaps then by deliberative democrats themselves.

While advocates of aggregative conceptions of democracy generally do not suggest that the processes of democratic decision making have the broadly transformative social quality deliberative democrats attribute to them, the aggregative vision nonetheless also offers some potential resources for a conception of democracy as recognitive of the value of inclusive justifiability. Advocates of aggregative democracy do not wish away the possibility of dissatisfaction for those who lose out in democratic conflict, but suggest rather that democracy represents the best solution to this problem. Democratic decisions are, after all,
decisions in which the views and interests of all are canvassed and accounted for to at least some extent. Aggregative democrats might therefore suggest that democratic decisions constitute our best means of recognizing both that laws must account for all and the fact that we will often have in most societies widespread disagreement about what constitute the standards of valuation which ought direct our decisions. At least three possible means of conceptualizing the aggregative democratic decision making process in terms of inclusive justifiability might be offered. My suggestion is that while these conceptualizations do imply some accord of aggregative democracy with the principle of inclusive justifiability, none can be taken as substantiating democracy’s realization of that ideal to the extent we would desire if our goal is the recognition of citizens as moral agents.

The first such conceptualization we might consider understands democratic processes as mechanisms directed at producing “maximal aggregate social utility” within a social order. Representatively-oriented theories of aggregative democracy suggest that political representatives are required by democracy’s incentive structures to seek in their law-making solutions to social conflict legal outputs which satisfy the greatest number of people to the greatest extent, while dissatisfying the smallest number to the least extent. This built in end of the democratic process might therefore be considered to represent a form of inclusive justifiability. The ideal of a maximally satisfied society is one which might arguably be understood as constituting a general evaluative standard capable of being recognized as binding all in a social order.

Unfortunately, the shortcoming of democratic processes understood in this light is that the utilitarian ideal of maximal aggregate social utility ignores the question of distribution of utility in a social order. Democratic modalities of values identification, it might be argued, are insensitive to the danger that some members of society may lose out more frequently or in regard to more significant obligations than others. To the extent that this is a widespread problem, the utilitarian standard has the effect of making those who lose out in important public disputes over social value the means to the winners’ ends without, one would suggest, assuring due consideration of the losers’ importance in their own right as ends in themselves. The utilitarian standard may in such instances therefore be far less inclusive than one would initially hope.

Some advocates of aggregative conceptions of democracy like Christopher Manfredi
suggest that in the long run democratic processes do tend to distribute utility evenly, because the losers in today’s debate over policy “x” can be expected to be the winners in tomorrow’s over policy “y” (Manfredi, 2001: 198). As I suggested in chapter three, however, this would seem to be an at least partially unrealistic expectation. Those whose aspirations, interests, or characteristics place them outside of the social mainstream might be expected to lose out in social conflict considerably more frequently than those more closely associated with social majorities. A consideration of the social plight of marginalized groups like African-Americans in the southern United States of the 1950s, for example, is indicative of this problem. One would be hard pressed to substantiate a claim that members of this group were during this time winners anywhere nearly as often as they were losers. The maximization of aggregate social utility, then, does not necessarily correspond to the assurance of inclusive justifiability.

The second conceptualization of aggregative democracy which I would like to address might be taken as recognizing this problem. It would suggest, however, that my criticisms here might perhaps be better understood as not directed at the modalities of democracy, but rather at the unfortunate realities of human life. We have in all human societies conflicts between people who want different, sometimes mutually incompatible goods. No modality of decision-making can satisfy everybody if we are trying to divide two pieces of cake between three people, and our search must therefore be for forms of political order which best respond to this unhappy reality. Democracy ranks highly in the face of this dilemma, because it functions so as to satisfy more rather than fewer in instances of social conflict. We might call this the “preference satisfaction” model, because it conceives of democracy as a mechanism by which to maximize the satisfaction of social preferences in the face of hard choices.

This conceptualization of democracy might be argued to satisfy the requirements of the principle of inclusive justifiability because it suggests that democracy represents a means of responding to the problem of social conflict in a way which treats citizens as subjects rather than objects. Democratic modalities ensure that each person in society has an equal voice in the processes of public decision making about such conflict. While one might wish therefore that a particular decision had gone in one’s favour, one cannot object on moral agency grounds to decisions which satisfy more at the expense of dissatisfying
fewer numbers of persons. Someone must be dissatisfied, and democratic modalities apportion this dissatisfaction in a way which recognizes all persons as equals.

As I suggested in chapter three, one significant problem with aggregative democratic theory is its relatively undifferentiated understanding of the claims at stake in the democratic decision-making process. Democrats arguing for this vision speak of “preferences” and “interests”, and this language suggests that conflicts of public value involve goods which have roughly the same meaning and import for all citizens. Of course, many public issues do have this quality. If my municipality can only afford to pave one road in the city, its paving of a road in my neighborhood will dissatisfy those in another neighborhood, and vice versa. The value of inclusive justifiability is arguably recognized in these instances when such decisions treat individual citizens equally by seeking to satisfy the interests of more rather than fewer, an outcome presumably ensured by the mechanism of “one person, one vote”.

But many important public obligations do not have this symmetrical quality. In this second category of laws, we might distinguish between two different sorts of interests which are at stake. There are, first of all, what might be called “preferential” interests. What is at stake here is the satisfaction of one’s preference for a particular policy outcome: is policy “A” enacted or policy “B”? This preferential interest is one in which all in society have an equal stake. This is the sort of interest which democratic theories of value focus upon, and this interest is accounted for within the terms of inclusive justifiability through the mechanism of one person, one vote. But there is also a second interest at stake in asymmetrical laws, an interest in which all in society do not have an equal share. We might call these sorts of interests “applicative” interests. What is at stake here is what happens to those to whom a particular law will be applied. As an example of a law in which the set of those with preferential interests is not identical to those who also have applicative interests, we might consider something like the now defunct Criminal Code prohibitions on abortion which were at issue in R. v. Morgentaler. All Canadians had a preferential interest at stake in that law; one’s preferences about what the country’s abortion law would be were either satisfied or not satisfied by the legislative regime in place. My preference, for example, that access to abortion be made relatively freely available was not satisfied by the law Parliament enacted; the preferences of those who believe in the “right to life” were satisfied. But
different applicative interests were also at stake. Women who wanted an abortion or might have expected that they might one day had in such laws not just their preferential interests at stake -- as a feminist philosopher might, for example -- but their applicative interests as well -- as persons who might in this case be required by such laws to carry unwanted pregnancies to term.

The difficulty with the preference satisfaction model of democracy is that it would seem incapable of explaining how deciding on the obligations of those with applicative interests through mechanisms which give them an equal say alongside those with only preferential interests might accord with the value of inclusive justifiability. Some explanation for the imposition of differentially onerous obligations on particular citizens is required that transcends the explanation that failing to do so will mean a majority of people will not get what they want. To make this our evaluative standard is to treat those with applicative interests in morally significant laws not as fellow subjects, but as the objects of those whose interests are only preferential. The aggregative theory of democracy as preference satisfaction is, I would argue, capable of justifying the non-satisfaction of preferential interests, but without more may fail in important circumstances to justify decisions about the applicative interests of those obliged by the decisions it legitimates.

A third conceptualization of aggregative democracy might be offered in response to this problem. It would suggest that we understand the decisions of voters in morally significant matters (like abortion policy, for example) not as statements of preference, but as expressions of some moral theory about the matter at hand. We might call this conception "moral voting" theory because it suggests that what is being aggregated through the processes of democracy is not the idiosyncratic, self-interested personal whims and desires of participants, but their differing, good faith moral theories about the proper choices in social matters which concern other citizens. In this conception, voters are understood not as deciding the fate of their fellows based on a canvassing of their own preferential interests, but based instead on the overarching moral theory to which each subscribes. One voter, a fundamentalist Christian, might assess the potential obligations in the light of Christian teachings and God's word in the Bible, another in reference to the moral philosophy of a favored academic, someone else in reference to a sincerely held theory of moral Darwinism. Political representatives might be understood in this model as having as part of their law-
making duties the task of discerning in the conflicting moral conclusions of their constituents some majority compromise or some dominant theory to apply. This is perhaps the conception of democracy F.L. Morton has in mind when he commends the legislative intent behind the pre-
\textit{Vriend} version of Alberta's \textit{Individual Rights Protection Act} which omitted protection for persons discriminated against on the grounds of sexual preference. Morton suggests that under the \textit{Act},

\begin{quote}
{government leaves homosexual alone. And it also respects the freedom of choice and association of those of us who think homosexuality is unnatural and unhealthy. It strikes a balance — a balance that is supported by an overwhelming number of Albertans. 
\end{quote}

(Morton, 2003)

This view would suggest then that majority or representative decisions made in favour of laws placing differentially onerous obligations on others should not be characterized as the making of some into the means to the majority's ends, but as reasoned conclusions by society about what moral standards ought be taken as authoritative. In this view, a decision, for example, to restrict abortions might be taken not as making women denied access into the means of satisfying the majority's whims or preferences (as it would be if the members of the majority are simply saying "I do not want abortions to happen") but as a decision expressing the best approximation attainable of a "collective" evaluative standard (as it would be if the majority is saying something like "abortions should not happen because they are, in our considered understanding, morally wrong").

Again, while this is an initially appealing notion, it is not without potential problems. We may, first of all, have reason to be skeptical about characterizations of democracy which envision it as involving by voters a process of clear and coherent moral reasoning about others' obligations. Are we certain when we consider voting behaviour that citizens are canvassing moral theory, or is there some potential danger, at least in some instances, that not insignificant numbers of voters may be invoking simply their own relatively unconsidered preferences on public policy issues? This skepticism is underscored by the fact that, unlike high court judges, voters \textit{en masse} offer us no written judgments by which we might assess the sincerity of their efforts to think morally rather than preferentially.

It is also not necessarily the case that even the sincere moral reasoning of all voters
could pass scrutiny of its capacity to account for all, as the principle of inclusive justifiability requires. To the extent that voter reasoning is premised, as some of it unfortunately is bound to be, on moral theories which themselves deny the moral status or equality of all persons — as a racist moral standard would, for example — then despite its "moral" character the reasoning of such voters will not lead them to inclusively justifiable conclusions about morally significant laws.

Finally, and perhaps most importantly, it must be noted that it is in fact not at all clear that even non-exclusionary collectively aggregated or majoritarian moral values can reasonably be understood as constituting inclusively justifiable standards; that is, evaluative standards capable of binding all in a society. Does the fact that a large majority in a given society endorses, for example, a fundamentalist Islamic world-view turn that world-view into an evaluative standard capable of binding non-Muslims in the society? Or, to return to the issue of abortion, does the fact that a majority of citizens divine through their faith the belief that abortion is morally wrong provide a rationale for its restriction which is capable of explaining the obligations to recognize such restrictions by a non-believer who might wish to seek an abortion? Partialist standards are not made inclusive, one would suggest, simply by virtue of the majority's having found them compelling.

III. PIERRE TRUDEAU AND THE VALUES OF MORAL AGENCY

My criticisms are intended to suggest, then, that while democratic modalities of values identification may in some or even many circumstances accord with the values of moral agency, they may not necessarily be in any of our conceptualizations of them as comprehensive in their realization of these values as we might desire. The same might be said in regard to the modalities of decision endorsed by communitarian and positivist theories of legitimacy. In general, I would argue that the processes of values identification associable with the primary values share a number of characteristics which contribute to the difficulties I have noted in their capacity to fully realize the values of moral agency.

The forms of values identification endorsed by the primary values are, first of all, collectively oriented. Democratic modalities of values identification, for example, suggest an understanding of collectively-determined standards as capable of explaining the obligation of all individuals who are their subject, even when such standards are partialist. Positivist theories of legitimacy locate legal authority in a way which conflates what may be partially
applicable standards of value — “socially accepted” grundnorms or social values — with more comprehensive standards. And communitarian theories conceive of community or cultural values as universally authoritative within their locality, although this cannot always be the case in the contemporary world. In a sense, each of the primary values attributes a collectively binding character to standards which are at least in some cases applicable to or authoritative only for portions of an order’s population.

The legitimative predispositions of the primary values are also toward conceptions of social value which are constructivist and non-critically-oriented. By this I mean that the advocates of the primary values understand public values as appropriately established either in reference to existing social values or in a way which substantially privileges such norms. This is clearly the case with positivist standards. But it is also the case with communitarian standards. The endorsement by communitarian philosophers like Charles Taylor and Mary Ellen Turpel of “axiomatic” public values (to use Taylor’s apt phrase) suggests a conception of public authority in which at least some choices are considered as out of bounds to citizens in a social order. And while democracy is considerably more critically oriented than the other primary values, it nonetheless implies a certain prioritization or privileging of existent norms as the source of public value because its primary reference is majority standards.

In turn, the non-criticality of the primary values suggests a third characteristic — a privileging of the status quo, a predisposition toward continuity rather than change in the construction of social values. The modalities of values identification of the primary values, as I have suggested at a number of points throughout this work, arguably direct us toward the preservation of pre-dominant social values rather than toward a process of seeking change in our public norms.

What is intriguing about Pierre Trudeau as a political leader in this context is the extent to which the personal and philosophical orientations which directed his political practice can be identified with values contrary and perhaps complementary to those associable with our primary values. Trudeau’s political philosophy and practice proclaim the importance of a recognition of individuals as individuals, of the goods of criticality and reason in our deliberations about public values, and of the possibilities of discontinuity and change in Canadian society. My suggestion here is that these philosophical orientations contributed to Trudeau’s development, elaboration, and practice of a certain “approach to
politics" — the title of one of Trudeau's important but under-scrutinized political writings — which has much to offer us in our consideration of the meaning and value of the Charter. Because Trudeau's orientations and predispositions were contrary or complementary to those of our primary constitutional values, they might be thought to have the potential effect of contributing to our ability to recognize some of the sorts of constitutional goods which I have argued the primary values under-recognize.

Social Activism and Political Practice: An Approach to Politics

In our exploration of Trudeau's constitutional and philosophical values we might begin first with a relatively brief consideration of their deeper roots, in Trudeau's more personal philosophy and self-conception. In discussing his orientations toward skepticality, criticality, reason and individualism, Trudeau opens the appropriately titled Against the Current this way;

I cannot say exactly when I became a contrarian, nor why. I do remember, however, that in my early years, far from going "against the current", I was more inclined to do and say the conventional thing and to devour gratefully every morsel of knowledge that came my way, whether from my parents, my friends, my teachers, or my Church. My childhood having been a happy one, I felt no need for "le doute methodique".  
(Trudeau, 1996a: ix)

Yet Trudeau has also suggested that his skepticism and criticality may have been a part of his personality even as early as his teen years. As a student at the College Jean-de-Brebeuf, Trudeau remembers himself and others being encouraged to "speak out" and question "conventional wisdoms" and "prevailing opinions" (Trudeau, 1993: 21). But regardless of the time or moment of Trudeau's recognition of himself in such light, this questioning, seeking persona became entrenched for Trudeau in his early adult life:

The sea-change came when I returned to Canada, in my late twenties, after several years of studying and travelling abroad. My province had become a citadel of orthodoxy with a state-of-siege mentality. To remain a free man in Quebec, one had to go against the current of ideas and institutions.
(Trudeau, 1996a: ix)

Trudeau notes that he came over time to seek not just knowledge, but "consistency
too: things had to make sense”; “the word of an authority was not proof enough...”. These are the early expressions of Trudeau's valuation of reason as a foundation of philosophical knowledge, as a powerful contributor to our ability to seek understanding of the society in which we live. Perhaps Trudeau's best known aphorism is “reason over passion”, and that value became the leitmotif most associated with his public, as well as private, philosophy.

In all things Trudeau was also an individual. He notes of himself, for example:

Ever since my youth I had been a loner, very jealous of my freedom. I had carefully kept my distance from my colleagues, no matter who they were. Even among friends, for example during expeditions into the bush, I instinctively took the lead where I would be alone. If my companions caught up with me I would slacken my pace until I was trailing far behind, once again alone.

(Trudeau, 1993: 160 - 1)

George Radwanski aptly summarizes Trudeau's vision of himself when he notes that Trudeau “identified, even in childhood with Cyrano's 'To climb not very high, perhaps, but all alone'” (Radwanski, 1978: 76). Trudeau's discussion of his early life suggests that while he felt very much a part of his society and had close relationships with friends and family, even from his early years he understood himself as the possessor of an individual as well as social identity.

While one must of course be careful of too ready an assimilation of the personal orientations of political leaders with their larger political practice, I would argue in Trudeau's case that his personal and intellectual predispositions to criticality, reason, and individualism can also be seen as having directed in a significant way his values and decisions in his lifelong participation in the political realm. This is evidenced in a consideration of Trudeau's work as justice and prime minister. The significant changes to Canadian divorce law and the *Criminal Code* which Trudeau introduced as justice minister, for example, might be thought to reflect such values. In both cases, the values expressed in the legislative regime which pre-existed the changes were those associable with predominant social mores and public traditions – primarily those derived from the Christian religious teachings to which a large majority of Canadians subscribed. The impediments which existing Canadian law erected to divorce for those whose marriages had broken down expressed what one might take as a religiously-oriented conception of marriage and social life. The *Criminal*
Code's penalties for such things as homosexual activity between consenting adults suggested a similarly religiously-directed understanding of social value. The problem in both cases, Trudeau has argued, was that such values are problematic as directives for a society in which not all recognize the authority of the particular religious tradition being espoused. "What is considered sinful in one of the great religions to which citizens belong", argued Trudeau,

\[\ldots\] isn't necessarily sinful in the others. Criminal law therefore cannot be based on the notion of sin; it is crime that it must define.

(Trudeau, 1993: 83)

Trudeau's arguments suggest in the interests of justice, our critical considerations of public value require us to account for all individuals who are to be subject to law — non-believers as well as believers.

Many of Trudeau's prime ministerial policies and actions similarly reflected his valuation of criticality — the idea that we appropriately subject our own and our public values to considerations which may direct us away from the status quo or our prior orientations. The foreign policy of Trudeau's governments might be seen, for example, as giving expression to the sorts of values with which I am suggesting Trudeau can be identified. As Thomas Axworthy has noted, Trudeau's foreign policy was motivated by an important over-riding goal. "My political action, or my theory", Trudeau has said, "can be expressed very simply: create counterweights" (Axworthy and Trudeau, 1990: 32). The idea of counterweights suggests an approach to international affairs in which critical attention is directed toward the policies and preferences of large and powerful states, including Canada's closest partner, the United States, in an effort to achieve more equitable international arrangements. The emphasis in Canadian foreign policy during this era on such things as international human rights and the North-South dialogue (aimed at improving economic conditions for people in underdeveloped countries through the assistance and cooperation of wealthier nations) is also suggestive of an additional aspect of Trudeau's approach -- a focus not solely on collective entities like other states, but on the status and well-being of individuals within the state as well.

These ideas might also be seen as having informed Trudeau's approach to the important question of inter-governmental affairs within Canada. While the foreign policy of
Trudeau governments was, with some exceptions, reasonably well-supported by Canadian public and scholarly opinion in its time, Trudeau's handling of and response to the problems of Canadian federalism has been the subject of considerably more criticism. Among the foremost of the charges of critics has been that Trudeau was one of Canada's foremost "centralizers", an opponent of true federalism. This is a concern which was raised both in regard to Trudeau's domestic and fiscal policies, and, importantly, in regard to the constitutional changes of 1982 which brought us the Charter. We encounter in consideration of such claims an important conflict between Trudeau and his critics. Despite his reputation as a centralizer, Trudeau's commentary on matters of federalism was a generally favourable one. In Federalism and the French Canadians, for example, Trudeau argues for an understanding of Canadian federalism as a means by which to ensure the valuable and, in fact, necessary recognition of Canada's regional and cultural diversity. "For the incorporation of these diverse aspirations", Trudeau wrote in 1962, "the Canadian constitution is an admirable vehicle" (Trudeau, 1968d: 178). Indeed, Trudeau identifies federalism with some of what I have been arguing are the values essential to his practice and philosophy. "[F]ederalism", he argued, "has all along been a product of reason in politics (Trudeau, 1968c: 195):

It was born of a decision by pragmatic politicians to face facts as they are, particularly the fact of the heterogeneity of the world's population. It is an attempt to find a rational compromise between the divergent interest groups which history has thrown together. . .

