PROTECTING RIGHTS AND FREEDOMS: ESSAYS ON THE CHARTER'S PLACE IN CANADA'S POLITICAL, LEGAL, AND INTELLECTUAL LIFE, eds. P. Bryden, S. Davis, & J. Russell (Toronto: University of Toronto Press, 1994).

Protecting Rights and Freedoms is a collection of 13 essays on the *Charter*,[1] originally presented in May 1992 at a conference sponsored by the British Columbia Civil Liberties Association and the Philosophy Department of Simon Fraser University.[2] Some might focus on the conference date as a reason for passing the book by; many students of the law are afflicted with a fetishism for the current — and nothing, they might say, is as old as yesterday's news. The issues considered by the contributors, however, are not dated. The issues are as fresh as the latest politician's attack on the *Charter* and as perennial as the tension between majority rule and minority rights.

The contributions are grouped under three headings: the *Charter* and Canadian Political Life,[3] the *Charter* in the Courts,[4] and the *Charter* and Our Intellectual Traditions.[5] Not only are the contributions theoretically diverse, but the contributors' disciplines are diverse. Contributors include journalists, a politician, legal and political science academics and philosophers. The book's unity of diversity is significant. The law has always been studied from a variety of perspectives. Different disciplines yield different and valuable reflections on the nature and effects of law. Philosophers and ethicists investigate the way the law should be and the conceptual underpinnings of the law; academic lawyers, what the law is and its possibilities; practicing lawyers, how to get things done with the law; sociologists, political scientists, and economists, the material effects of the law. What is increasingly recognized is that different perspectives should not be isolated, but institutionally coordinated and unified. The structure of this book and its linkage of diverse perspectives mirror the way in which the law should be studied, both for academic and political purposes.

---

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

2 P. Bryden, S. Davis, & J. Russell, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994).

3 The Right Honourable Kim Campbell (then Minister of Justice), "Parliament's Role in Protecting the Rights and Freedoms of Canadians" (*ibid.* at 23); P. Russell, "The Political Purposes of the Charter: Have They Been Fulfilled? An Agnostic's Report Card" (*ibid.* at 33); L. Gagnon, "The Charter and Quebec" (*ibid.* at 45); J. Simpson, "Rights Talk: The Effect of the Charter on Canadian Political Discourse" (*ibid.* at 52); Dean L. Smith, "Have the Equality Rights Made Any Difference?" (*ibid.* at 60).

4 A. Lajoie & H. Quillinan, "The Supreme Court Judges' Views of the Role of the Courts in the Application of the Charter" (*ibid.* at 93); P. J. Monahan, "The Charter Then and Now" (*ibid.* at 105); R. Elliot, "The Supreme Court's Rethinking of the Charter's Fundamental Questions (Or Why the Charter Keeps Getting More Interesting)" (*ibid.* at 129).

5 F. I. Michelman, "Is Democracy a Constitutional Right? New Turns in an Old Debate" (*ibid.* at 145); E. Z. Friedenberg, "Après Nous la Liberté?" (*ibid.* at 170); J. Tully, "Multirow Federalism and the Charter" (*ibid.* at 178); J. Russell, "Nationalistic Minorities and Liberal Traditions" (*ibid.* at 205). P. Bryden also provides an introductory essay: "Protecting Rights and Freedoms: An Overview" (*ibid.* at 3).

The value of *Protecting Rights and Freedoms* lies in its demonstration of the complex and ambiguous presence of the *Charter* in Canadian political life. In debates on national unity, democracy and "rights talk" culture, the *Charter* has been read as a script for heros and villains, liberators and tyrants, patriots and traitors. I shall briefly describe the contributors' readings of the *Charter* in these three debates.