(Trudeau, 1968c: 195)

Can these claims by Trudeau be reconciled with the critiques of scholars like Guy LaForest, who identifies Trudeau with the destruction of accommodational federalism (LaForest, 1995: 12), or with the critical responses to Trudeau offered by provincial premiers like Alberta's Peter Lougheed and Quebec's René Levesque who opposed federal intrusions on provincial jurisdiction? To some extent, they cannot be, for there is in fact some apparent inconsistency in Trudeau's early intellectual arguments and his practice as a political leader. Where Trudeau argued in 1957, for example, against the use of the federal spending power in areas of provincial jurisdiction (noting in fact that on that issue he found himself in unusual agreement with Premier Maurice Duplessis) (Trudeau, 1968h: 79), his
governments' propensity for taking just that action was the cause of frequent conflict with provincial premiers concerned about the implications of such measures for the jurisdictional autonomy of their provinces.

In a larger sense, though, Trudeau’s prime ministerial response to the federalist question is given some greater clarity and perhaps self-consistency if we recognize that the approach his governments took to many federal matters was one informed by and expressive of the values of criticality and a concern for individuals. The sometimes assertive expression of federal jurisdictional authority by his governments, Trudeau argued in his post prime ministerial writings, derived not from a rejection of the federalist model but from a concern that the dynamic of that model in Canada was pushing the country toward too much decentralization (Trudeau, 1990: 205). As in their foreign policy, Trudeau’s governments adopted the idea of critical counterweights, in this case to the expansion of provincial jurisdiction (Trudeau, 1993: 290). While our own valuations of criticality and skepticism require us to recognize that perhaps at least some of the motivational impetus driving his governments’ expressions of jurisdiction lay in Trudeau’s desire to preserve or enhance the authority of the federal government apparatus under his control, Trudeau’s defence of federal assertions of jurisdictional authority suggests the possibility of more transcendent justifications as well.

In discussing the jurisdictional conflict with the government of Alberta in the 1970s and 80s over natural resources, for example, Trudeau argued that “if one province is very rich and another very poor, my view is that there should be some redistribution of resources” (Trudeau, 1993: 290); as a consequence, “sometimes that means saying no to one region and yes to another in order to redistribute equality of opportunity” (Trudeau, 1993: 290; emphasis added). This focus on the reality of individual well being rather than on the more abstract claims of provincialized collective identities might also be suggested to have underlied the Trudeau governments’ aggressive defence of the pan-Canadian standards of access to medical care embodied in the Canada Health Act against provincial departures from those norms. One of the larger conflicts of public value during Trudeau’s time in office was, for example, over the issue of user fees which a number of provincial governments wished to attach to visits to doctors and hospitals. Many, including Trudeau’s Health Minister, Monique Bégin, were concerned that such fees would have the undesirable consequence of
limiting access to medical care for poorer Canadians (Coutts, 1990: 196). In both cases, the deeper implicit idea one might take as explaining or justifying the actions of the federal government under Trudeau was not a rejection of federalism, but a concern to ensure that in its function it did not sacrifice individual goods such as equality of opportunity or access to medical care in favour simply of a recognition of provincial identities.

While Trudeau’s “approach to politics” is evidenced in his elected life, it is perhaps equally well exemplified in his earlier, pre-elected political and social activism. His work and writing was marked by a strong and consistent opposition to the authoritarian, nationalist, and collectivist values and decisions of Quebec Premier Maurice Duplessis and the province’s ruling Union Nationale government. Of Duplessis, for example, Trudeau noted critically that the premier

\[\text{... constantly teaches us that we must not criticize the authority he exercises: firstly because this authority comes from God, and secondly because he rules in the name of the Province and the 'race', values that none but a perverse spirit could assail.} \]

(Trudeau, 1970: 33)

Trudeau’s critical concerns in Quebec were not focussed exclusively on the premier, however, but in general on the social climate in the province in which dissent and social difference were rejected or penalized. In a 1958 article entitled “Some Obstacles to Democracy in Quebec”, Trudeau advocated a more critical form and practice of democracy in his province, yet lamented both that “[h]istorically, French Canadians have not really believed in democracy for themselves” and that “English Canadians have not really wanted it for others” (Trudeau, 1958: 297). Trudeau suggested that the political culture of Quebec had been, sadly, ill-suited to authentically democratic forms of government. Historical realities and the inhospitality of anglophone Canada to Quebec’s culture, religion, and language had caused Quebecers, he argued, to come to see democracy not as a means for advancing the “common weal”, but, “not unnaturally”, as primarily a tool for national and cultural self-preservation. But such a view was not without important moral consequences, Trudeau suggested:

In such a mental climate, sound democratic politics could hardly be expected to prevail, even in strictly local or provincial affairs where racial issues were not involved. Through historical necessity, and as a means of survival, French Canadians had felt
justified in finessing the parliamentary game; and as a result the whole game of politics was swept outside the pale of morality. They had succeeded so well in subordinating the pursuit of the common weal to the pursuit of their particular ethnic needs that they never achieved any sense of obligation towards the general welfare, including the welfare of the French Canadians on non-racial issues.

(Trudeau, 1958: 300)

These social attitudes were reinforced, Trudeau noted, by the power of the Catholic Church and other social institutions like the Quebec press which opposed the processes of modernization and secularization in Quebec. He cites caustically, for example, this Church radio broadcast before the 1956 Quebec provincial election:

Sovereign authority, by whatever government it is exercised, is derived solely from God, the supreme and eternal principle of all power . . . . It is therefore an absolute error to believe that authority comes from the multitudes, from the masses, from the people, to pretend that authority does not properly belong to those who exercise it, but that they have only a simple mandate revocable at any time by the people. The error, which dates from the Reformation, rests on the false principle that man has no other master than his own reason. . . .

(Trudeau, 1958: 302)

Such attitudes were productive, Trudeau concluded, of a form of social life in which individuals were often disregarded or even sometimes actively oppressed. His concerns about the active consequences of his fellow citizens' deferential attitudes to the collective values of the status quo prompted Trudeau to engagement in such things as social criticism of Quebec's "Padlock Law" (which gave the provincial government the power to close premises used for the "propagation of communism") (Trudeau, 1970: 81) and of the provincial government's suppression of the free expression and religious practices of Jehovah's Witnesses (Trudeau, 1968d: 171). His participation in and support for Quebec labour unions such as that of the miners of Asbestos in the 1949 strike (which the Duplessis government had attempted to crush by sending in the Quebec Provincial Police) also expressed Trudeau's interest in social change and his focus on the status and individual well-being of Quebecers during the Duplessis era.
These examples of Trudeau's political practice are indications of what might be taken not only perhaps as his general intellectual commitments, but as I have suggested as much or more so as indications of what one might describe as a certain "approach" to questions of social and political value. Because Trudeau was as I have said both a political leader and a political philosopher, in seeking to understand this approach, we might consider not just Trudeau's political activities, but also his more explicit and considered discussion of his political theory. It is here where the value and justification of Trudeau's constitutional ideals becomes most clear to us I would argue, particularly his valuation of rights.

One particularly direct and compelling discussion is to be found in the 1970 book, *Approaches to Politics*, which incorporates a series of articles Trudeau wrote in 1958 for the newspaper *Vrai*. Trudeau argues here for the importance in our consideration of issues of political value of what can be taken as the question of *legitimacy*:

> The first — almost the only — question to ask is: how does it happen that one man has authority over his fellows? (Trudeau, 1970: 26)

Trudeau's innate criticality, I think, both suggest to him the importance of the question — "authority . . . is not to be taken for granted" — and places some restrictions on the sorts of answers he suggests we should be prepared to accept. He considers, for example, some widely vouched answers to the question. Is authority conferred perhaps by God? By "nature"? By force? Trudeau finds each of these answers unsatisfying. He suggests that force is unlikely in the long run to be a successful ground of political authority. He rejects the idea that God might be the source; those who endorse such a theory "omit to explain why God conferred it on a Stalin or a Hitler, or why, in our democracies, God would choose to express himself through the intermediary of electoral thugs and big campaign contributions" (Trudeau, 1970: 27 - 8). Nor can it be "the nature of things" Trudeau concludes. While it is indeed true that men must have government, we are not "bees, nor are we ants" (Trudeau, 1970: 31): this sort of answer explains perhaps how it is that we have authority, but "this answer by itself is not enough".

These answers are not enough, one thinks, because while they may be explanations,
they are not justifications; they fall short as grounds for authority because they leave unanswered questions for us -- why would God pick Hitler? How can “nature” “explain the contradictory variety of forms of authority and law? Trudeau seeks something more ultimate, more imperative, as the source of political obligation. What constitutes such an imperative? Trudeau argues that we must recognize that it is our own consciences which provide the grounds of obligation. “Each man”, Trudeau contends, “is bound only by his own conscience; from which it follows that neither authority nor obedience can be taken for granted” (Trudeau, 1970: 71).

For Trudeau, conscience is the relevant answer for two reasons. First, in an empirical sense, Trudeau argues that authority cannot exist without the support of citizens (Trudeau, 1970: 31); this is why he denies the viability of force as the grounds of political obligation. In turn, a consideration of this empirical reality suggests that supporting the state is morally implicating oneself in its authority. He argues, for example, that

> It follows that when authority in any form bullies a man unfairly, all other men are guilty; for it is their tacit assent that allows authority to commit the abuse. If they withdrew their consent, authority would collapse.

(Trudeau, 1970: 34)

It is because citizens themselves are responsible for social order that they must consult their consciences in order to determine their obligations. It is, argues Trudeau, “... the duty of citizens to make conscientious judgments on the value of laws and the integrity of rulers” (Trudeau, 1970: 39).

These values are aptly captured by Trudeau when he argues:

> If my father, my priest, or my king wants to exert authority over me, if he wants to give me orders, he has to be able to explain, in a way that satisfies my reason, on what grounds he must command and I must obey.

(Trudeau, 1970: 27; emphasis added)

The phrase “my reason” here conveys some important meaning. It is, of course, an expression of an essential personal value for Trudeau. But more importantly, Trudeau’s use of the phrase suggests something about his idea of the nature of political obligation. When Trudeau says here, “my reason”, he is putting himself in the position of a potential obligee,
and he is suggesting therefore that obligations must be justified to all those who are to be obliged. The implication of his view is that the justification for a claim to authority must address obligees as individuals, each as a reasoning creature thinking critically about his duties to the state. This value follows from a recognition of conscience, that is, of a morally compelling claim, as the ultimate source of political authority.

But the invocation of reason as the standard against which obligation is to be evaluated is also important. It suggests that the standard by which obligations are imposed by the state and acknowledged or repudiated by individuals in the state cannot be derived from a mere assertion of whim. One cannot as an individual proclaim one’s dissent on idiosyncratic or solipsistic grounds, because one’s duty is rooted in conscience, not merely consent. But neither can the collectivity to which one belongs justify its claims upon any citizen on such grounds either. Trudeau’s valuation of reason follows from his understanding of conscience — that is, of morality — as the source of political obligation.

Trudeau’s wariness of collective theories of value as the means of establishing ongoing obligations in political order is, one might suggest, founded at least in part on these premises. His concern is that such forms of valuation can fail to account for all, and that to the extent such sources of value are not subject to rational and critical evaluation, they may make recognition of the individual value of conscience difficult. Thus, while Trudeau recognizes and argues for the value of democracy as a means to the realization of legitimate authority (Trudeau, 1996c: 77), he also suggests that democracy alone is not enough. We need rights as well:

. . . we must refrain from making undue claims for democracy, that would be the best way to discredit it. For instance, democracy does not claim that majority rule is an infallible guide to truth. . . . one person may be right and ninety-nine wrong. That is why freedom of speech is sacred: the one person must always have the right to proclaim his truth in the hope of persuading the ninety-nine to change their view.

(Trudeau, 1970: 77)

Trudeau expresses similar reservations about another of our primary values — communitarianism, in the form of Quebec nationalism. Again, while Trudeau recognizes the value and importance of community — “the nation is, in fact, the guardian of certain very positive qualities . . . all of which, at this juncture in history, go to make a man what he is”
he argues — he also recognizes some important dangers in adopting too deferential a conception of the community's claims upon us. One such danger is the propensity of this form of valuation to the *irrational*, to an emphasis of the ties of the heart rather than the head. Trudeau forcefully expresses this view when he chides Quebec nationalists for founding their claims on "faith" rather than reason. This nationalism, he says,

... is the faith that takes the place of reason for those who are unable to find a basis for their convictions in history, or economics, or the constitution, or sociology. ‘Independence’, writes Chaput, ‘is much more a matter of disposition than of logic . . . More than reason, we must have pride.’ That is the way all those dear little girls and young ladies feel, who like to put it in a nutshell thus: ‘Independence is a matter of dignity. You don’t argue about it; you feel it.’

(Trudeau, 1968d: 173)

While Trudeau's phraseology here is perhaps outdated, it nonetheless conveys quite powerfully one of the essential problems he sees with this form of argument, this source of social value; such claims do not befit thinking people and cannot therefore be taken as compelling our consciences. For Trudeau, uncritical acceptance of the ties of the heart to a cultural community is incompatible with the larger responsibilities of citizens. He cites admiringly Ernest Renan's adage that

[m]an . . . is bound neither to his language nor to his race; he is bound only to himself because he is a free agent, or in other words a moral being.

(Trudeau, 1968d: 159)

Another difficulty with nationalist or communitarian theories of value in Trudeau's view is their inherent incapacity to fully account for the obligations of all in a society governed by their norms. "Nationalists", Trudeau argues,

... are politically reactionary, because in attaching such importance to the idea of a nation, they are surely led to a definition of the common good as a function of an ethnic group, rather than of all the people, regardless of characteristics. This is why a nationalist movement is by nature intolerant, discriminatory, and, when all is said and done, totalitarian.

(Trudeau, 1968d: 169)
Trudeau shares Lord Acton’s concern with these forms of nationalism:

The nation is here an ideal unit founded on race. . . . It overrules the rights and wishes of the inhabitants, absorbing their divergent interests in a fictitious unity; sacrifices their several inclinations and duties to the higher claim of nationality, and crushes all natural rights and all established liberties for the purpose of vindicating itself.

(Dalberg, 1948: 184; cited in Trudeau, 1968d: 169)

The problem with collective theories of value like those embodied in nationalist or unconstrainedly democratic political theory in Trudeau’s view is that, if unmediated by more critical approaches to questions of public value, they may conflict with the necessary recognition of our status as reasoning, moral beings bound by our consciences. Rights in this view are important contributions to ensuring that the justifications we seek for the political and social duties we impose collectively on ourselves and others give due respect to the claims of reason — the grounds of conscience respecting obligation in Trudeau’s theory. These Trudeauvian arguments provide I would suggest an elegant and succinct summary of what one might describe as Trudeau’s theory of legitimacy and social value. They suggest the importance in our thinking about the shape and nature of constitutional order and the everyday obligations such orders impose a consideration of the nature of citizens and the sources of value to which we might advert in considering our choices. They recognize the value and importance of such things as community and democracy, but they suggest that alongside such values we must recognize the value of rights as endorsements of criticality, reason, and individualism if we are to recognize obligation in society as a matter capable of demanding our conscientious obedience.

What does Trudeau have to say to those like Maurice Duplessis (and perhaps to those advocates of the primary values whose constitutional theory endorses such goods as “continuity”) who fear that too much criticality may undermine existent forms of social order? Trudeau notes Pascal, who suggest that it must be

. . . clearly recognized that the surest way of provoking rebellion was to make people think about the injustice of established laws and customs. ‘The art of opposition and revolution is to upset established customs, tracing them to their source to point out their lack of authority and justice’.

(Trudeau, 1970: 34)
Trudeau acknowledges, perhaps even embraces, this possibility: “there is nothing wrong with doing this”, he suggests;

... on the contrary, it is often the only way to re-establish justice and liberty among men. For society is made for man; if it serves him badly he is entitled to overthrow it. The purpose of living in society is that every man may fulfil himself as far as possible. Authority has no justification except to allow the establishment and development of a system that encourages such fulfilment.

(Trudeau, 1970: 34)

Trudeau’s argument, one might suggest, is that the values of criticality, individualism, and reason are worth endorsing precisely because they encourage us to seek change in our community in order to create a juster society.

IV. PIERRE TRUDEAU, MORAL AGENCY AND THE CHARTER

How, then, does this reading of Pierre Trudeau’s political philosophy and practice figure in our consideration of questions of the Charter’s meaning and value? In a general sense, I would argue that to the extent we find compelling the values Trudeau’s work commends to us, we have reason perhaps to adopt an “approach to the Charter” which recognizes their importance. This approach might apply both to our foundational characterizations of the document and in efforts to interpret the rights of the Charter in the legal context. Those critical of the Charter in the strong rights sense condemn its emphasis on individualistically oriented rights and its departure from longstanding Canadian values which give pride of place to our traditionally recognized communities or democratic processes of values identification. And they argue for a reading of the document which tones down or mediates these characteristics. The arguments embodied and expressed in Trudeau’s political philosophy and practice suggest to the contrary that we have reason to read the Charter as an expression of the values of mutually responsible individualism, and in terms which direct us to a reasoned and critical response to predominant Canadian social and constitutional values. Trudeau’s critical responses to established Canadian traditions and mores suggest to us that the values associated with individual forms of identity have been under-recognized in Canadian social practice, and his arguments about the nature of political obligation invite us to recognize that these values need greater acknowledgement if
our desire is to have and create just political order.

The Charter in this view can be taken as a constitutional instrument which directs us to greater self-criticality through the mechanism of rights review, and therefore, if understood in this sense, as a valuable contribution to our search for political justice. This in turn suggests that rather than approaching the Charter in a way which takes it as a continuation or re-expression of traditional Canadian social and constitutional values, our courts more appropriately understand the document as directing them to critical and reasoned reconsideration of those values.

Of course, while the delineation of an approach to the Charter is a perhaps helpful start, that alone cannot provide a theory of constitutional value specific or comprehensive enough to be capable of responding either to questions about the Charter's legitimacy or its applicative meaning in the legal context. Something more than simply an approach is needed. I argued in the previous chapter that in our consideration of the question of constitutional legitimacy we ought acknowledge the claims associated with a recognition of constitutional obligees as “moral agents”. My suggestion here is that Trudeau's political philosophy identifies and proceeds from a set of values with much in common to those recommended to us in the moral agency theory, and that those values are reflected in the Charter in a significant way. Rather than simply suggesting an abstract “approach” to the Charter, then, Trudeau's political theory might be thought of relevance and interest in regard to larger questions of the Charter's legitimacy and in our attempts to give more specific applicative definition to many of the document's central provisions.

Five central claims or ideas might be associated with the concept of moral agency in the constitutional realm. Moral agency theory suggests first that we recognize that legitimate claims — at least those which are generally entertained in the Canadian context — are moral claims. That is, they imply that the basis of constitutional obligation for citizens is “should” rather than simply or fundamentally “must”.

The moral character of Canadian constitutional claims suggests that those advancing them understand obligees as persons whose constitutional obligations are appropriately established in reference to an evaluative standard which recognizes them as subject rather than object; in short, as persons with a moral status. And the fact that such claims are advanced and defended in Canadian constitutional practice through argument and
explanation which I argued could be understood as directed obligees themselves implies a recognition of obligees as persons with a participatory status in regard to the question of their obligations. Taken together, these attributes suggest the second of moral agency's claims — constitutional obligees are appropriately recognized as moral agents, as persons capable of and concerned to discern and act upon their moral duties.

The third of moral agency's arguments is that our recognition of constitutional obligees as moral agents has some important implications in our consideration of the shape and nature of ongoing constitutional order. Moral agents, I suggested, would be unprepared to forego that status in the ongoing constitutional order to which their allegiance is being solicited by a given legitimative claim.

While there is considerable room for disagreement about just or ideal forms of political order and even greater room for debate about the historically, geographically, or socially contingent collective values which legitimate political order might embody, I argued that there were also some limited but important locally-transcendant values which our recognition of constitutional obligees as moral agents suggested ought be acknowledged. Ongoing political orders must provide means and mechanisms ensuring access for inhabitants of the order to the goods of moral exploration, and ensuring that morally significant ongoing obligations in the order are established in reference to inclusively justifiable evaluative standards. These can be taken as the fourth and fifth propositions associable with the constitutional ideal of moral agency.

There is, I would argue, an important and substantive accord between these ideas and values and the legitimative theory embodied in Pierre Trudeau's political philosophy. Like moral agency theory, Trudeau's philosophy might be said to suggest both that legitimative claims are moral claims and that constitutional obligees should be understood as moral agents. While the arguments I sought to develop in the previous chapter suggest that we attribute an understanding of obligees as moral agents to advocates of our primary values by reasoning backwards from the moral character of the legitimative claims they advanced, these are propositions which might be said to be reversed in Trudeau's legitimative theory. In a sense, Trudeau begins with an identification or recognition of constitutional obligees as possessors of a moral status. He argues in Approaches, for example, that persons should be "regarded as fundamentally free and equal, each man being of infinite value in himself"
(Trudeau, 1970: 27). It is as a consequence of this moral status, Trudeau reasons, that the question of authority must be answered in moral terms — with justification rather than simply explanation. Trudeau’s theory also suggests the importance of recognizing citizens as possessors of a participatory status as well. His argument that justificatory claims must satisfy “my reason” — that is, the reason of those to be obliged — suggests that claims to authority are appropriately subject to the critical consideration of obligees as well as those who seek to oblige them.

Like moral agency theory, Trudeau’s theory of obligation also suggests that our recognition of citizens as moral agents has important implications in our ongoing constitutional and social arrangements as well. We ought reject the “argument from established authority” (Trudeau, 1970: 66) he contends in Approaches, and recognize that it is “the duty of citizens to make conscientious judgments on the value of laws and the integrity of rulers” (Trudeau, 1970: 39). In recognition of this, “civilized peoples”, Trudeau argues, ought

\[\ldots\text{provide mechanisms whereby citizens can fight against laws they disapprove of without going outside the law or becoming conscientious objectors or political martyrs.}\]

(Trudeau, 1970: 39)

Like moral agency theory, Trudeau’s political philosophy might also be taken as suggesting the importance of recognizing the value of what I have called the goods of moral exploration in our thinking about the ongoing obligations of citizens. Trudeau’s arguments for “freedom of thought, speech, [and] expression” (Trudeau, 1970: 80) in Approaches suggest his recognition of the basic ideas associated with this ideal. But his political philosophy is also suggestive of a broader understanding of such freedoms. When he argues that “the purpose of living in society is that every man may fulfill himself as far as possible” and that “[a]uthority has no justification except to allow the establishment and development that encourages such fulfillment” (Trudeau, 1970: 34), he is suggesting, I would argue, the importance of limiting restrictions on citizens’ abilities to explore moral possibilities. Indeed, in his conclusion to the extended defence of “the Trudeau legacy” — including the Charter of Rights — in Towards a Just Society, Trudeau argues that “freedom is the most important value of a just society, and the exercise of freedom its principal characteristic”
Finally, like moral agency theory, Trudeau's political practice and philosophy also suggests the importance of recognizing the ideal of inclusive justifiability, the idea that the morally significant ongoing obligations of political order ought be established in reference to evaluative standards capable of being understood as binding on all to be obliged. This is evidenced, for example, in the justification Trudeau offers for his earliest significant endeavours as an elected representative — the elimination of criminal code prohibitions on homosexual activity between consenting adults and the revision of Canadian divorce laws. It is because such laws were based on only the partialist standards of particularist religious belief, Trudeau argued, that they could not be understood as capable of binding all to whom they were to apply (Trudeau, 1993: 83). The emphasis which Trudeau's philosophy of obligation places on "reason" might also be taken as suggestive, I would argue, of this value. The idea that obligations must satisfy "my reason", as I have argued, suggests the invocation of standards of justification which are neither individual and idiosyncratic nor culturally partialist and mystical. What is appropriately sought Trudeau's philosophy suggests is, rather, forms of justification which are capable of speaking to all who are to be obliged.

This close accord of the values embodied in Trudeau's philosophy and practice with those implied us by our recognition of constitutional obligees as moral agents suggests, I would argue, a response from one perspective to those critical of the Charter project or skeptical about its value in the strong rights sense. Not infrequently, those who identify the constitutional changes of 1982 with Trudeau himself offer a characterization of the Charter as an embodiment of Trudeau's merely personal or idiosyncratic values or as an expression of a Machiavellian or Nietzschean "will to power". While the values associable with Trudeau's interest in and push for a constitutionalized bill of rights are indeed understandable -- as my own exegesis itself suggests -- as having a very personal resonance for Trudeau, they are more importantly expressive of a larger theory which makes claims for a set of values which I have attempted to argue have some claim to our recognition even from within the context of other Canadian constitutional theories like those of our primary values.

In turn, the constitutional theory advanced by Trudeau and expressed in the ideas of moral agency might therefore be thought to provide a means of evaluating and characterizing the Charter in a way alternative to those suggested by the primary values. Claims for the
legitimacy and authority of the Charter would in this view depend not on its accord with the evaluative standards endorsed in our primary values, but rather on the Charter's embodiment and expression of values which derive from a different but arguably nonetheless compelling legitimative standard — that suggested to us by our recognition of constitutional obligees as moral agents. This conception of the Charter acknowledges its character as a constitutional discontinuity in the Canadian context, but suggests that this need not be taken as undermining its authority or value. Unless we identify the constitutional status quo or the existent forms of social order in our country with perfection, we have reason to value the possibility of constitutional discontinuity as well as continuity, as Trudeau's arguments suggest.

In the next chapter I suggest that the values of moral agency can be understood as having a significant place in the Charter, and that these values might be thought therefore to provide helpful insight and guidance in regard to questions of the legal meaning of many of the document's most central provisions.
Notes

1 Bora Laskin has also noted a connection between the judicial defence of civil liberties and non-positivist adjudicative practice. In the 1957 case of *Chabot v. School Commissioners of Lamorandiere* (1957) 12 D.L.R. (2d) 796, the Quebec Court of Appeal was required to consider a claim by a Jehovah’s Witness parent seeking to have his child exempted from the prescribed Catholic religious exercises of his local public school. In a holding which has a remarkably contemporary feel, the Court upheld the claim and ordered the school to refrain from imposing the exercises on its non-Catholic pupils. Laskin has suggested that the ruling in *Chabot* depended on what he called an “interesting and largely ‘natural law’ construction of school legislation” (Laskin, 1959: 88). Indeed, Justice Robert Taschereau explicitly invoked “natural law” in his judgment in the case, noting that it would “be contrary to natural law as well as to the most elementary principles of our democratic institutions that a father could not exercise the right or fulfill his obligation to instruct his children without renouncing his religious faith” (*Chabot*: 834, *per* Taschereau).


3 Gérard Bergeron, for example, has described the *Constitution Act, 1982* as a Trudeauvian “constitutional coup” (Bergeron, 1983: 63). Guy LaForest expresses similar sentiments in *Pierre Trudeau and the End of a Canadian Dream* (LaForest, 1995).
Chapter 7: The Charter and Moral Agency

I. THE CHARTER AND THE VALUES OF MORAL AGENCY

In the previous chapter I sought to contrast two important competing visions of social and political order — those embodied, respectively, in the political theories of our primary values, and in that of former prime minister Pierre Trudeau. I argued that the ongoing forms of political order endorsed by our primary values less fully realized the constitutional values of inclusive justifiability and access to the goods of moral exploration than might be desired if our goal is to ensure the recognition of constitutional obligees as moral agents. I suggested therefore that a perhaps more compelling theory of legitimate political order was to be found in the political practice and constitutional philosophy of Pierre Trudeau, the Canadian Charterist most closely associated with a valuation of the Charter in the strong rights sense. Trudeau's political thought gives expression, I argued, to a theory of political obligation with much in common with the ideals of moral agency, and Trudeau's constitutional philosophy might therefore be thought to represent an important contribution to the explanation and justification of the Charter project in these terms.

Of course, while there is some appeal in a conception of the Charter in terms of moral agency (more so perhaps for its defenders in strong rights terms than for those who oppose such a reading), the validity of this claim depends to no small degree on the extent to which the Charter itself can be seen to reflect such values. Unless we can connect the realities of Charter text with values such as inclusive justifiability and access to the goods of moral exploration in a meaningful way, the moral agency vision of the Charter is more likely to be understood as representing wishful thinking than useful constitutional theory. I suggest in this chapter that the ideas of moral agency do in fact offer useful insights and guidance to questions about the Charter's legal meaning.

My argument is not, nor do I think it could be, that the Charter is a singular and unflinching endorsement or embodiment of the values of moral agency. The realities of the Charter's creation and a fair consideration of its text suggests that the document embodies a number of different constitutional values, as many scholars have noted. The Charter is not, to use a phrase borrowed from Brian Mulroney, a "seamless web". The claim I offer here then about the ideals of moral agency in Charter interpretation speaks not to the Charter in
its entirety, but to a more limited sub-set of the document. My suggestion is that the constitutional values of moral agency can be understood as having their expression particularly in sections 1, 2, 7, and 15 of the Charter, and therefore that those values provide some helpful insight and direction in our attempts to give applicative legal interpretation to these provisions. The fact that these are among the Charter's most central provisions does however suggest the importance of the values of moral agency in our overall reading of the document. I conclude my discussion of the Charter here by suggesting that our valuation of moral agency might be argued to direct us toward a certain approach to other sections of the Charter -- provisions such as sections 25 and 33, for example -- which are less amenable to characterization in those terms or indeed which potentially speak contrarily to them. My suggestion is that while we must of course be faithful to the text in our interpretation and use of these provisions, a valuation of the ideals of moral agency suggests that they should be understood in more limited terms than those Charter sections which more directly contribute to assuring our recognition of constitutional subjects as moral agents.

II. SECTION 1

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

I begin with section 1 here in my discussion of the Charter not because it is the most fundamental expression of moral agency in the document, but because this provision serves as a guide and constraint on our readings of the Charter in general. Since s. 1 figures in all determinations of Charter rights, some clearer picture of its implications is necessary before I can discuss provisions like ss. 2, 7, and 15. While my suggestion is that s. 1 can and should be understood as giving expression in a general sense to the constitutional values associated with moral agency, there are two potential obstacles to a characterization of this provision in that light. First, s. 1 invokes the value of democracy as one of the guidelines it sets out for limiting Charter rights claims. I have suggested that there is some potential conflict between primarily democratic processes of values identification and the values of moral agency. To the extent then that s. 1 suggests to us a primary valuation of democracy, it seems to be suggesting the potential for reading the Charter in a way more open than that
suggested by the moral agency approach to limiting individualist rights claims in favour of democratic expressions of value. Secondly, whether or not s. 1 invites us to a democratically-oriented reading of the Charter, it is, of course, a clause which limits Charter rights. As such, it seems potentially suggestive of a conception of rights in something less than the “strong” terms associable with the moral agency vision of the Charter.

In responding to the first of these obstacles, I return for a moment to one of the subjects of my chapter on democratic theories of Charter value. I noted there Patrick Monahan’s arguments in Politics and the Constitution for a conception of s. 1 in democratic terms. In responding to Professor Monahan’s characterization of s. 1 as an invocation of the values of democracy, I argued that we ought place at least as much emphasis on the provision’s invocation of a second parameter of limitation: freedom. Section 1 proclaims Canada to be not simply a democratic polity, but a “free and democratic society”. A recognition of constitutional obligees as moral agents suggests a high valuation of personal autonomy, on the freedom to make morally significant life choices for oneself. The inclusion of the good of freedom in s. 1 suggests the viability of recognizing this aspect of the ideal of moral agency as being an important consideration in decisions to limit Charter rights in the name of democratic decisions.

Unfortunately, this still leaves the question of how to respond to the potential conflict between s. 1’s dual invocation of freedom and democracy. If in our reading of s. 1 we emphasize its “democratic” element, we are more likely to be prepared to accept as limitations on Charter rights democratically derived public values; if, on the other hand, our emphasis is on the “free” element of s. 1, we are more likely to read Charter rights in the more expansive way suggested by moral agency’s valuation of the individual component of human identity.

There is, of course, no ready textual or grammatical argument available which might help resolve this difficulty. Section 1 is textually understandable as inviting us to recognize either ideal as the pre-eminent one, or one or the other ideal as being pre-eminent depending on particular circumstances. We might, however, take one step back from a purely textual attempt to come to terms with s. 1 by considering the deeper values implicit in arguments for more democratically-oriented readings of the limitations clause. While I do not wish to suggest that all of democratic thought can be summarized in two neat
statements of value, for our purposes here we might consider two large justificatory claims associable with a valuation of democracy.

The first suggests that we ought cherish democracy because of its collective dimension, its emphasis on and contribution to the creation of social unity. This is, for example, the ideal of democracy which I think Allan Hutchinson invokes when he argues in *Waiting for Coraf* that “[f]or the democratic citizen, a good life consists in the public-spirited engagement with others over the shape and substance of ‘the good life’” (Hutchinson, 1995: 215), or which Michael Mandel may have in mind when he argues that rights are problematic because they allow “individuals to shortcircuit representative institutions and groups, and to advance claims which ‘trump’ more representative claims” (Mandel, 1989: 60). Democracy in this conception derives its value from its contribution to a good — collective unity — which might be expected to conflict not infrequently with the assertions of individual value embodied in rights claims. This conception of democracy is therefore suggestive of a reading of that element of s. 1 in terms which emphasize its value in some priority to that of “freedom”.

The second justificatory claim for democracy emphasizes a different value; it suggests that we ought value democracy because it is an important means of ensuring liberty or freedom. It does so because it makes the question of who is to govern us one in which we have a say as individuals; through our vote and our participation in the democratic process we “decide for ourselves”, one of the essential elements of liberty. This is a conception of democracy often associated with the American founding fathers, but it has other advocates as well. While Charles Taylor’s philosophy emphasizes the collectively-oriented values of democracy, he also notes, for example, that democracy is a means of ensuring “the dignity of the free individual” whose “freedom and efficacy reside in his ability to participate in the process of majority decision-making, in having a recognized voice in establishing the ‘general will’” (Taylor, 1993: 92). Pierre Trudeau offered a similar argument in his defence of democracy in Duplessis-era Quebec when he suggested that

Democracy is superior to other political systems . . . because it solicits the express agreement of the people . . . At each election, in fact, the people assert their liberty by deciding what government they will consent to obey.

(Trudeau, 1970: 77)
While the first justificatory claim for democracy emphasizes the importance of its collective dimension, democracy in this second conception is understood as deriving its value from its contribution to the good of freedom, a value both more consonant with the moral agency conception of the Charter and less suggestive than the alternative of reading s. 1 in terms which emphasize the claims of democracy over rights. In this view, we might take “freedom” as the larger operant value s. 1 invokes, and democracy as a specific expression or means of attaining that value. To the extent we understand s. 1 in these terms, we are more likely to see its democratically-oriented limitation on rights as secondary to its recognition of the importance of freedom in the larger sense in reading the Charter. To its advantage, a reading of the idea of democracy as “liberty” minimizes rather than exacerbates the interpretive tension implicit in s. 1’s dual invocation of democracy and freedom, and it might therefore be thought more consonant with the interpretive canon suggesting we prefer readings of legal text which avoid rather than endorse repugnant textual meanings. Of course, this argument can hardly be taken as disposing of such a significant issue of Charter meaning, and the question of which reading of s. 1 we might prefer on these grounds must therefore remain largely an open one. My intention is to suggest, however, that democratically-oriented attributions of meaning to s. 1 need not be preferred to those which suggest a more cautious valuation of that ideal.

If not in its invocation of democracy, does s. 1’s more general character as a limitations clause suggest its incompatibility with moral agency’s valuation of rights in the strong sense? I think it need not, for the ideal of moral agency, either in the version I advanced in chapter five or in the philosophy of Pierre Trudeau which I discussed in chapter six, does not suggest that individual liberty ought be understood as an absolute good as it is, for example, in the work of libertarian thinkers like Robert Nozick. If we recognize the question of social duty as one involving individual conscience assessed in the light of reason, as idea advanced by Trudeau in the Approaches, we are likely, I think, to recognize that we have duties to others with whom we share our society and therefore that our own individualistic claims must account for others as well as ourselves. Individual as well as collective claims might therefore be thought to have a place in the “just society”.

In this light, I would argue that s. 1 can be understood as a means by which individualist claims might be limited in the name of larger social goods or collective goals
whose values or compellingness can be justified in inclusive terms. At the same time, a recognition of the potential for collectivist and constructivist mechanisms of values identification to under account for individuals commends a certain wariness on our part about such justifications. These concerns are reflected, I would suggest, in the guidelines s. 1 sets out for limiting Charter rights. The provision requires that limits on rights be “reasonable” and demonstrably justified”, and it suggests therefore a scrutiny of justificatory claims which is rational and critical.

These are values which are well expressed in the Supreme Court’s leading s. 1 decision, R. v. Oakes ([1986] 1 S. C. R. 103). On behalf of a unanimous Court, Chief Justice Brian Dickson suggests there, for example, that s. 1 imposes a “stringent standard of justification” (Oakes: 136). This is a value reflected in the Court’s placement of the burden for establishing a justifiable limit on the state, an approach which suggests that the mere proclamation of some well supported public value in aids of rights-contravening legislation will not be enough to save it under s. 1. Indeed, what has now become known as the “Oakes test” arguably reflects a valuation of the rational and critical approach at almost every step. While I wish to comment here only on the first element of the test, I think the character of each of the principles of Oakes as commendations of rational and critical scrutiny by courts of s. 1 claims can be seen fairly clearly simply in the language Dickson employs in setting them out. Oakes mandates that objectives justifying s. 1 limits “must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’”, that “the measures adopted must . . . not be arbitrary, unfair or based on irrational considerations (“in short, they must be rationally connected to the objective”), that “the means . . . should impair ‘as little as possible the right or freedom’”, and that “there must be proportionality between the effects of the measure . . . and the objective” (Oakes: 138 - 9; internal quotes are to R. v. Big M Drug Mart ([1985] 1 S. C. R. 295).

That the constitutional theory of moral agency might have a useful role to play in reading s. 1 can be seen here in a consideration of the first element of the Oakes test, the question of the sorts of objectives which might be thought capable of justifying limitations on Charter rights. Two broad issues arise here. The first is that of identifying the objectives which might be attributed to legislation in aid of a s. 1 justification. One of the central difficulties which arises in applying the first element of the Oakes test is that of identifying
the objectives of rights infringing legislation in the first place. Not all legislation makes its purpose clear and not all clearly stated purposes are necessarily those essentially attributable to a particular piece of legislation. Two observations might be made here.

First, a moral agency reading of the Charter would suggest that the task of identifying the relevant objective in rights infringing legislation is a crucial one. If we recognize individuals as moral agents — as possessors of a participatory status — and therefore as persons with an interest in considering critically the obligations the state seeks to impose upon them, we must recognize that particularly onerous obligations — those which, for example, infringe the rights of individuals — should be justified in clear and patent terms. To the extent that cogent justification for such obligations is difficult to discern, the "costs" of that indeterminacy should, as Oakes itself suggests, be borne by the state, by way of having its impugned legislation overturned.

Secondly, courts should also therefore be prepared to consider claims about the objectives of impugned legislation with some degree of skepticism. If constitutional subjects are to be recognized as moral agents, then presumably the justificatory process must have as its end something more akin to honest and sincere debate rather than mere persuasion. The goal of attributing objectives to legislative enactments should not therefore be that of "finding" a theory which might justify the impugned legislation, but investigating the deeper underlying values which might reasonably be attributed to it.

This is a difficulty which I think the Supreme Court might be thought to have faced, for example, in R. v. Edwards Books ([1986] 2 S.C.R. 713). There a majority of the Court upheld under s. 1 Ontario's Retail Business Holidays Act which infringed the Charter's guarantee of freedom of religion by requiring (with some exceptions) retail stores to close on Sunday. The case stands in contrast to that of R. v. Big M Drug Mart, in which the majority struck down the federal Lord's Day Act which also required Sunday closing. While Edwards is distinguishable in part from Big M because the Edwards legislation made provisions to exempt non-Christians from the law, the difference in the cases also rides at least in part on the Court's having attributed different objectives to the laws in each case. While the Court found (reasonably it might be suggested, given the title of the statute) that the purpose of the Lord's Day Act was to "compel sabbatical observance" (Big M: 331), it found that the objective of the Business Holidays Act was to ensure for Ontarian's a "common day of rest", 

most conveniently set for Sundays. While the idea of a common day of rest is perhaps an inclusively justifiable standard, the fact that the saved law in Edwards had a largely similar effect to that of the unconstitutional law in BigM suggests at least some possibility that the real objective of the law was the less inclusively justifiable end of compelling observance of the Christian sabbath. Chief Justice Dickson's acknowledgement (for himself and Justices Chouinard and Le Dain) of this possibility in Edwards suggests his recognition of this concern.

One might also suggest the importance of the critical approach in regard to a second issue of concern in regard to the question of objectives, that of placing a valuation or weight on social goals invoked as limitations on Charter rights. The constitutional theories of the primary values suggest a largely deferential role for courts in considering constructivist theories of value advanced by legislatures on behalf of society. This is arguably the tenor, for example, of the Supreme Court's approach to s. 1 in RJR-MacDonald v. Canada ([1995] 3 S. C. R. 199). In his judgment in the case Justice Gérard LaForest (for himself and Justices Gonthier and L'Heureux-Dubé) suggested that courts are ill-equipped to “assess social science evidence” concerning such things as the harm of social ills and therefore that this role is “properly assigned to the elected representatives of the people” (RJR-MacDonald: 277). The difficulty with such an approach is that it privileges forms of collective opinion which may be less rationally defencible than would be desired if our goal is to determine if the legislative restriction on an individual right is capable of binding dissenters in an inclusive way. A moral agency conception of s. 1 would suggest that courts go to greater lengths to “look behind” legislative assignments of value to the objectives of rights infringing legislation.

The moral agency approach would also suggest that courts appropriately consider not just the weight, but the legitimacy of social objectives invoked in s. 1 justifications as well. This is something the Supreme Court has been hesitant about doing, and only in BigM does the Court categorically deny the validity of an objective (compelling sabbatical observance) advanced as part of a s. 1 defence. While any number of categories of admissible objectives might be offered, I would like to comment only on one of these, the notion that s. 1 might be invoked in order to avoid “harm to society”. My concern is not to elaborate on what I think is an obviously inclusively justifiable goal, but rather to distinguish this justificatory
claim from another less defencible one that legislatures sometimes confuse with it — the objective of preventing the social "ill" which occurs when favoured public norms are endangered by changing social attitudes. As I have argued, a valuation of moral agency suggests the potential value in change and discontinuity in the social context.

To the extent that existent social norms are partialist or fail to fully recognize of the worth of all members of society, there is reason to desire their alteration. For this reason, the legislative objective of preserving some existent social balance or public ideal through rights infringing legislation might be thought illegitimate as a s. 1 defence. This is the sort of concern which might be considered in contemporary debates about the extension of conjugal benefits and marital status to homosexual couples. One of the themes in some of the public debate on this issue has been that by recognizing homosexual couples we are "endangering" the family or "devaluing" the institution of marriage and thus harming society. Given that these are fairly untenable arguments, I would suggest that the real peril with which critics of homosexual marriage are concerned is not some objective harm to society, but rather to the partialist vision of society embodied in the now eroding social norms surrounding homosexuality. These are in fact, it might be argued, the sorts of norms which the moral agency vision would suggest ought be subject to critical revision, and they therefore should not be recognized as constituting the "harm to society" which s. 1 might be thought to contemplate.

One final point I would like to make about s. 1 is to note its capacity to encourage legislators to adopt what might be called "intermediate solutions" to the problems which arise when collective goals conflict with the rights of individuals. Intermediate solutions are legislative responses to conflicts of potentially partialist collective goals and individual rights which attempt to acknowledge the claims on both sides of an issue. This conception of s. 1 as an encouragement toward intermediate solutions is expressed, I think, in the in the Oakes test, particularly in its requirement of "minimal impairment", which can be taken as contemplating circumstances where a potentially desirable collective goal might be achieved while at the same time recognizing the importance and value of individual rights. I note a number of intermediate solutions in my discussion of the Charter's substantive rights below, but perhaps the clearest example of the possibility is seen in the Supreme Court's ruling in Ford v. Quebec ([1988] 2 S. C. R. 712). While the Court struck down Quebec's French-only
signs law in the case, it suggested that the objectives of the law might have been constitutionally achieved by a less restrictive version of the law, perhaps one in which French was required on public signs but other languages were not forbidden. As I suggest in my discussion of Ford below, the value of the intermediate solution is that it recognizes the realm of individual value without denying the existence of mutual ties and collective obligations, an end which seems to accord with the ideal of moral agency and the theory of obligation Trudeau advances in Approaches.

III. SECTION 2

Arguably, section 2 is among the Charter's clearest expressions of the sorts of values associated with the ideal of moral agency. In a general sense, s. 2 can be understood as suggesting a conception of the subjects of the Charter as moral beings, for whom sources of moral value such as conscience and religion are important motivators and whose freedom to act upon such imperatives or free of the imperatives of others on such matters must be respected. In my discussion of s. 2, I focus here on its first two sub-sections, each of which I think can be understood as speaking to a different specific value of moral agency:

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication...

Section 2(a)

The first of s. 2's guarantees, that of freedom of conscience and religion, can be understood as both implying a recognition of persons as possessors of what I have called a "moral status" and as reflecting that valuation through a guarantee which I would suggest is understandable in terms of the value of "inclusive justifiability". By recognizing the right of all individuals to follow the dictates of sources of moral value such as conscience and religion which they themselves recognize as authoritative, the Charter suggests that the evaluative standards underlying morally significant obligation in our order cannot be those of the few or even the many, but that they must be capable of being understood as binding all who are to be subject to the laws. One's freedom of conscience (or religion) is infringed, it might be argued, when one is made the subject of a morally significant obligation which derives from
an evaluative standard which is partialist or not inclusively justifiable in the sense that it cannot cogently be defended as binding the obligee as well as those who seek to bind him.

There are in this tentative definition two elements which perhaps require further clarification. The first is the idea of “moral significance”. To the extent that the Charter is characterizable as an expression of the values of moral agency, it is appropriately understood I think as aimed at protecting the moral independence of persons which follows from our recognition of them as moral agents. This would suggest a broad definition of moral significance and a recognition of a significant realm of moral freedom. The idea of moral significance might therefore be thought to involve not simply the deepest matters of human spirituality, but also other aspects of human life which go to the heart of individuals’ moral independence.

As an example of this sort of interest we might consider something like what those of previous generations often referred to as “living in sin”; conjugal cohabitation without the sanction of marriage. At least three aspects of this choice would suggest an understanding of it as a matter of moral significance. First, the choice is a matter of moral significance not because those who make it are in their own minds necessarily pursuing what they believe to be a moral “duty”, but because it involves a matter understandable as either “objectively” morally significant or at least one to which most value systems attach moral importance. Secondly, the choice might be understood as a matter of moral significance because the rationale offered for its condemnation by those who oppose the practice is expressed in moral terms; that is, the choice has been imbued with a subjective moral significance by society’s response to it. Thirdly, moral significance might be attributed to the choice because it involves such an important and personal matter that state restrictions on it would raise questions about the ability of persons affected by them to retain their moral independence. These, I think, are the sorts of interests 2(a) might be thought to protect. An understanding of moral significance in these terms would suggest a view of 2(a) as directed to protecting interests which are fundamental the moral identity of individuals, a reading which I think accords with the provision’s protections of “conscience” and “religion”. I note that I argue below for a conception of s. 7 which also speaks to the idea of moral independence, but my suggestion is that the guarantee of “fundamental justice” is perhaps best understood as protecting (in somewhat weaker terms) individual
independence in regard to matters less central to persons' moral identity than those with which 2(a) might be thought to be concerned.

In regard to the second definitional element of 2(a) which I am advancing — the idea that the provision applies when partialist standards of justification underlie a morally significant law — I would note that perhaps the most frequently occurring form of this offence to conscience arises when the state passes legislation whose ends are primarily justified in reference to an inherently partialist or mystical standard. The non-rational standards of valuation embodied in religious belief represent perhaps the most paradigmatic exemplar of this sort of norm. The difficulty with laws deriving from such standards is, as I suggested in the previous chapter, that they have the effect of making dissentient individuals into the objects of majority standards which cannot reasonably be taken as binding all in society. This is the concern which Justice Dickson raises, for example, in R. v. Big M Drug Mart, one of the Sunday closing cases I discussed above, when he identifies the problem with the Lord's Day Act as being in its "proclaiming the standards of the Christian faith" as a social "ideal". In so doing, Dickson notes, the law

\[ \text{... takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike.} \]

\[ \text{(Big M: 337)} \]

As Dickson suggests, 2(a)'s valuations of conscience and religion indicate that laws derived from religious or otherwise partialist standards will be difficult for the state to defend.

This too is the implication I would argue of Justice Wilson's consideration of the issue of conscience in R. v. Morgentaler (1988) ([1988] 1 S. C. R. 30). Morgentaler, a case I have discussed elsewhere in this work, concerned provisions of the Criminal Code which restricted access to abortion by limiting its use only to circumstances in which a woman's health was endangered and requiring that fact to be warranted by a hospital medical board. While Morgentaler was essentially decided on s. 7 grounds, Wilson's judgment in the case also contains a discussion of 2(a) in which she notes that the decision to have an abortion is "essentially a moral" one, "properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being", and therefore of "fundamental personal importance" (Morgentaler: 172). The problem with the impugned Morgentaler regime,
Wilson's judgment suggests, is that the state's restrictions on abortion derived from partialist standards which could not justify the significant impositions on women's freedom to "pursue their own good in their own way" (Morgentaler: 166) entailed in the impugned law. She suggests that the abortion law represents the state "taking sides on the issue of abortion", "enforcing ... one conscientiously-held view at the expense of another" (Morgentaler: 179).

Interestingly, Wilson also considers in the s. 1 portion of her judgment the possibility of characterizing the evaluative standard underlying the abortion law in Morgentaler in what might be characterized as more inclusively justifiable terms. She notes that "the primary objective of the impugned legislation must be seen as the protection of the foetus" (Morgentaler: 181), and, indeed, she acknowledges the legitimacy of this interest, although only in the later stages of pregnancy. In arguing for what she calls the "developmental approach" to the question of protecting the foetus, she argues, for example, for

... a permissive approach to abortion in the early stages of pregnancy and a restrictive approach in the later stages. In the early stages the woman's autonomy would be absolute; ... [h]er reasons for having an abortion would, however, be the proper subject of inquiry at the later stages of her pregnancy when the state's compelling interest in the protection of the foetus would justify it in prescribing conditions. (Morgentaler: 183)

Given that Wilson's objections to the Morgentaler regime lie in her concern that it "enforces ... one conscientiously-held view at the expense of another", I take her acceptance of later stage restrictions to imply that she would understand their justification as depending on some less partialist theory of value than that she rejected in her consideration of 2(a). And, given that Wilson has described a pregnant woman's interest in making her own decisions about her body as a moral one, essential to her dignity, I would suggest that the theory of foetal value she is endorsing implies the attribution of some moral value to the foetus once it reaches a certain stage of development. Presumably, lesser forms of value — sentimental or economic, for example — would not be capable of justifying overriding a woman's morally fundamental right to make her own choices about such a significant matter.
The problem, however, is that Wilson does not fully specify what theory she relies on in adopting the developmental approach. She does note that “[i]t is a fact of human experience that a miscarriage . . . of the foetus at six months is attended by far greater sorrow and sense of loss than a miscarriage . . . at six days or even six weeks” (Morgentaler: 182), suggesting a theory dependent to some extent on social valuations of foetal life. This is a problematic standard for Wilson to adopt, however. In a democracy one might reasonably suggest, I think, that laws like those embodied in the Criminal Code provisions Wilson struck down are themselves expressions of a particular social valuation of foetal life. If our standard of evaluation is a social one, there is some question as to why we should favour the narrower valuation Wilson identifies theoretically here over the wider one the legislature might be thought to have identified empirically in this instance.

In fact, one might suggest that perhaps the most plausible moral theory which would support the sort of approach Wilson adopts here is that which she seems to implicitly reject in her thinking on 2(a) -- the idea, perhaps, that the foetus itself has what anti-abortion activists would call a “right to life”. Wilson herself avoids considering this most difficult of philosophical questions, noting that “[t]he Crown did not argue it and it is not necessary to decide it in order to dispose of the issues on this appeal” (Morgentaler: 184). In other cases on the issue (Borowski v. Canada [1989] 1 S. C. R. 342; Tremblay v. Daigle [1989] 2 S. C. R. 530;) the Supreme Court has also, perhaps understandably, sought to avoid direct engagement with this question. I share the Court’s apparent trepidation about entering this philosophical morass, and my commentary here is therefore only a limited one.

It is an easy task to imagine considerably more difficult cases on the issue of abortion than Morgentaler. Since the impugned provisions in that case as Wilson notes took “the decision away from the woman at all stages of her pregnancy”, she was able to reasonably avoid having to consider in detail the question of from whence an interest in protecting foetal life might come. The rest of the Morgentaler majority was able to overturn the abortion law on the even less difficult grounds that it infringed the Charter’s s. 7 guarantee of “security of the person” because the administrative procedure associated with getting approval of a hospital medical board imposed long delays on women seeking health-related abortions. Should a more delicately crafted abortion law come before it, the Court will have much greater difficulty in avoiding some engagement with the question of the foetus’s
status. The problem in that eventuality would be, however, the very difficulty which has prompted the Court to avoid the question; that of offering a dispositive answer to a question which ranks among the most intractable of philosophical inquiries. It is difficult to see how the question could be resolved without reference to a controversial and essentially partialist theory of value. In a sense, however, this very fact might itself provide one potential answer to the problem. To the extent that the question can only be resolved through the invocation of a partialist theory of value, it is difficult to see how an attempt to substantially restrict access to abortion for those who do not share the relevant theory could be justified.

While Wilson’s “developmental approach” might be thought to be underjustified, it perhaps represents nonetheless then a good “intermediate solution” to the problem. By providing for a reasonable period in which women might seek an abortion if they choose yet restricting that decision later in the pregnancy, the developmental approach seems to acknowledge both sides of the dispute. It respects women’s individual status as persons of conscience while acknowledging the possibility that evaluative standards endorsing respect for foetal life might represent more inclusively justifiable claims than the standards of substantiation enable us to ascertain determinately on this issue. This is perhaps not an elegant solution, but it may be the best that can be attained given the difficulty of the question of abortion and our desire to ensure that morally significant obligations be capable of justification to those subject to them as well as those who seek to oblige them.

Section 2(b)

Like the Charter’s guarantee in s. 2(a) of freedom of conscience and religion, the guarantee in 2(b) of freedom of thought, belief, opinion and expression can be understood in a broad sense as concerned with the moral independence of members of Canadian society. Where 2(a) can be understood as protecting this value via the ideal of inclusive justifiability, 2(b) does so, I would argue, by protecting the communicative freedoms associated with what I have called “access to the goods of moral exploration”. In chapter five I argued that two important freedoms might be thought to follow from this constitutional value. I suggested that perhaps the paradigmatic ideal associated with moral exploration was that of freedom of expression which I contended should be understood in very broad terms. Since 2(b) is primarily concerned with communicative freedoms, my suggestion is that it can be understood as protecting this aspect of moral exploration. I also
argued that a valuation of access to the goods of moral exploration brought with it a corresponding valuation of a broad realm of freedom associated with the making of personal choices — what John Stuart Mill aptly described as “experiments in living”. My suggestion here is that this aspect of moral exploration can be understood as having its protection in the “liberty” element of s. 7 of the Charter.

There is, I would note some significant opposition to moral agency’s broad conception of freedom of expression and therefore of an expansive reading of s.2(b) to be found in both democratic and communitarian theories of constitutional value. Democratic theories of constitutional value sometimes suggest that this right should be understood as limited to the forms of expression associated with public and political debate. Communitarians often endorse the limitation of some forms of expression in the name of collective goals and values — the sorts of prohibitions associated, for example, with obscenity laws. As I suggested in chapter five, however, a conception of constitutional subjects as moral agents — as persons concerned to discern and act upon their moral duties — arguably suggests a valuation of expression not simply within the bounds suggested by collective theories of the good, but as a means by which persons can inform themselves about moral possibilities and thereby make their own free choices about their individual good. A conception of s. 2(b) in terms of the values of moral agency would suggest, then, that the relevant question determining the applicative ambit of the right to freedom of expression is not “is this the sort of communication necessary to ensuring the democratic process?” or “does this communication fall within the range our society would be prepared to tolerate?”. It suggests that the appropriate question in a s. 2(b) claim might be that of whether the communication the state seeks to limit is of the type persons concerned to discern and act on their own conception of their moral duties would be concerned to preserve from interference.

This reading of s.2(b) might potentially suggest a more expansive conception of its guarantees than has been recognized in prior Canadian jurisprudence on this issue, particularly in the areas of “reprehensible speech” such as pornography and obscenity, and hate propaganda, for example. While the Supreme Court has for the most part given 2(b) the very broad reading moral agency theory would recommend, it has mitigated its expansive approach through its preparedness to accept justificatory claims for infringements of the
right under s. 1. Since the sorts of justificatory arguments one endorses under s. 1 presumably derive in an important way from one's theory of the right which is to be limited, I understand the Court's preparedness to accept limitations on 2(b) claims to imply an endorsement of a somewhat narrower conception of the right to freedom of expression than I have argued the moral agency vision of the Charter would endorse.

One of the central cases concerning s. 2(b) and the issue of pornography is that of R. v. Butler ([1992] 1 S.C.R. 452), which concerned the constitutionality of s. 163 of the Criminal Code which prohibited sexually obscene expression. Butler was the owner of a sex shop who had been charged with selling such materials, including pornography which depicted women in degrading sexual interactions. The Supreme Court held unanimously that the restrictions on expression here contravened 2(b) but that they could be saved under s. 1. In his judgment for himself and five others, Justice John Sopinka considered two possible s. 1 defences of s. 163 -- the idea that such laws constitute legitimate expressions of public "moral disapprobation" of pornography, and the idea that they have as their ends the prevention of pornography's harm to society.

Sopinka offers a nuanced theory of the admissibility of moral disapprobation as a s. 1 objective. He rejects the idea that laws based on what might be called "subjective" standards of morality can meet the s. 1 test, but he endorses the possibility that more "objective" moral standards might represent sources of value which would justify a s. 1 defence. Laws aimed at "impos[ing] subjective standards of morality", Sopinka argues, are not justifiable under s. 1 because their "dominant, if not exclusive, purpose [is] to advance a particular conception of morality", an objective which "is no longer defencible in view of the Charter (Butler: 492). Sopinka's theory here seems to suggest, to use the terminology of moral agency, that moral disapprobation in this form is inadmissible because it has the effect of imposing the partialist and non-inclusively justifiable standards of majority "conventions" (Butler: 492) on members of society whom they cannot be thought to bind. But Sopinka does not reject the idea of moral disapprobation in its entirety; the Charter itself might be thought to provide a source of moral value capable of providing a s. 1 justification for rights infringements. As Sopinka suggests, "[m]oral disapprobation is recognized as an appropriate response when it has its basis in Charter values" (Butler: 493; citing Dyzenhaus, 1991: 376).
Ultimately, however, Sopinka founds his conclusion that obscenity laws can be saved under s. 1 not in reference to moral disapprobation but on the concern that obscene expression is harmful to society (Butler: 493). He identifies two sources of concern here. The first of these is the idea that obscene forms of pornography bring with them the danger of “reinforc[ing] some unhealthy tendencies in Canadian society”, notably the reprehensible attitudes engendered by pornography about “male-female stereotypes”, gender equality, and “normal and acceptable” sexual relationships (Butler: 493-4; citing Canada, 1978: 184). This, I would note, is much the same concern about harm which Chief Justice Brian Dickson advanced in his majority judgment in another important case on reprehensible speech, R. v. Keegstra (1990) [1990] 3 S.C.R. 697, which concerned the constitutionality of the Criminal Code’s prohibition on “promoting hatred against an identifiable group”. In his majority judgment, Dickson upheld the provision under s. 1, holding that its objective was to “bolster the notion of mutual respect” in the face of the “harms caused by [the] message of hate speech that “members of identifiable groups are not . . . human beings equally derserving of concern, respect and consideration” (Keegstra: 756). Like Butler, Keegstra suggests that reprehensible speech is harmful because it engenders socially deplorable attitudes among members of society about vulnerable groups like women and identifiable minorities.

While there is of course some strong appeal in the idea that restrictions on freedom of expression like those at issue in Butler and Keegstra are justifiable because they counter the effects of reprehensible ideas like those embodied in obscene pornography and hate speech, I would suggest that this view is nonetheless a potentially problematic one from the moral agency perspective. Perhaps the essential difficulty is that the judgments of Dickson and Sopinka in these cases apparently depend on a theory of the person which seems to reject the notion that individuals are capable of discerning for themselves through engagement with all the sources of data available to them in society the rightness or wrongness of the information they receive from hate propagandists or pornographers.4 Dickson’s concerns that the effects of hate propaganda will be to persuade the Canadian public to adopt the ludicrous ideas of people like Jim Keegstra5, for example, suggests a fairly pessimistic view of the ability of persons to reason for themselves. In effect, the
judicial theories of the person in *Keegstra* and *Butler* seem premised on a conception of persons which denies what I have called their "participatory status", the idea that individuals ought be understood as capable of reasoning about and discerning for themselves their moral duties as regards their personal obligations.

As an aside, it might also be suggested that there is some reason to believe that conclusions of the sort Justice Sopinka reaches about the harms of reprehensible speech like pornography are not only philosophically problematic, but empirically doubtful as well. A consideration of historical and sociological evidence, for example, seems to suggest an *inverse* correlation between access to pornography and such things as gender inequality. Both in recent non-liberal societies (Afghanistan under the Taliban regime, for example) and in the less liberal history of our own society, there was less access to pornography and less equality for women than is now the case. The causal link between these facts is not, of course, a direct one, but there are arguments to be made that there is in fact an indirect connection here. Freer access to information and to relatively unrestricted investigation of moral possibilities might, as John Stuart Mill has suggested (Mill, 1993 [1859]: 85), be thought to ultimately direct societies to the recognition of more profound social truths than is possible when free debate and moral exploration is impeded.

Indeed, one might suggest that there is in the notion that individuals need protection from false ideas something of the paternalistic air of the sorts of values and ideas of Duplessis era Quebec which as I noted earlier underlay at least to some extent Pierre Trudeau's desire to establish a Canadian rights charter. In part, Trudeau's concerns with such things as the Union Nationale's authoritarianism, with the Catholic Church's opposition to democracy, and with Premier Duplessis's attempts to suppress religious literature of the Jehovah's Witnesses critical of the Catholic Church was that they impeded the ability of Quebecers to think for themselves. The same concerns arise I would argue in considering Dickson's and Sopinka's justicatory theories in regard to hate speech and pornography.

To some extent, Justice Sopinka's *Butler* judgment seems to acknowledge the potential difficulty in connecting pornography with harm in the second source of concern about that issue which it identifies. Here, Sopinka suggests that substantiation of the harm of pornography might depend not so much on substantive evidence, but rather on *public*
perceptions of harm, indeed, perceptions which the Justice notes are not "susceptible of exact proof" (Butler: 479). Given that few issues in human sociology are amenable to this level of proof, I would agree with Sopinka that the standard for adjudging harm cannot be an exact one. I would argue, however, that the standard of justification that ought be adopted in regard to overriding this sort of rights claim should be considerably higher than that entailed simply in an aggregation of public opinion. To the extent that the application of the Charter's rights is taken to depend on a fairly uncritical invocation of collective opinion in the form suggested by Justice Sopinka, there is some concern I would argue that its capacity to protect individuals from majority oppression or error will be less than it would be if the Court adhered to more rational evaluations of public harm.

Arguably, the invocation of public opinion about the harm of reprehensible speech is also problematic from within Sopinka's own interpretive perspective. Justice Sopinka rejects the idea that partialist or subjective standards of moral disapprobation might justify a s. 1 defence of restrictions on freedom of expression. Yet it is difficult to see how a potentially pre-rational or mystical public theory about the harm of reprehensible expression differs relevantly from the similarly non-inclusive public valuations of "subjective standard[s] of morality" which Sopinka rejects as part of his theory of 2(b) (Butler: 492). In both instances, a restriction on the right to freedom of expression is justified in reference not to an inclusively justifiable evaluative standard, but from more partialist forms of public belief. These are the sorts of standards, I would argue, which a valuation of Charter rights in the strong sense would suggest we view critically.

IV. SECTION 7

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.

Like the declaration of the values of conscience and expression in s. 2, s. 7's guarantees of "life, liberty and security of the person" are on their face fairly readily amenable to characterization in terms of the values of moral agency. Their inclusion in the Charter arguably suggests a valuation of the goods associable with a conception of persons as morally important in their individual character and therefore as beings whose autonomy and
well-being are relevant considerations in legislative decision making. The provision's invocation of the "principles of fundamental justice" as the relevant standard to be applied in decisions involving those interests is also suggestive of moral agency's appeal to locally-transcendant rather than localist or constructivist values in the constitutional sphere.

Of course, the abstract nature of s. 7 and in particular of the ideal of "fundamental justice" raises the question of exactly what locally-transcendant values the provision commends to us and, more specifically, the question of what state intrusions on individuals s. 7 prohibits. Four competing conceptions of s. 7 appear in Charter jurisprudence. The first, advanced by the Crown in the leading case on the matter, the B. C. Motor Vehicel Reference ([1985] 2 S. C. R. 486), suggests a highly restrictive view of the provision. The Reference concerned the constitutionality of a provision of the British Columbia Motor Vehicel Act which imposed significant penalties for driving with a suspended licence, whether or not the driver knew of the suspension. In effect, the provision eliminated an element of guilt long associated with criminal type sanctions in Anglo-American law, mens rea. Crown counsel argued that s. 7 ensured only procedural and not substantive justice, and therefore that the substantive mens rea requirement was not guaranteed by the provision.

The second jurisprudential conception of s. 7 we might note is represented by the Court's decision in the same case. For all intents and purposes, this approach represents the dominant opinion of the Court on matters concerning s. 7. In his judgment for the majority in the Motor Vehicel Reference, Justice Antonio Lamer rejected the proceduralist theory of s. 7 advanced by the Crown and the Court struck down the impugned provision on the substantive mens rea issue. While it is clear that the majority decision in the Motor Vehicel Reference offers a less restricted view of the ambit of s. 7 than that endorsed by the Crown because it rejects the proceduralist conception of the provision, it nonetheless suggests two important limitations on the guarantee.

First, it implies an understanding of the idea of "fundamental justice" as a mechanism setting out allowable parameters within which legislatively directed deprivations of life, liberty and security of the person can occur (Motor Vehicel Reference: 501), rather than as a guarantee of such interests in their own right. This is an idea Lamer expands upon in the Prostitution Reference ([1990] 1 S.C.R.), where he argues that

... s. 7 is, in a manner of speaking, "permissive". In other words the section allows the state to deprive an individual of life,
liberty and security of the person as long as it abides by the principles of fundamental justice.

(Prostitution Reference: 1178)

Secondly, Lamer’s approach to s. 7 suggests that its guarantees are primarily concerned with deprivations which arise within the context of the justice system. In the Motor Vehicle Reference he argues for example that the meaning of s. 7 should be defined keeping in mind the provision’s connection with ss. 8 to 14 (Motor Vehicle Reference: 501). Again, Lamer offers some helpful clarification of this theory in the Prostitution Reference when he argues there that s. 7 is part of the Charter’s guarantee of “legal rights” and therefore that

... the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual’s interaction with the justice system, and its administration.

(Prostitution Reference: 1173)

Both provisos suggest that courts ought not engage in review of what Lamer calls the “merits or wisdom’ of enactments” (Motor Vehicle Reference: 498):

... the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.

(Motor Vehicle Reference: 503)

In contrast to the more restrained readings of s. 7 which appear in the Motor Vehicle Reference stands a third and considerably more expansive approach. While the dominant conception of s. 7 has been enunciated by Justice Lamer, the alternative is most closely associated with Justice Bertha Wilson, perhaps most representatively in the s. 7 portion of her judgment in R. v. Morgentaler, a case I noted above. Rather than focusing as did the Morgentaler majority on the abortion law’s effect on the right to “security of the person” which s. 7 guarantees, Wilson’s ruling emphasizes the law’s infringement of liberty, which she construed in broad terms:

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 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. ... John Stuart Mill described it as "pursuing our own good in our own way".  

(Morgentaler: 166)

She concluded therefore that "the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important personal decisions intimately affecting their lives" (Morgentaler: 171). The effect of Parliament's abortion law was to impede a woman's choice and personal autonomy in a matter of an "intimate and private nature" and therefore it was contrary to the essential meaning of "liberty" in s. 7 (Morgentaler: 172).

Unlike the Lamer approach, Wilson's conception of s. 7 suggests that the principles of fundamental justice may have application not only in determining how or to what extent an individual's interests in life, liberty, and security of the person might be limited, but in fact that in some circumstances those principles might entirely prohibit the infringement of those interests. And while Morgentaler concerned the "interaction of persons with the justice system" (to use Justice Lamer's phrase), the implication of Wilson's reading of s. 7 as a guarantee of personal autonomy seems to be that even lesser sanctions might represent unconstitutional intrusions on liberty. In this view, s. 7, and particularly its guarantee of liberty, is understood not as a mere adjunct of the rights associated with the justice system as Lamer suggests, but as an at least partially independent declaration of the values of freedom and autonomy as goods in their own right. And while Lamer rejects the notion that courts should engage in review of the "merits or wisdom' of enactments", Wilson's reading of s. 7 seems to suggest that that sort of scrutiny may be not only desirable, but unavoidable when the liberty interest is in question. In Morgentaler, the effect of Wilson's ruling is not simply to call into question Parliament's approach to the question of abortion, but its very right to pronounce on the question at all.

While Wilson's broad approach to s. 7 has not been widely adopted, it has attracted the support of at least some members of the Supreme Court in post-Morgentaler cases, who in fact might be thought to have construed s. 7 in even more independent terms than Wilson herself. In B. (R.) v. Children's Aid Society of Metropolitan Toronto ([1995] 1 S.C.R. 315), for example, Justice LaForest, on behalf of himself and Justices, Gonthier, L'Heureux-Dubé, and McLachlin, endorsed Wilson's theory that "the liberty interest was rooted in the
fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being" (B. (R.): 369). LaForest held there that the liberty interest in s. 7 prohibited among other things state interference in a parent's right to "make decisions for" his child "in fundamental matters such as medical care" (B. (R.): 370). The same justices offer similarly expansive readings of s. 7 in R. v. O'Connor ([1995] 14 S.C.R. 411) and (without Gonthier) in Godbout v. Longueil ([1997] 3 S.C.R. 844). In the latter case, the group concluded that the liberty interest extended so far as to prohibit a local government from imposing a requirement on its employees to reside within the municipality.7

While I wish to make the case here for a somewhat different reading of s. 7, I would argue that of these two most influential jurisprudential conceptions of the provision, the Wilsonian approach might be thought to be considerably more compelling from the moral agency perspective than that endorsed by Justice Lamer. Because it directs a broad rather than narrow reading of the protections of s.7, the Wilsonian approach suggests an expansive conception of the realm of personal freedom, a value which I have argued is commended to us in a recognition of individuals as moral agents.

Indeed, one of the most intriguing aspects of Wilson's Morgentaler ruling is the extent to which it seems to derive from values very much like those suggested by the moral agency conception of the Charter. When Wilson objects to the abortion law's imposition of partialist moral theories on women seeking abortions, she argues, for example, adopting a Kantian turn of phrase, that the effect of such restrictions on those who do not share their underlying valuations is to treat them as "means" rather than "ends" and to deprive them of their "essential humanity" (Morgentaler: 179). In her use of the idea of liberty in s. 7 as an adjunct to the Charter's guarantee of freedom of conscience, she is in effect suggesting that the provision can be understood as mandating, in the same way I have suggested 2(a) does, the value of inclusive justifiability as the standard against which s. 7 claims might be evaluated. And when Wilson suggests that "the framers of the Constitution" had in mind a conception of liberty as implying a valuation of "the freedom of the individual to develop and realize his potential to the full" (Morgentaler: 166), she is in effect emphasizing what I would think is not so much the view of the "framers" as that of the framer most identifiable with the moral agency vision, Pierre Trudeau. Wilson's invocation of the value of self-fulfillment
echoes that of Trudeau when he argues in *Approaches* that “the purpose of living in society is that every man may fulfill himself as far as possible” (Trudeau, 1970: 24). To a significantly greater extent than Lamer’s approach, Wilson’s reading of s. 7 implies a conception of the *Charter* in terms of the values of moral agency.

There are, however, some important objections to the Wilsonian approach. First, the approach raises concerns about judicial fidelity to the *Charter* text. As Justice Lamer points out, the guarantee of fundamental justice is embedded in a portion of the *Charter* which is headed “legal rights”. Since the provisions which accompany s. 7 within that portion of the *Charter* clearly speak directly to concerns associated with the justice system rather than with all issues of public policy, is it perhaps too much of a stretch of *Charter* text to construe the provision, as the Wilsonian approach seems to suggest we might, as somehow an independent guarantee of goods such as liberty in their own right? We might call this the “legal rights critique”.

Secondly, as Lamer points out in defence of his own s. 7 theory in *B. (R.) v. Children’s Aid Society of Metropolitan Toronto* ([1995] 1 S.C.R. 315), too expansive a reading of s. 7 seems to raise the question of what, if any, purpose, might be ascribed to other important *Charter* rights such as s. 2’s guarantee of freedom of conscience. “[I]f s. 7 were to include any type of freedom whatever” he points out,

... we might seriously question the need for and purpose of s. 2. Either it is redundant, or s. 7 should then be considered to be a residual provision so that we can make up for anything that Parliament may have left out.

(B. (R.): 343)

In essence, Lamer’s suggestion is that a reading of s. 7 in broad and independent terms implies a drafting redundancy which makes it difficult to make sense of the *Charter* in a structural sense. We might call this the “redundancy critique”.

A third objection to the Wilsonian approach which we might note can be called, in the terms of those critical of overbroad endorsements of personal freedom, the “licence critique”. This criticism suggests that Wilson’s approach to s. 7 seems to imply a view of “liberty as licence”, a concern which David MacAlister raises in an article critical of Wilson’s *Morgentaler* judgment. “The ramifications” of *Morgentaler*, MacAlister suggests...
... are staggering. Does one now have a constitutionally protected right to drug use or gambling, regardless of criminal law prohibitions under the rubric of personal autonomy. ...?

(MacAlister, 1988: 168)

MacAlister's concerns here are also likely to have some resonance for advocates of democratic theories of value. To the extent that s. 7 is read in terms as broad as these, it is likely to make it difficult for Canadian legislatures to give expression to democratically determined values on the wide range of public issues that relate to these sorts of freedoms. Nor is MacAlister's reading of the implication of Morgentaler implausible. If Wilson's judgment suggests, as I argue it does, that s. 7 protects individuals from the imposition of partialist moral standards (like religiously-inspired objections to abortion, for example), then to the extent that laws against such things as drug use and gambling derive from similarly partialist standards, they too would seem objectionable from within this interpretive perspective.

There is, however, a fourth jurisprudential response to s. 7 available to us which I would like to suggest might, with some variation, offer a means of accommodating these criticisms while preserving a broad reading of the right. It is to be found in the dissenting judgment of Justice Louise Arbour in a recent Supreme Court ruling on s. 7, in R. v. Caine (2003) S.C.C.; as yet unpublished). Caine was charged under the Narcotic Control Act with possession of marihuana for personal use. His counsel advanced a novel and one might suggest daring claim — that the guarantee of liberty in s. 7 should be understood, in perhaps nearly the broadest terms possible to imagine, as an expression of John Stuart Mill's "harm principle". Counsel referred to On Liberty, in which Mill advances "one very simple principle": "... the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will", Mill argues, "is to prevent harm to others" (Mill, 1993 [1859]: 78).

While the Caine majority rejected this argument, in her dissent on the case Justice Arbour adopted what might be understood as a somewhat more limited version of the defence's theory of s. 7. Her judgment relies on what I take be an implicit distinction between two aspects of the s. 7 guarantee. The first is what might be called the "interest" an individual might be thought to have under the provision — the activity or choice he might seek to preserve from state intrusion. The second is the issue of the "jeopardy" an
individual faces; the question here is what is at stake for the individual should he pursue his interest in the face of the legislature’s restrictions. Arbour’s ruling in *Caine* suggests a broad interpretation of interest but a narrower construction of jeopardy. She concludes that s. 7 indeed ought to be understood as an embodiment of Mill’s harm principle, but only when the state’s intrusion on the individual’s liberty is enforced through threat of incarceration. “I am of the view”, Arbour says, “that the principles of fundamental justice require that whenever the state resorts to imprisonment, a minimum of harm to others must be an essential part of the offence” (*Caine*: para. 244). The *Charter*, she goes on to say

... requires that the highest form of restriction of liberty be reserved for those who, at a minimum, infringe on the rights or freedoms of other individuals or otherwise harm society.

(*Caine*: para. 246)

She concludes, therefore, that because “the harms associated with marihuana use are exclusively health risks for the individual user” (*Caine*: para. 256), the *Narcotic Control Act’s* penal sanction for its use contravened s. 7.

Arbour’s judgment might be seen as attempting to accommodate, with reasonable success, two conflicting values in the approach it recommends to s. 7. By adopting a broad, Wilsonian reading of the liberty interest, Arbour in effect acknowledges the importance of an idea of liberty as a guarantee of the sort of personal autonomy suggested by the *Charter’s* individualist character and, as I have argued, by the moral agency conception of the document. The harm principle, one might suggest, is perhaps the epitome of an “inclusively justifiable” evaluative standard. Arbour’s autonomy oriented reading of s. 7 is balanced, however, by her adoption of a narrower conception of the provision’s application as being primarily to penal sanctions. This would seem to imply a conception of s. 7 as concerned with the sorts of jeopardy Justice Lamer might be thought to have had in mind in his reading of the provision as concerned with “an individual’s interaction with the justice system, and its administration” (*Prostitution Reference*: 1173). In this reading, the provision not only accords with Lamer’s legal rights critique, but it also reflects a valuation of the more collectively oriented theories of public value implicit in the licence critique. By preserving room for the state to express through non-penal laws collective disapproval of personal choices such as drug use and gambling, Arbour’s reading avoids endorsing a view of s. 7
which would prohibit in their entirety laws directed at these concerns.

I would suggest, however, that perhaps a slight modification of Arbour's approach might ensure a reading of s. 7 which would enhance its ability to ensure moral agency's valuation of individual autonomy while still accommodating the concerns of the legal rights and licence critiques. We might to this end broaden Arbour's definition of jeopardy so as to include not just incarceration but criminal-type sanctions in general. In this view, s. 7's guarantee of liberty would have application not just when incarceration is the measure used to express collective condemnation of an individual choice, but whenever the state makes use of the criminal law (or its equivalents, like the Narcotic Control Act), threatens an individual with a criminal record, or otherwise takes measures tantamount to prohibition rather than simply condemnation of relatively harmless personal choices. This would suggest that in regard to these sorts of choices, s. 7 might be thought to imply that the state's role should be primarily a regulatory one. A perhaps apt analogy might be to such things as provincial liquor control laws, which, although they can be quite strict, do not have the effect of prohibiting the individual choice of persons to consume liquor if they so choose. This reading of s. 7's liberty guarantee would be both more in keeping with moral agency's valuation of individual autonomy and, I think, still arguably respectful of the "legal rights" critique. It would also maintain room for collective expressions of public value without however imposing these in such a way as to make individual choice impossible.

Two potential concerns still arise in this view. To the extent that this reading of s. 7 is understood as implying that the Charter might be thought to permit state restrictions on highly important moral freedoms, it is problematic from within the moral agency perspective itself. On the other hand, if s. 7 is read as including protection for highly important moral freedoms, then it seems to run afoul of Justice Lamer's redundancy critique, because it would seem to suggest that s. 7 plays a role in the Charter essentially similar to that played by 2(a) in its guarantee of freedom of conscience.

The answer to these difficulties might be found in emphasizing a distinction between these two rights. In the reading I am advancing here, s. 7 is understood as including protection for even relatively trivial freedoms — the "right to smoke pot", for example, as the Caine majority described the interest here — and as offering a lower level of protection for such freedoms than 2(a) might be thought to contemplate for the freedoms of
conscience and religion. One might suggest therefore that the s. 7 liberty guarantee ought be understood as providing less comprehensive protection for less essential interests, while 2(a) would be read as providing more comprehensive protection for more essential interests. In this view, Justice Wilson's invocation of 2(a) on behalf of the right to access to abortion in Morgentaler might be thought a better response to the issue in that case than a s. 7 approach. Since the personal choice associated with seeking an abortion is clearly one central to both conscience and the moral identity of a rights claimant, basing a claim on 2(a) when interests of that sort are in play might be thought a reasonable approach, as well as one likely to ensure a more comprehensive protection of the individual’s freedom than is to be found in s. 7. Since this reading would suggest different roles for s. 2(a) and s. 7, it seems to offer a reasonable response to the redundancy critique.

In this view, s. 7 might therefore be understood as giving expression to both the value of inclusive justifiability and that of access to the goods of moral exploration. It suggests the unconstitutionality of punitive restrictions on individuals which derive from partialist standards like those associated with irrationalist objections to such things as the recreational use of drugs, and it therefore provides a constitutional niche which can be used to protect individuals' rights to make the sorts of exploratory personal choices associated with such relatively harmless activities.

V. SECTION 15

15. (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Like s. 2(a) and the liberty element of s. 7, the Charter's equality guarantee can be read, I would argue, in terms of the value of inclusive justifiability. Where s. 2(a) and s. 7 might be thought to mandate inclusive standards of obligation primarily in regard to laws affecting individual choices, s. 15 can be understood as an endorsement of such standards in application to laws which have broader group-based implications. While the terminology of the moral agency perspective and the idea of inclusive justifiability are perhaps somewhat novel, the conception of s. 15 which I advance here is not I think essentially discordant with
the Supreme Court's larger theory of the provision, enunciated perhaps most authoritatively in Justice Frank Iacobucci's recent summary (for a unanimous Court) in *Law v. Canada* ([1999] 1 *S.C.R.* 497) of the "state of the law" regarding s. 15. The difficulties which courts have faced in giving applicative definition to the concepts of "equality" and "discrimination" which appear in the text of s. 15 has led the Supreme Court to emphasize a definition of the larger purposes of the equality guarantee in terms of the value of protecting "human dignity" (*Law*: 529). I believe that the essential value of this ideal is captured in an important way within the theory of the person suggested by the idea of moral agency.

In outlining the theory of s. 15 I seek to advance here, I note that *Law* offers a helpful summary of three central questions a court hearing a s. 15 claim should consider. The first is the question of "whether a law imposes differential treatment between the claimant and others, in purpose or effect"; the second, that of "whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment"; and the third, that of "whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee" (*Law*: 548). In shorter form, these issues might be characterized as involving the questions (a) of differential treatment; (b) of who s. 15 covers; and (c) of what constitutes condemnable differentiation.

My comment on the first two of these issues is brief, as the Court's approach to the questions of differential treatment and of s. 15's coverage would be likely I think to largely meet the approval of those adopting the moral agency perspective on s. 15. As Justice Iacobucci's delineation of the first applicative question of s. 15 indicates, the Court has affirmed the value of the "purpose or effects" doctrine -- the idea that differential treatment attracts s. 15 scrutiny whether nor not the legislature has intended to discriminate against a group (*Law*: 518). This is a reading of the equality guarantee which is consistent, I would argue, with the idea that inclusive justifiability requires an *accounting* for all who are to be bound by law. Failing to account for persons is from this perspective problematic in the same way as intentionally harming them, and the Court's endorsement of the purpose or effects doctrine aptly captures this I think.

In regard to the question of who s. 15 covers, the Court in *Law* adopted a broad approach to the difficult task of defining what constitute grounds of discrimination "analogous" to those enumerated in the provision. Iacobucci noted with approval a wide
variety of indicia and tests of analogousness applied in prior s. 15 jurisprudence, an approach which in effect suggests that many different forms of human identity can be understood as attracting s. 15 protection. If our concern is protecting the human dignity of all members of Canadian society, a broader approach is probably I would argue to be preferred to a narrower one. The Supreme Court’s preparedness in its more recent jurisprudence to recognize previously under-recognized grounds of discrimination such as sexual orientation indicates its commitment to a more rather than less expansive reading of the idea of enumerated and analogous grounds.

Although the first two elements of the Law approach involve important and difficult questions about s. 15, my focus here is on the third element noted there by the Court — the question of what constitutes condemnable differentiation — because it is here I would suggest that the idea of “inclusive justifiability” might be thought most helpful as a clarification of s. 15’s aims and application. As I have noted, the idea of discrimination has come over time to become more closely associated in Supreme Court rulings on equality claims with the idea of protecting the dignity of rights claimants. As the Court suggested in Law, the “overriding concern with protecting and promoting human dignity . . . infuses all elements of the discrimination analysis” (Law: 530), and it is perhaps particularly relevant in regard to the issue of condemnability. My suggestion is that some more specific meaning might be attributed to the idea of dignity by a characterization of it in terms of moral agency and the value of inclusive justifiability.

I argued in chapter five that one of the two central attributes of personality associated with those we recognize as moral agents is the possession of a “moral status”. To recognize someone as having a moral status is to recognize that their obligations should be determined in a way which treats them as fellow subjects — “equally” we might say in the context of s. 15 — and not as mere objects of the imposed obligation. The value of inclusive justifiability, I argued, can be understood as an expression of this requirement. It suggests that important obligations in an ongoing social order should be established in reference to evaluative standards which apply to, account for, and bind those to be obliged as well as those who seek to oblige them. One’s dignity, it might be suggested, is imperilled in an essential way when one is made the object rather than the subject of law by being obliged to obedience in the name of evaluative standards which do not meet this requirement.
My argument here, then, is that s. 15 can be read in these terms. The larger question which might therefore be asked in regard to whether a law impugned under s. 15 represents a condemnable form of discrimination is that of whether or not it ignores, jeopardizes, or denies the moral status of a rights claimant’s group. To use the terminology of the moral agency approach, the question is, does the law treat the claimant’s group as objects rather than subjects by imposing differential obligations on them which cannot be justified in inclusive terms? While I am unlikely to be able to capture here all possible ways in which this could occur, some clarity about the application of this idea might be found by considering some different forms of discrimination which are arguably caught by this definition. For expository purposes I call the three categories of discrimination I would like to note here “failures to justify”, “failures to account”, and “failures to respect”, the terms denoting different ways in which justificatory claims for legal differentiations might be thought to fall short of the requirement of inclusiveness.

The most basic form of condemnable discrimination is that involving “failures to justify”. This is the sort of justificatory failure involved in laws which impose burdens on or withhold benefits from identity groups for no apparent (or at least articulable) reason; that is, when differentiations are made for which no cogent or tenable justification can be found. It is perhaps not unreasonable in such instances to infer that an impugned law’s lack of justification indicates either the legislature’s unconcern for the claimant group or, in the worst cases, an intention to do harm to its members. In either case, such measures are objectionable because they fail to provide an accounting for their differential treatment in terms capable of justifying the obligations of those who miss the benefit of the law. The implication of laws which differentiate without apparent justification is that the obligations of the identity group which has been marginalized are appropriately established not as they are for subjects, but as they are for objects lacking a moral status.

While this form of discrimination has been evident in regard to a variety of identity groups in the Canadian context, legislative enactments failing to provide the benefit of the law to homosexuals have arguably been among the most prevalent exemplars of the failure to justify in recent Canadian jurisprudence. I would include the legislative regimes impugned in *Egan v. Canada* ([1995] 2 S.C.R. 513) and *M. v. H.* ([1999] 2 S.C.R. 3) in this category, but perhaps the clearest illustration of this problem is to be found in *Vriend v. Alberta* ([1998] 1
S.C.R. 493). *Vriend* concerned the omission of sexual orientation from the Alberta Individual's Rights Protection Act, a legislative enactment which included human rights protections for most of the forms of identity which are associated with discrimination. While the Alberta government apparently decided with some self-conscious consideration not to include sexual orientation in the *I.R.P.A.* (Knopff and Morton, 2000: 164), little in the way of cogent justification for that decision was offered in *Vriend*, and the Supreme Court held that the omission contravened s. 15. A consideration of these sorts of exclusions or marginalizations of homosexuals would suggest not infrequently I believe that such differentiations have no viable justification.

A second form of condemnable discrimination is that involving “failures to account”. Failures to account might be thought to occur when a law imposes burdens on or withholds benefits from an identity group in a way which suggests that those imposing the law have not fully considered the group, its circumstances, or its perspective. Such laws would seem to imply that the well-being or interests of the group marginalized by the law have not been considered or that law-makers understand the group as such that it need not be accounted for in the same way or to the same extent as other groups. Perhaps the most paradigmatic form discrimination of this type takes is in laws of adverse effect on persons with physical or mental disabilities. In effect, the underlying values which condemn this form of discrimination might be thought to provide some justification for the principle of “reasonable accommodation”. Laws which have the effect of excluding, marginalizing, or otherwise penalizing the disabled because they have been constructed from a perspective which under-recognizes the special circumstances of members of this group are laws which fail to fully acknowledge the moral status of such persons.9

The same might be said in regard to gender-based discrimination, a concern which is well exemplified I think in an important non-Charter gender discrimination case which the Supreme Court heard in 1989. At issue in *Brooks v. Canada Safeway* ([1989] 1 S.C.R. 1219) was an employee benefits plan which provided compensation for health related absences from work but excluded pregnancy related absences from its coverage. Counsel for the pregnant claimants argued that the exclusion was contrary to the *Manitoba Human Rights Act*'s prohibitions on gender discrimination. In his defence of the arrangements, counsel for the employer argued that since pregnancy was “neither an accident nor an illness” it was
appropriately excluded from the health benefits plan. In his judgment for a unanimous Court, Chief Justice Dickson rejected this argument and found the arrangement discriminatory. While Dickson “agreed entirely” “that pregnancy is not characterized properly as a sickness or an accident”, it is nonetheless “a valid health-related reason for absence from the workplace” (Brooks: 1237). The argument offered in justification of the exclusion of pregnancy from health coverage here offers a clear example of the idea of discrimination as the failure to account for or recognize others. The idea that “sickness and accident” constitute exhaustive definitions of health issues depends fairly clearly on what might be taken as anthro-centric predispositions -- few women it might be suggested would be likely to ignore or exclude pregnancy issues in seeking to define a regime of health protection. The impugned benefits plan’s definition of health in the overly narrow terms of “sickness or accident” was suggestive therefore of an important failure to fully account for all those to whom it applied.

While the “failure to account” involves standards which are indirectly partialist, laws discriminating in the third sense I would like to consider here -- the “failure to respect” -- are based on evaluative standards which are more directly partialist. In a general sense, laws might be thought characterizable as failing to respect an identity group when the obligations they impose have their justification in an evaluative standard or claim which is not reasonably understandable as authoritative for or binding on the identity group, although the collectivity as a whole might perceive the standard as a compelling one.

In one expression, the failure to respect arises in instances where the explanation or justification for an impugned law’s differentiations would seem to be that a marginalized identity group has been assigned a particular character or social status which derives from a partialist theory of value concerning the group or its activities. Sometimes such laws involve doubtful, underconsidered, or incorrect sociological propositions about the nature, capacities, or abilities of an identity group. In chapter five, I noted an historical example of such a standard -- Aristotle’s justification in the *Politics* of slavery for “barbarians” (that is, non-Greeks) on the grounds that members of that group were deficient in their “rational faculty”. At other times it is a partialist moral valuation of a group which underlies the failure of respect. Among the sorts of laws which might be thought to discriminate in this way are those which withhold benefits or impose burdens on identity groups which have
attracted public condemnation deriving from partialist beliefs such as those associated with religious faith. There is some intimation, I would suggest, that one of the unarticulated justifications behind the failure to include sexual orientation in Alberta’s *Individual Rights Protection Act* which was at issue in *Vriend* was that associated with religious condemnation of homosexuality. To the extent that laws withhold benefits or impose burdens on groups like homosexuals in the name of this sort of partialist religious belief, they would seem clearly to lack justification capable of being understood as inclusive.11

A second expression of the discriminatory “failure of respect” I would like to note here involves the somewhat more complex idea of what might be called “unfair burdening”. Here what is involved are laws which seek to secure a collective social goal which requires the imposition a significant burden on a group whose members cannot reasonably be understood as themselves bound by the values underlying the goal. Laws embodying these characteristics might be thought to treat marginalized groups as objects rather than subjects because they in effect, to use a perhaps somewhat precious metaphor, treat such groups as a teamster does a donkey carrying a load of gloves — the beast of burden is required to carry a load which can be of no purpose or value to himself. Perhaps the clearest exemplar of this sort of problem is expressed in a popular argument advanced by white racists in defence of the particularly oppressive form of discrimination embodied in the segregation era in the southern United States. Those defending segregation not infrequently suggested that its foundation was in the desire to preserve southern values and culture, which included the “ideal” of ethnic purity and the separation of the races. The difficulty with such arguments of course is that they imply imposing the burdens of a partialist cultural goal on the very persons least understandable as bound by it.

This sort of offence is not always so clearly discernible, however. Some laws may impose unfair burdens in the name of considerably less malevolent theories of public value than those embodied in segregation. The French only sign laws mandated by Quebec’s *Charter of the French Language* which were at issue in *Ford v. Quebec* ([1988] 2 S.C.R. 712), for example, might be thought to represent a form of unfair burdening in the name of what was in fact a quite laudable, although nonetheless non-inclusive goal. As the Supreme Court noted in *Ford*, the larger goal of the impugned law, the preservation of the French language in Quebec, “... was a serious and legitimate one” (*Ford*: 778 - 9). As it also noted, however,
the measures of Bill 101 burdened non-francophones disproportionately relative to francophones \((\text{Ford}: 787)\). In effect it might be argued, the larger consequence of the language restrictions at issue in \textit{Ford} was to treat allophone and anglophone Quebecers as the means to the ends of the francophone majority without due consideration of their own value. Despite the critiques of \textit{Ford} from those hostile to its protections of commercial speech (Hutchinson, 1990) and those concerned to protect the French language in Quebec (Galipeau, 1992), this would seem to suggest, at least from the moral agency perspective, that the Court was largely correct in striking down the language restrictions at issue in that case.\(^{12}\)

As a final note on s. 15, I would like to discuss a specific sort of justificatory claim for differential treatment which has been endorsed in Canadian jurisprudence, in \textit{Law v. Canada}, and in the text of the \textit{Charter} itself, in s. 15(2): the idea that otherwise condemnable differentiations in law may not be “discriminatory” if they have an ameliorative purpose for disadvantaged individuals \((\text{Law}: 539)\). In general, terms, this is a principle which I think is in keeping with the moral agency conception of the \textit{Charter}. To the extent that disadvantage has the consequence of making choices and opportunities in society less available to some than others, the idea that evaluative standards must account for all would seem to suggest the value and legitimacy of legislative efforts to assist the less fortunate. Ameliorative purpose, then, is likely to represent a justificatory argument which will in many instances be thought to have a fair claim to inclusiveness.

If our concern is to protect the dignity and recognize the moral status of all persons in society, however, we may have reason to exercise some degree of caution in applying the principle of ameliorative purpose. I would argue, for example, that ameliorative purposes contributing to social equality which bring the disadvantaged “up” are perhaps more legitimate than those which bring the non-disadvantaged “down”. As an illustration of these alternatives, we might contrast two different approaches to assisting the disadvantaged access higher education, an area where such measures are frequently used. The provisions of greater amounts of financial assistance on the basis, for example of race (where race demonstrably correlates with disadvantage to at least some degree) is more readily characterizable as raising the prospects of the disadvantaged rather than reducing those of their non-disadvantaged competitors. While such measures make it easier for the
disadvantaged to access post-secondary education, they do not make it more difficult for the non-disadvantaged to do so. A rigid quota system, on the other hand, which limited the number of places for non-disadvantaged persons in an educational institution on the basis of race would constitute a measure which assisted the disadvantaged by making it more difficult for non-disadvantaged individuals to compete. While both approaches have the effect of enhancing the moral autonomy of the disadvantaged by increasing the opportunities and choices available to them, the quota system at the same time reduces the moral autonomy of (competitively marginal) non-disadvantaged competitors because it eliminates them from competition entirely. The effect of programs of this sort is, arguably, to make non-disadvantaged individuals means in a rather unremediated way to the larger social end of helping their disadvantaged competitors.

Indeed, it might be suggested that the difficulty from the moral agency perspective with measures such as racial quotas is that they represent a form of “unfair burdening” in the name of the non-partialist value of helping the disadvantaged. In these cases, the partialist quality of such measures derives from their arguably unfair distribution of the burdens associated with achieving their laudable social goals. Approaches to affirmative action which bring the disadvantaged up generally distribute the costs associated with their assistance across society as a whole (by way, for example, of the taxes required to pay for such programs). The quota and similar approaches, on the other hand, impose virtually all the significant costs of the ameliorative ends on the relatively small group of persons unfortunate enough to be disqualified from fair competition on the basis of their attributes of personal identity.

This is a concern which is perhaps sometimes underconsidered in discussion of this issue, perhaps most notably I would argue by Ronald Dworkin in his widely esteemed defence of “Reverse Discrimination” in Taking Rights Seriously. Taking as his illustration a race based law school admission standard challenged in the case of Defunis v. Odegard (94 S. Ct. 1704 (1974)), Dworkin offers an essentially utilitarian justification for affirmative action programs. The right to “treatment as an equal”, Dworkin suggests, requires that the interests of those (like the white-skinned Defunis) who lose out because of their race “be treated as fully and sympathetically as the interests of any others when the law school decides whether to count race as a pertinent criterion for admission” (Dworkin, 1977: 227).
The comparison he has in mind is of Defunis and the "community as a whole", and Dworkin suggests that

Any standard will place certain candidates at a disadvantage as against others, but an admission policy may nevertheless be justified if it seems reasonable to expect that the overall gain to the community exceeds the overall loss.  
(Dworkin, 1977: 227)

The benefit to society from such programs is their contribution to making the "community more equal overall" (Dworkin, 1977: 228), and Dworkin's arguments suggest that this might be thought to outweigh the disadvantage imposed on persons like DeFunis who lose out as a consequence.

With respect to Professor Dworkin, it is arguably difficult to see how someone like DeFunis can be considered to have been "treated as an equal" here relative to the other individuals with whom he shares his community. A consideration of the competing interests at stake would seem to suggest that Mr. DeFunis is being asked to give up a place in law school to provide other individuals in his community — his next door neighbour, for example — the incremental and presumably relatively small (viewed from his neighbour's individual perspective) enhancement of the community's social atmosphere that would follow from making one additional place in law school available to a minority candidate. In effect, Dworkin's justificatory theory here seems to speak to the question of the ends of affirmative action to the exclusion of a consideration of their means. While the idea of "overall benefit" most certainly explains why we would want affirmative action, it seems to fall short in explaining why DeFunis in this case should pay so much more of the costs associated with that benefit than his next door neighbours. The principle of inclusive justifiability would suggest that some explanation is required in such instances not simply about the (worthy) goals of affirmative action programs, but also about the more problematic issues of who is to pay the costs of such measures and how much they might reasonably be expected to sacrifice for the common good. A due respect for the dignity of individuals and a recognition of their status as possessors of a moral status suggests that these are calculations which ought not be ignored.
VI. OTHER CHARTER PROVISIONS

While I would argue that the "moral agency provisions" in sections 1, 2, 7, and 15 are among the Charter's most central guarantees, they obviously do not comprise the entirety of the document. Some commentary on the implications of a number of other Charter sections for the moral agency vision is therefore necessary. Among the Charter sections which I have not addressed here I might note are a number of provisions which, while not necessarily speaking directly to the values of moral agency, might nonetheless be taken as amenable to characterization in these terms. Both s. 27's invocation of the value of multiculturalism and s. 28's guarantee of gender equality, for example, are suggestive of the ideal of inclusive justifiability, the idea that partialist standards (such as those which might be thought to be embodied in public decisions which are chauvinistic in either the contemporary or the historical sense of that word) cannot bind those whom they exclude. Similarly, the Charter's legal rights in sections 8 to 14 might be taken as suggesting a recognition of persons as individuals and possessors of a moral status in their guarantees of such goods as the right to a fair trial — that is, a trial which does not place considerations of the individual's value behind collective desires to secure conviction of the accused.

There are also a number of other Charter rights which might be taken either to suggest a valuation of moral agency or, alternatively, some contrary conception of constitutional value. The "democratic rights" in sections 3 to 5, for example, figure prominently in claims that the Charter should be understood as primarily about democracy. Clearly, however, democracy is also a value which moral agency theory endorses, although not in the more unlimited terms that advocates of democracy seul do. These sorts of provisions need not be taken as denying the validity of a moral agency conception of the Charter, but neither need they be thought to mandate such a reading of the document.

I would like to focus here, however, on two important Charter provisions which might reasonably be understood not simply as not well characterized in terms of moral agency, but, in fact, as speaking contrarily to its values. Section 25 provides that Charter rights and freedoms "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada". Section 33 is the Charter's notwithstanding clause, which permits Canadian legislatures to in effect exclude laws of their choice from Charter scrutiny under ss. 2 and 7 to 15. Sections 25 and 33
bring with them some important implications at both the foundational and applicative levels of *Charter* meaning.

As I noted in chapter four, s. 25's provision for special arrangements for the aboriginal cultural community is potentially suggestive of a valuation of communitarian theories of cultural value which identify collectivities rather than individuals as the essential units of constitutional personality. To the extent that s. 25 is taken as representative of the *Charter's* overall character, it adds a significantly communitarian colouration to readings of the document. At the applicative level, s. 25 has been argued by a number of scholars to in fact constitute a partial or general exemption of aboriginal governments from the *Charter's* individual rights guarantees. While this has been a matter of considerable contention\(^1\), to the extent that s. 25 is understood as the advocates of exemptive reading argue it should be, the *Charter's* moral agency provisions would not in fact be understood as applying to aboriginal Canadians.

Section 33 also has both foundational and applicative implications in the question of *Charter* meaning. As I noted in chapter three, the notwithstanding clause has been, and I think fairly, suggested to imply a fairly significant valuation of democratic theories of constitutional value in its implication that Canadians might direct their legislators to give effect to collective values even when they conflict with individual rights. While I argued that the inclusion of s. 33 in the *Charter* might reasonably support stronger rather than weaker readings of the document's rights guarantees, the arguments on the other side that the notwithstanding clause invites a more generally democratic reading of the *Charter* cannot be discounted. And, unlike the question of s. 25's applicative meaning, there can be no debate that s. 33 does permit Canadian legislatures to over-ride individual rights — indeed, all of the substantive *Charter* provisions which I have characterized as the moral agency rights.

Both sections 25 and 33 might be thought, then, to represent a constitutional vision potentially in conflict with that suggested by the moral agency theory of the *Charter*. Depending on our reading of and approach to these provisions, their inclusion in the *Charter* might be thought potentially regrettable from the moral agency perspective. As with other *Charter* provisions, however, our conception and approach to these provisions depends to some extent on the legitimative and foundational character we attribute to the
Charter. My suggestion, then, is that while we cannot and should not seek to read such provisions out of the Charter, to the extent we recognize the importance and value of the ideas of moral agency we might approach sections 25 and 33 in a way which seeks to make them more amenable to those values.

Two observations about s. 25 might be made here. First, as I noted in my discussion in chapter four of the foundational implications of the provision, there is some reason to suggest that s. 25 might appropriately be understood not so much as an expression of the Charter's general thrust and larger purposes than as an acknowledgement of prior constitutional commitments like those embodied in aboriginal treaties. An understanding of s. 25 in this light suggests a more limited view of its foundational implications for the Charter than do readings of the rights as a statement of the Charter's larger values.

Secondly, in regard to the question of s. 25's status as an exemptive clause, I would note that there are constructions of the provision open to us which might be thought to recognize s. 25's character as a recognition of aboriginal communities without depriving the individuals who live within them of the protection of the Charter. In advancing this view of s. 25, I make use of a distinction Will Kymlicka offers in Multicultural Citizenship between what he calls "external protections" and "internal restrictions" (Kymlicka, 1995: 35) aimed at recognizing cultural communities. External protections, which include such things as language rights, federalized political structures, and self-government, are measures which protect vulnerable cultural communities "from the impact of external decisions (e.g. the economic or political decisions of the larger society)" (Kymlicka, 1995: 35). Internal restrictions, on the other hand, are measures which a group takes "against its own members", generally with the aim of protecting "the group from the destabilizing impact of internal dissent (e.g. the decision of individual members not to follow traditional practices or customs)" (Kymlicka, 1995: 35). Kymlicka argues that external protections are in many formulations justifiable within liberal theories of political value, because in protecting a "societal culture", they contribute to ensuring access for members of cultural communities to the social resources associated with a meaningful life. The problem with internal restrictions from the liberal perspective, however, is that they deny individual autonomy; the ability, for example, of persons to "question and revise traditional authorities and practices" in their community (Kymlicka, 1995: 37).
My suggestion would be, then, that we might make use of Kymlicka's categorical distinction here in attempting to assign an applicative meaning to s. 25. This approach would suggest an understanding of the aboriginal rights guarantee as a sanction of "external protections" permitting distinctions between members and non-members of such communities, but not of "internal restrictions" such as infringements on the rights of aboriginal individuals. This reading might be thought to fairly recognize the significance of s. 25 as a protection of aboriginal communities without eliminating the Charter's protections for dissentient aboriginal individuals. The recognition of persons as possessors of a moral status suggested by the moral agency conception of the Charter would suggest that we would be likely to desire avoiding subjecting individuals within aboriginal communities to the sorts of impositions of collective value which were at issue, for example, in the case of Thomas v. Norris ([1992] 2 Canadian Native Law Reporter: 139 (B.C.S.C.)), which I discussed in chapter four. While I recognize that this reading of s. 25 does not flow from the text of the provision itself, but from a prior invocation of the values of moral agency, in a sense we are forced back upon such referents by the provision's indeterminacy and by the lack of consensus among legal experts about its exemptive status. My suggestion is not, then, that this is the only way in which s. 25 can be understood, but that this is a reading which is both fair and reasonable and which most accords with the moral agency theory of constitutional value which I have argued we ought recognize as compelling. As with much of the Charter, claims about s. 25's meaning tend more toward the persuasive than the dispositive.

My comments about s. 33 are somewhat briefer. In regard to the implications of the Charter's notwithstanding clause, it must be noted, of course, that what is at issue here is not so much an interpretive or legal matter, as a question which citizens themselves must ponder. I have argued that the Charter can and should be understood as a means for directing critical attention to public assertions of value. The value of inclusive justifiability suggests that important ongoing obligations in our society should derive from evaluative standards capable of binding all to be obliged. The value of access to the goods of moral exploration suggests that members of society should be able to freely pursue moral knowledge and make their own choices about matters of individual value. The mechanism of rights review provides a means of considering critically whether important public
obligations meet these standards. To take the easy option s. 33 offers of exempting ourselves from decisions which go against our personal or collective values is, it might be argued, to forego the goods associated with this critical perspective.

To the extent we recognize as a people or peoples the values of moral agency -- the ideal of respect for the rights and moral status of our fellow citizens -- we will be likely, I think, to refrain from invoking s. 33. In this regard, the question of s. 33’s impact on the Charter’s regime of individual rights is one which must be decided in reference to our own individual consciences as members of society, as we advise our legislators to use, or not to use, the notwithstanding clause. While s. 33 provides us perhaps with the option to eschew the duties of moral agency, in a larger sense it might also be understood as challenging us to voluntarily recognize those duties. This is perhaps in keeping with the larger conception of social authority which I have suggested Pierre Trudeau’s political philosophy commends to us. Trudeau argues that we are as individuals and members of our collectivity personally responsible for the sorts of authority we recognize. “It follows”, Trudeau argued,

```
... that when authority in any form bullies a man unfairly all other men are guilty; for it is their tacit assent that allows authority to commit the abuse. If they withdrew their consent, authority would collapse.
```

(Trudeau, 1970: 34)

Ultimately, then, s. 33 and our decisions about its use may say more about us as Canadians than it does about the Charter itself.
Notes

1 Dickson rejected the idea that the statute "was a surreptitious attempt to encourage religious worship" (Edwards: 744).

2 In an article for a non-scholarly publication about the implications of the Supreme Court's gay rights ruling in Vriend v. Alberta ([1998] 1 S.C.R. 493), F. L. Morton has argued for example that

The gay rights movement hopes to use Vriend to create a legal foothold with which to force their agenda in a variety of related policy fields. These policy changes serve in turn as a means to a still more radical end - the extermination of "heterosexism" and its source, the heterosexual family.

(Morton, 2003)

3 As a married person, it is difficult to see how the value or significance of my own marital union is altered by someone else's marriage or marital situation. That other couples might be unkind to each other or might even seek divorce, for example, seems not to reflect on the quality and value of my own relationship with my wife. The same might then be said about homosexual unions. The state's recognition of a marital bond between such persons surely says nothing about the marital bond between people in other forms of the relationship.

4 I note that in Keegstra this issue is perhaps somewhat obscured by the fact that the hate speech in that case had been directed by Keegstra as a teacher at his pre-adult students (although the Court considered the constitutionality of the impugned provision in a more global sense there and not simply in its specific application to the Keegstra facts). My argument here is that general restrictions on forms of expression directed at the adult public -- that is, persons understandable as capable of reasoning for themselves -- ought not to be considered justifiable under s. 1. I think there are, however, compelling arguments to be made that restrictions on expression directed at children or restrictions directed at the expression of persons acting for the state (as Keegstra was as a teacher under the employ of his local school board) are justifiable.

5 Among the anti-Semitic claims Keegstra advanced which resulted in his prosecution were that Jewish people collectively sought to destroy Christianity, were responsible for the world's major economic depressions and wars, and, indeed, even for the Holocaust itself.

6 Sopinka notes that "[t]his type of material . . . is perceived by public opinion to be harmful to society, particularly to women" (Butler: 479).

7 It is important to note, I think, that there is perhaps some reason to doubt whether Justice Wilson herself can be associated with quite this broadly independent a reading of s. 7. In the Prostitution Reference, for example, she upheld a provision of the Criminal Code which prohibited running a "common bawdy-house" (s. 193) while striking down another which made public communication for the purpose of prostitution illegal (s. 195.1). While the latter involved an infringement of the Charter right to freedom of expression, the former did not entail other rights besides s. 7 itself. Wilson's conclusion that "absent the infringement of some other Charter guarantee, this particular deprivation of liberty [that of operating a bawdy house] does not, in my view, violate a principle of fundamental justice" (Prostitution Reference: 1221) suggests that she does not understand the liberty guarantee in quite such broad terms as her reference to John Stuart Mill in Morgentaler might suggest. We might therefore distinguish Wilson's own somewhat narrower approach from its broader
alternative seemingly expressed in cases like *Godbout*.

8 I discussed these cases in chapter three.

9 This is a principle which the Supreme Court would seem clearly to have recognized, for example, in *Eldridge v. British Columbia* ([1997] 3 S.C.R. 624). There the Court declared unconstitutional the British Columbia government's failure to provide interpretive services for the hearing impaired in their interaction with the B.C. health care system. In his judgment for a unanimous Court, Justice LaForest noted that

\[\ldots\text{the adverse effects suffered by deaf persons [here] stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone.}\]

(*Eldridge*: 675)

10 A more contemporary example of discrimination in this form is arguably found in the 1993 case of *Weatherall v. Canada* ([1993] 2 S.C.R. 872), which concerned a gender discrimination claim brought by a male inmate of a federal prison institution. Weatherall complained that while the institution ensured that female prisoners were not guarded by male personnel, opposite sex guarding of male prisoners was permitted. By the nature of prison life, scrutiny by guards involved for inmates such things as being frisked and observed in the shower and at the toilet. For a unanimous Court, Justice LaForest upheld the differentiation because "the effect of cross-gender searching is different and more threatening for women than for men" (*Weatherall*: 874), emphasizing the psychological unease arising for female prisoners from feelings of sexual vulnerability in the face of opposite sex guarding. While LaForest was clearly correct in his conclusions about the implications of opposite sex guarding for women, I would argue that the Court might have given some greater consideration to the possibility that male prisoners might nonetheless have been impacted in a significantly negative way by the same practice. Given the prevalent attitudes in our and most cultures about gender roles, being guarded in such circumstances by female personnel might be thought likely to emphasize for male prisoners their powerlessness (although not necessarily their vulnerability) and their social degradation. Both the penal system's decision about opposite sex guarding of male prisoners and the Court's approval of that decision seem to suggest that male prisoners ought be understood as psychologically harder than their female counterparts; in effect, that they should be able to "take" without ill effect whatever prison regime is provided for them. With respect, the Supreme Court's failure to more critically consider this possibility raises some concern that both Corrections Canada and the Court might have been relying on an at least potentially partialist and therefore problematic theory of masculine character here.

11 It might be suggested that this essentially was Pierre Trudeau's conclusion in his decision to seek the repeal of *Criminal Code* provisions against sodomy in 1966. As he pointed out, "what is considered sinful in one of the great religions to which citizens belong \ldots\ isn't necessarily sinful in the others", as a consequence therefore he suggested, law "cannot be based on the notion of sin" (Trudeau, 1993: 83).

12 In Ford's companion case, *Devine v. Quebec* ([1988] 2 S.C.R. 790), the Court upheld under s. 1 a less restrictive Quebec language law which required business documents to include French but did not prohibit the use of other languages as well. As I have suggested, s. 1 might be thought to encourage "intermediate solutions", and this seems a reasonable one from the moral agency perspective. The non-exclusive language requirement would seem to contribute to achieving the laudable but partialist goal of preserving the French language in
Quebec without imposing overly onerous burdens on non-francophones. One might note the similarity between this approach and that taken by the Trudeau governments to federal bilingualism in such things as product packaging laws.

13 I assume Dworkin’s implicit comparison here is not between DeFunis’s individual interest and the aggregated interests of his five million fellow Washingtonians (DeFunis concerned the University of Washington). The problem with a comparison of that sort is that it would not only validate DeFunis’s sacrifice of his law school place for enhanced social equality, but in fact would also seem to justify his being killed if that would prevent his five million fellow citizens from suffering half an hour with a slight headache. That would seem a fairly problematic definition of “equal concern and respect”.

14 Kent McNeil (McNeil, 1996), Brian Slattery (Slattery, 1982), and Bruce Wildsmith (Wildsmith, 1988) have argued that s. 25 can or should be understood as an exemption of some or all aboriginal decisions from Charter review. Others such as Bryan Schwartz (Schwartz, 1986) and the authors of the Final Report of the Royal Commission on Aboriginal Peoples (Canada, 1996) have contended that these provisions are not appropriately understood as Charter exemptions for aboriginal governments. Patrick Macklem discusses the positions of these scholars on this issue in Indigenous Difference and the Constitution of Canada (Macklem, 2001: 209). I note that the Supreme Court has considered (in Delgamuukw v. British Columbia ([1997] 3 S.C.R. 1010) the meaning and applicability of a related provision in the Constitution Act, 1982, s. 35, which affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada”. In Delgamuukw, what was primarily at issue was a land claim and therefore no clear conclusions about the provision’s relationship to the question of Charter applicability can be drawn from the case. It is noteworthy, however, that a recent agreement between the Nisga’a people and the federal and British Columbia governments on a land claims issue included a provision affirming the Charter’s application to the band’s government. A valuation of the Charter would obviously suggest the desirability of these sorts of assurances in contemporary treaty negotiations.

15 As such, it might be thought therefore to protect special arrangements for aboriginal Canadians like reserved land and hunting rights from challenge under such things as the Charter’s equality rights guarantee in s. 15.
Chapter 8: The Problem of Rights and the “Authenticity” of Moral Agency

I have argued to this point that we ought recognize the importance and value of moral agency in our deliberations about constitutional value in Canada. My suggestion has been that we can recognize that value both through a conceptual consideration of the meta-values implicitly endorsed in the legitimative claims of our primary values, and in the political practice and philosophy of the Charter's central advocate, Pierre Trudeau. In turn, our recognition of moral agency as a constitutional norm suggests a valuation of such things as individual conscience and reason in our deliberations about public values. My argument has been that the Charter can (and should) be understood as a constitutional mechanism enhancing through its guarantees of individual rights our ability to recognize these goods in the Canadian context. There is one final criticism of the constitutional theory I have offered here which I would like to address in bringing this work to a close. The goods of individuality, reason, and rights have, of course, a not unproblematic status in both the larger and more local realms of political thought. Those skeptical of such goods suggest that the constitutionalism of rights is dismissive of valuable cultural and traditional legacies of the past, and they warn us that societies which too fully embrace such goods tend toward an ethos of narrow and selfish individualism. I would like here first to sketch out the claims of those who adopt these positions, and then to offer a tentative response to their criticisms. My suggestion is that the vision of rights suggested to us by Pierre Trudeau and the theory of moral agency need not be understood in quite such negative terms.

The critique of rights, reason, and individualism has perhaps its most recognized exposition in Edmund Burke's noted discussion of the French Revolution and the Declaration of the Rights of Man and the Citizen. Burke condemned the Revolution's overthrow of the "mixed system of opinion and sentiment" which had animated and given moral foundation to French society before the events of 1789. And he denied the feasibility of tinkering with or overturning existent social order in the name of "reason". The difficulty with reason, Burke suggests, is its overweening ambition. In our aspiration to the rational, we forget that our social order and institutions are the product of a long history of evolutionary development, and that the goods and values they embody may therefore not be capable of wise alteration by ourselves as creatures of limited vision. "We are but too apt", 
Burke notes, “to consider things in the state in which we find them, without sufficiently adverting to the causes by which they have been produced and possibly may be upheld” (Burke, 1955 [1790]: 89). What is more, the rationalistic impulse omits consideration of the possibility that as humans we may need deeper connections to our social order and institutions than merely rational deliberation can provide. Burke therefore lamented the spirit of the age embodied in the French Revolution in which

\[\text{[a]ll the pleasing illusions which made power gentle and obedience liberal, which harmonized the different shades of life, and which by a bland assimilation incorporated into politics the sentiments which beautify and soften private society, are to be dissolved by this new conquering empire of light and reason.} \]

(Burke, 1955 [1790]: 87)

Burke’s suggestion, then, is that to the extent we licence reason as the director of our values, we are apt to deny the value of our mutual connections, the “habits of the heart” (Bellah, 1985) which underlie viable and human social order.

These are concerns which are also reflected in contemporary critiques of rights, reason, and individualism, a complex of goods which those offering such critiques often associate with a rather bleak seeming “modernity”. Charles Taylor, for example, suggests that contemporary emphases on individualism have brought along with them one of what he calls the “malaises of modernity”: an increasing emphasis on the use of “instrumental reason”, “the kind of rationality we draw on when we calculate the most economical application of means to a given end” (Taylor, 1991: 5). Alasdair MacIntyre similarly criticizes the attraction of “practical rationality” in contemporary societies, which he identifies with an individual self-interest given pride of place over more morally compelling sources of value (MacIntyre, 1988: 2). Taylor and MacIntyre suggest that the modern emphasis on reason and individualism directs us to a conception of the individual as the source of all social value, a view which encourages us to think only of ourselves and not of the ties to and claims upon us by others which whom we share our society.

These are connections which are also often made in debate around the *Charter*. Allan Hutchinson’s noted critique of the *Charter* in *Waiting for Coraf*, for example, is premised in large part on the idea that individualistically-oriented rights are unproductive and divisive. They take us away from the sorts of social interaction and deliberation
productive of common solidarity and mutual regard which Hutchinson associates with authentically democratic forms of government (Hutchinson, 1995: 102). Rainer Knopff and F. L. Morton make a similar claim in *The Charter Revolution and the Court Party*. They suggest that in far too many instances, *Charter* rights claims are not about the preservation of fundamental human goods or values, but rather the self-focussed assertion of claimants’ narrow individual preferences. The “real effect” of the strong rights *Charter* is

\[
\ldots \text{not to protect rights in any fundamental sense, but to encourage rights claiming, a partisan exercise whose objective is not to protect the fundamental core of existing rights, but to change public policy through the judicial creation of new rights.} \\
(\text{Knopff and Morton, 2000: 155})
\]

Knopff and Morton emblematize the cultural consequences of the strong rights *Charter* in a recent case involving a Toronto by-law concerning residential gardens. A homeowner in that city had replaced her lawn with a garden of weeds, and local by-law officers had cited her for this offence against residential rules. “Instead of obeying the law”, Knopff and Morton report, “the woman went to court, arguing that the by-law infringed upon her freedom of expression -- and she won!” (Knopff and Morton, 2000: 156). While the authors do not identify the case they note here and indeed acknowledge that it would likely have been overturned by a higher court, the s. 2 weed garden claim is nonetheless a valuable citation because it highlights the philosophical view Knopff and Morton advance. Rights in this view are understood as creating a culture of solipsism in which individuals come to deny even the most trivial of collective claims upon themselves.

This identification of rights with self-interested individualism is often associated in Canada with the argument that the *Charter* in strong rights form represents an alien, perhaps especially American model of social value. The outlines of this theory are familiar to any student of Canadian political science. The emphasis on rights and individualism in American society is understood as deriving from the American founding fathers’ valuation of Lockean forms of what might be called radical individualism. In contrast, Canadian society is seen as having been built around a model which recognized to a greater extent the claims of culture and tradition and which rejected the “me first” individualism associated with the rights vision. Robert Martin, for example, argues that “\ldots the *Charter* is, culturally and historically, an American document” which has “done a great deal to persuade us that
American ways are best..." (Martin, 1991: 128 - 9). He suggests that the coming of the Charter has brought with it a certain orientation in Canadian politics which “abolish[es] our history” and “exalt[s] individualism” (Martin, 1991: 128). Patrick Monahan raises similar concerns when he argues in Politics and the Constitution, for example, that the democratic-communitarian understanding of the Charter “fits” better with Canada than the American “universal justice model” (Monahan, 1987: 99). So too does Charles Taylor when he suggests that the rights culture represents an American rather than Canadian vision (Taylor, 1993: 77). Michael Mandel (Mandel, 1989: 4), Jeremy Webber (Webber, 1994: 251), and others share these scholarly concerns about the Charter as potentially giving expression to American rather than Canadian values. The Charter in the view of those who adopt this critical perspective is not only undesirable in its expansive embodiment of strong rights constitutionalism, but fundamentally alien to Canadian experience and social values.

There is, of course, nothing novel in concerns that the seduction of American values might lead to the loss of the Canadian identity. Among the deepest and most insightful of commentaries on this tension is to be found in George Grant’s widely read Lament for a Nation. It is a testimony to Grant’s profound insight that his 1965 work foreshadows contemporary Charter debate in quite a remarkable way. Towards the end of the Lament, Grant cites a 1964 work he finds problematic “by seven French-Canadian intellectuals” of Cité Libre which advocates an “enlightened humanism” and liberal “universalism” in the Canadian constitutional context (Grant, 1965: 84). It is of course no surprise for a contemporary reader of Grant to find Pierre Trudeau’s name among the authors of that article, entitled “An Appeal for Realism in Politics”. Grant’s concerns with the values proclaimed in “An Appeal” are almost exactly those contemporary critics of the Charter raise. How, he asks, “can a faith in universalism go with a desire for the continuance of Canada?”, for

[t]he belief in Canada’s continued existence has always appealed against universalism. It appealed to particularity against the wider loyalty to the continent.

(Grant, 1965: 85)

It must be recognized, then, that the values associated with the moral agency vision of the
Charter are not perceived by all as unalloyed goods. Despite Grant's concerns, however, my suggestion here is that Pierre Trudeau's political practice and philosophy might be seen as offering some important resources for response to the criticisms of the values associated with the strong rights Charter.

We might turn first in this regard to the concerns voiced by philosophers like Burke that the politics of rationality expressed in the abstraction of human rights is potentially destructive of valuable existent goods and ideals in complex human societies. The resonance of such concerns in regard to the Charter is evident. In its strong rights form, the Charter might reasonably be understood, I think, as requiring or inviting our reconsideration of many of our traditional values. The conflict between the Charter and some of the goals of quebecois nationalism has, for example, prompted Guy Laforest to describe the Constitution Act, 1982 as the "end of a Canadian dream". Similar lamentations have arisen as the Charter has been used to overturn or amend laws like those at issue in Morgentaler, Vriend, and many of the other cases I have discussed in this work.

Two responses to such concerns might be offered. First, while the Charter has brought change to the Canadian constitutional order, it has not, to make a perhaps obvious point, done away with the arrangements of 1867. The Constitution Act, 1867 still stands. So too then do the arrangements of federalism (and therefore the protections they offer for at least the provincialized version of particularized community in Canadian life) and democracy. As I have noted, the political philosophy Trudeau advanced was not one which denied the importance of either community or democracy. It does suggest, however, that these can be too strongly endorsed, and that we may therefore have reason to desire to mediate their claims in the light of a consideration of their potential negative as well as their positive effects. The idea, I would suggest, is that the Charter in the moral agency conception might appropriately be thought of as recommending to us an approach -- to use Trudeau's conception of his own political theory -- to our consideration of social values rather than a more ambitious and comprehensive ideology which denies or sweeps away all that preceded it.

That is not, however, to say that the Charter does not imperil some arrangements and institutions. But, of course, this need not necessarily be understood as an entirely bad thing. The moral agency vision suggests an understanding of the Charter as a mechanism
for exposing our most deeply held values to the light of critical reconsideration. It invites us to consider whether the social values invoked on behalf of particularistic claims are — to use the terminology of inclusive justifiability — capable of binding all. To the extent that such values are imperilled by this form of critical evaluation, it might be suggested that their claims upon citizens may not be as compelling as their advocates assume them to be.

Of course, this characterization of the Charter raises the second of the large critiques I have alluded to here. By identifying the Charter as an embodiment of a legitimative theory which focusses on individual obligation, are we endorsing a vision of society in which self-interest and selfishness reign, in which all collective claims must give way to the idiosyncracies of individualist preferences? There is indeed some danger of this in an adoption of the strong rights vision of the Charter. Rights are a counterweight to the human tendency to overvalue collectively determined social values. But that can of course lead to over correction in the opposite direction — to a tendency for individuals to value their own claims above those of others with whom they share their society. It is in regard to these sorts of concerns about rights, reason, and individualism, I think, that Trudeau's theory of obligation offers some important insights particularly relevant in the Canadian context. For while it is possible to understand reason and rights as expressions of some fundamental meta-physical assertion of individual primacy as in the Lockean American founding fathers' theory, this is not our only means of identifying their value and import. Nor, I would argue, is this the understanding of rights and the role of reason suggested by Trudeau's philosophy.

If it was, it would be an understanding seemingly at odds with Trudeau’s political practice as prime minister of Canada. Trudeau has remarked for example, that he believed it the duty of the state and thus the individuals who make it up to protect the weak (Trudeau, 1993: 190). This attitude was I think expressed in many of the legislative measures adopted by the governments over which he presided. While Trudeau was not the originator of Canadian social programs like medicare or social assistance, or of the redistributive forms of taxation embraced by governments of his era, his efforts to protect and enhance such programs suggests in fairly clear terms one might argue that the social vision which informed his practice was not one identifiable with radical or selfish individualism. Trudeau’s more directly stated philosophical values seem also at odds with
this sort of conception of society. In his observations on "Some Obstacles to Democracy in Quebec", for example, he describes the political orientation of "every man for himself" as a corruption of one's civic sensibility and, indeed, as "political immoralism" (Trudeau, 1958: 297).

The approach to the question of rights and obligation offered in Trudeau's philosophy is, I would argue, one more consonant with the values of concern for others, recognition of mutual connection, and the like than that suggested by the radically individualist and self-interested version of rights theory. I have suggested that Trudeau's theory is premised on the idea that we might understand the source of rights as the conscience of those who inhabit a political order. He asserts, for example, that "[m]y purpose [is] to establish that it is the duty of citizens . . . to examine their consciences on the quality of the social order they share and the political authority they acknowledge. . . ." (Trudeau, 1996c: 72). Our conscience presumably therefore directs us not simply to the assertion of our own values and interests, but to the recognition of others with whom we share our society as themselves agents of conscience too. It is our responsibility for others that requires us to recognize their legitimate claims against the state, an idea suggested by Trudeau when he argues that "[i]t follows that when authority in any form bullies a man unfairly, all other men are guilty; for it is their tacit assent that allows authority to commit the abuse" (Trudeau, 1970: 34).

In keeping with this idea, Trudeau suggests that "... the state must go further than merely investigating the needs [of its inhabitants]; it must also encourage them to demand what they consider just" (Trudeau, 1996c: 72; emphasis added). Rights in this view are not proclamations of our eschewal of mutual obligation, but a means by which those who make up a political collectivity recognize their duties to those with whom they share their society. Those duties cannot be met if one treats one's fellow citizens as objects whose obligations are to be established only in consideration of one's own personal views and aspirations. One must, rather, recognize one's counterparts as fellow subjects with their own perspectives and aspirations too. Rights in this view are mechanisms by which the justifications offered for collective claims can be subjected to a consideration of their capacity to bind in conscience not only those who support the claim being advanced, but minority or dissentient members of the society too. The constitutional enshrinement of rights, then, signifies not a denial of
the claims of others, but a recognition of others, like ourselves, as subjects and moral agents.

It is for this reason I would suggest that the strong rights conception of the Charter need not be understood as imposing upon Canadians a set of values characterizable as “American” in their orientation. The theory of rights we are invited to embrace by Trudeau’s political philosophy is not founded in an eschewal of social duty and human connection — the critique of some for the American rights theories they associate with the Charter¹ — but one which understands rights as fundamental expressions of our recognition as individuals in a collectivity of our duties to others. This is a theory one would think considerably more compelling in its orientations for Canadians than the alternative.

Nor should it be thought surprising that Trudeau’s political theory might be found to have an identifiably “local” flavour. It is is a philosophy which very much, I think, was derived from Trudeau’s own experiences and observations as a Quebecker, as a member of a very significant local Canadian community. It is, therefore, a theory with perhaps more authenticity, of greater resonance and relevance, for Canadians than critics of the strong rights view of the Charter sometimes acknowledge. A consideration of some of the causes Trudeau championed in the years before he entered elected politics evidences, for example, both the rootedness of his political theory in his experiences as a Quebecker, and the conception of social duty which underlied that theory. To the extent that the claims of reason, rights, and individualism derive from an adoration of solipsism and self-interest, one would think that Trudeau’s interests and values in his political activism would have been those most related to or benefitting himself. Yet Trudeau, as the wealthy son of a successful businessman, endorsed and actively participated in the cause of the miners at Asbestos during the strike of 1949, and as the legal representative of a variety of Quebec working class unions throughout the 1950s. “What I found there” says Trudeau,

... was a Quebec I did not really know, that of workers exploited by management, denounced by government, clubbed by police, and yet burning with fervent militancy.

(Trudeau, 1993: 63)

Trudeau’s engagement in the union struggle of the 1950s in Quebec was driven, he suggests, by his realization that “... in Quebec, the labour movement was in urgent
need..." (Trudeau, 1993: 66).

Trudeau's concern for the civil rights of Quebec minorities would seem similarly to
derive from his own observations of the reality of Quebec life and from a conception of the
duties of citizenship as having their focus not in oneself, but in one's ties to others. It would
be hard to deny, I think, that Trudeau was an authentic Quebecer -- a French Canadian
Catholic and, indeed, a member of a generation in which Quebec's collectivist and
nationalist character was perhaps most comprehensively expressed, through the political
rule of Maurice Duplessis and the social rule of Quebec's Catholic Church. Despite his
self-professed "citizenship of the world", it is equally clear I would argue that Trudeau
understood himself as a Quebecer, too, as a person shaped by and connected to his cultural
roots. It is, one thinks, as a self understood member of this collective community that
Trudeau considered his own obligations and values. As such, his criticisms of the Duplessis
government's trampling of the civil rights of Jehovah's Witnesses and other minorities
takes on a certain character. Those criticisms cannot be said to have derived from
Trudeau's concern for, say, his own religious freedom or cultural values, since as a Catholic
quebecois he was of the pre-eminent Quebec faith and heritage. The idea expressed in
these forms of social activism, then, is not that we ought deny our ties to others in our
society, but rather that we must recognize our obligations to all those with whom we share
our society and not simply those whose cultural heritage or ancestry we happen to share.

Indeed, one of Trudeau's stronger criticisms of Quebec separatists was that their
cause represented a collectively oriented solipsism, a denial or ignoring of connection to and
obligation to those not of the clan. In the "New Treason of the Intellectuals", for example,
Trudeau hypothesizes the response of future Quebecers to his generation's fixation on
separatist politics:

What! they will say to the judges and lawyers, civil liberties
having survived in the province of Quebec thanks only to the
Communists, the trade unions, and the Jehovah's Witnesses,
and to English and Jewish lawyers and the judges of the
Supreme Court in Ottawa, and you had nothing better to do
than cheer on the coming of a sovereign state for French
Canadians?

(Trudeau, 1968d: 171)
Trudeau’s experiences as a Quebecker of the Duplessis era suggest also that too strong an endorsement of collective expressions of value can harm not just minorities like the Jehovah’s Witnesses, but *individuals* who are themselves part of the collectivity itself. The collectivist impulse in human nature is such that expressions of dissent or disagreement are often unwelcomed; it is a natural human tendency one might suggest to seek a cozy oneness in our local communities. When no means exist by which to counter this tendency, life can be made difficult for the skeptic, for those who wish to bring critical views to bear. Trudeau’s own experience as an advocate of dissent and as a social critic illustrate this danger too:

> When I got back to Montreal [my] search for a job ran up against the pettiness and the prejudices of the political establishment. I wanted to teach [and] I applied to the Université de Montréal, which was much in need of qualified political science professors. But on three occasions over the next decade, I was stonewalled, and I learned that Premier Duplessis himself had intervened to block me...

*(Trudeau, 1993: 63)*

Trudeau’s own personal experiences suggest that the dangers of a denial of individual values such as conscience and self-expression are not simply for those who are of some extra-cultural minority, but for those too who are fully members in the ethnic or cultural sense of a political community. Rights in this view might therefore be thought a valuable good even in what are or might seem to be fairly homogeneous communities.

Nor is the value or applicability of Trudeau’s observations limited to Quebec. At the Constitutional Conference of 1968, Trudeau noted that he had “been asked what need is there in Canada for a bill of rights”:

> My answer is that our need may not be so great as is that of persons in some other countries. But my answer as well is that we should not overemphasize our righteousness. We are not in this country innocent of book-burning or -banning legislation, or deprivations by law of previously guaranteed minority-language rights, of legal expropriation which at times appears to be more akin to confiscation. . . We have no reason to be complacent.

*(Trudeau, 1996f: 217)*

As Trudeau’s arguments suggest, the experience of discrimination, disregard for civil
liberties, or perhaps a discounting of the human values of those "not like us" has by no means been limited in Canada to his community of Quebec alone. Only a few of the most frequently noted of such expressions of disregard for some of the members of our community need be cited to emphasize this point -- laws such as British Columbia's 1890s Coal Mines Regulation Act barring "Chinamen" from many employments in B.C.; the 1935 Alberta Press Bill which was aimed at limiting freedom of expression in that province; the long and often slow evolution of the franchise in our country, which prohibited women from voting in some places in Canada until 1940, Asian-Canadians until 1948, and aboriginal Canadians until 1960; federal persecution of members of the Communist Party and wartime internments of Ukrainian-, Japanese-, and other Canadians; the atrocities of the residential schools era, and the longstanding unequal treatment of homosexuals in Canadian society.

It might be suggested that in each of these examples a recognition of the rights claims of the marginalized or oppressed need not be understood as having its foundation in an endorsement of personal selfishness or self-interested individualism, but in the recognition by citizens of their duty to recognize the moral value and independence of those with whom they share community but not necessarily all imaginable important human values or personal attributes. A recognition, in other words, by moral agents of their fellows as moral agents too.

This is perhaps why the Charter -- despite early academic misgivings about its popular appeal 4 -- has had as favorable a reception as it has among Canadians. The Charter is understood by a great many Canadians, I would argue, as an expression of the sorts of values I have suggested we can identify in Pierre Trudeau's philosophy and practice. That understanding is of the Charter not as a proclamation of self-regarding individualism for its own sake, but as a means by which to contribute to our ability to recognize our obligations of respect to our fellow citizens. These are values whose importance is evident to many Canadians by virtue of their own or their ancestors' experiences of Canada, or through their own recognition of the difficulties faced by those marginalized in Canadian society.

In an earlier chapter I noted the words of Alan Cairns, who argued that the Charter ought be understood not as "a minor addition to the Canadian constitutional system", but as "a profound, wrenching transformation" (Cairns, 1991: 179). I agree with Cairns, but to this observation it might be added that, in another sense, the Charter is perhaps equally
understandable not as a departure from Canadian values, but as an expression of a set of values which, while authentically Canadian, have been under-recognized at the constitutional tables of our past. This is also then perhaps why Canadians collectively rejected the attempts of the 1980s and 90s to alter the Canadian constitution in ways widely perceived as endangering or potentially limiting the Charter's rights guarantees. Prime Minister Brian Mulroney's Meech and Charlottetown Accords represented, I would argue, a "politics of the primary values" -- a conception of the goal of Canadian constitutionalism as fundamentally that of accommodating the traditional values and claims of those sufficiently powerful and well recognized to have seats at our constitutional tables. The values underlying such claims are, of course, neither unworthy nor unimportant, but, as many Canadians perhaps realized, those values are in many senses already well protected in Canadian institutions and constitutional structures.

But whether or not the constitutional changes brought about in 1982 represent new Canadian values or longstanding values now given greater applicative force, the Charter ought be understood, I would argue as an embodiment of what are now authentically Canadian values. This is evidenced in such things as our collective rejection of the Meech and Charlottetown Accords. But it is also evidenced in more everyday expressions of public value too. One of the most expressive examples of the changes wrought by the Charter in Canadian attitudes is to be found perhaps in a series of events seen in Alberta in recent years. Under the auspices of the province's Sexual Sterilization Act (operative between 1928 and 1972), many of the unfortunate inmates of Alberta's mental facilities were sterilized against their will. When Lelani Muir brought a lawsuit seeking damages for such actions against Alberta in 1998, the provincial government introduced before the legislature the Institutional Confinement and Sexual Sterilization Compensation Act which was intended to cap the permissible amount of damages in future claims for the forced sterilizations of the past. The legislation included an invocation of the Charter's notwithstanding clause, presumably to forestall s. 15 claims that the legislation's compensation limitations discriminated against mental patients and the disabled. The legislation was soon withdrawn, however: the angry response of Albertans to their government's attempts to deny the rights of their fellow citizens made the invocation of s. 33 politically unviable for the provincial government. Pierre Trudeau's constitutional theory was premised in no small part on the idea that
citizens “should be encouraged to seek what they consider just”. The *Charter* represents a strong encouragement in this regard, an invitation which Canadians appear to accept in growing numbers. In this sense I would argue, the ideal of moral agency might be thought to represent a new Canadian “primary value”.
Notes

1 It should be pointed out that the atomistic and self-interested individualism often associated with "American" rights culture need not be taken in the United States itself as a definitive statement of the values associated with rights claiming. The conception of rights as duties to others might equally reasonably be attributed to the guarantees of the Bill of Rights as to those of the Charter. Is Brown vs. Board of Education ((1954) 347 U.S. 483), for example, better understood as an expression of the United States Supreme Court's deference to Brown's self-interested selfishness, or of its recognition of him and other African-Americans as equal American citizens with their own personal identity and dignity?

2 As evidence of Trudeau's self-perception here, we might consider his discussion of this issue in a 1980 speech during the public debate around the Quebec sovereignty referendum. When Quebec premier René Lévesque, suggested that Trudeau was "not as much of a Quebecker as those who are going to vote YES" because his middle name was the English "Elliott" (Trudeau, 1980), Trudeau responded:

   Of course my name is Pierre Elliott Trudeau. Yes, Elliott was my mother's name. It was the name borne by the Elliots who came to Canada more than two hundred years ago. It is the name of the Elliots who, more than one hundred years ago, settled in Saint-Gabriel de Brandon, where you can still see their graves in the cemetery. That is what the Elliots are.
   My name is a Québec name, but my name is a Canadian name also, and that's the story of my name.

   (Trudeau, 1980)

3 Gary Botting offers a discussion of the importance of the Jehovah's Witnesses' situation in Quebec to the development of Trudeau's views in Fundamental Freedoms and Jehovah's Witnesses (Botting, 1993: 105 - 116).

4 Alan Cairns notes the widespread skepticism about the Charter expressed by Canadian political scientists in a chapter entitled "Political Scientists and the Constitutional Crisis" in his work, Disruptions (Cairns, 1991: 196). The very title of Keith Banting's and Richard Simeon's collection of early essays by Canadian political scientists on the Charter -- And No One Cheered (Banting and Simeon, 1983) -- similarly suggests the prevalence of this viewpoint among Canadian political scientists.
Bibliography


Re Objection by Quebec to Resolution to Amend the Constitution. [1981] 2 S. C. R. 793.