The *Charter* was conceived as an instrument of national unity: "As lawyers, you will appreciate that the adoption of a constitutional Bill of Rights is intimately related to the whole question of constitutional reform. Essentially, we will be testing — and, hopefully, establishing — the unity of Canada."[6] By setting out the fundamental rights and freedoms of all Canadians, the *Charter* would confirm shared principles, firmly establish these principles as standards by which our political life would be governed, and thereby "break down the particularisms of region, province, language, and ethnicity, and highlight the common citizenship possessed by all Canadians."[7] It would be a symbol of Canadianism, our own version of the Declaration of Independence and the Bill of Rights, a papery national dream.[8] To some extent, the *Charter* has acted as a unifying force. Simpson refers to a November 1991 Focus Canada survey by Environics Research: "Seven in ten respondents — six of ten in Quebec — considered [the *Charter*] a 'very important' part of the Canadian identity, higher than for any other symbol."[9]

Nonetheless, commentators argue, the *Charter* has also been used as a tool of disunity, particularly when employed to assail Quebec's cultural politics. Russell writes that "English-speaking Canadians who in the past simply disliked Quebec's language policy [may] now, as Roger Gibbons has observed, 'wrap themselves in the flag of the *Charter* and come charging forward in defence of human rights.'"[10] English-speaking Canada (rightly or wrongly) has sought to impale Quebec on a dilemma: choose either a distinct society or the *Charter*.[11] Quebec may soon make its choice.

Tully perceives the *Charter* — at least in its present form and in its dominant interpretations — to be not so much an instrument of disunity, as an instrument of imposed unity. In his view, the over-arching *Charter* violates the principles of the Canadian federation of provinces, Anglophones and Francophones, and First Nations. Tully disputes the characterization of Canada as a unitary society; the *Charter* distorts our "plural federation."[12] Tully criticizes the *Charter* on two main grounds. First, he argues along classical liberal lines that consent is a necessary condition for the formation or amendment of a federation.[13] Since neither Quebec nor the First Nations have consented to the enactment of the *Charter*, its application to these groups is

---

6 P.E. Trudeau, "An Address to the Canadian Bar Association" (Quebec City, 4 September 1967) in *Federalism and the French Canadians* (Toronto: Macmillan of Canada, 1977) 52 at 54.

7 Monahan, *supra* note 4 at 120.

8 Russell, *supra* note 3 at 34; Gagnon, *supra* note 4 at 46; Tully, *supra* note 5 at 181.

9 Simpson, *supra* note 3 at 53; see Russell, *ibid.* at 35; Monahan, *supra* note 4 at 118-19.

10 Russell, *ibid.* at 36; citation omitted.

11 *Ibid.*

12 Tully, *supra* note 5 at 195.

13 *Ibid.* at 184, 186, 195-96.

illegitimate. Second, Tully argues for a principle of "legal and political continuity": "when a pre-existing body federates with others ... its laws, customs, and forms of self-government continue into the new federation."[14] The legal traditions of Quebec and the First Nations should have continued into the Canadian federation. Since the *Charter* imposes Anglo-Canadian legal concepts which are inconsistent with the legal traditions of Quebec and the First Nations, its application to these groups is, again, illegitimate.[15] Tully's vision is of Canada as a "strange federal multiplicity," in which the *Charter* does not dominate, but is coordinated with the jurisprudence of Quebec and the First Nations.[16]

John Russell comes to a conclusion similar to Tully's. The special legal status of the First Nations and Quebec should be recognized (although Quebec, in his view, requires only formal rather than material recognition of its distinctness).[17] Russell, however, understands the special legal status of "minority cultures" not to be supported by traditions outside the *Charter*, but to be expressions of the liberal values of equality, liberty, and respect for autonomy set out in the *Charter*.[18] Russell's argument, adapted from the work of Will Kymlicka, is thorough and sophisticated. Its main part might be sketched in the following way: The individual is "the ultimate unit of moral worth."[19] Individuals should be autonomous; they should have the capacity to develop themselves freely.[20] A precondition for meaningful and free self-development is a cultural structure.[21] To reach the position that some individuals may claim an unequal distribution of social goods to preserve particular cultural structures, a position apparently inconsistent with liberal egalitarianism, Russell distinguishes between circumstances that are chosen and unchosen. He holds that "people do not deserve to suffer from disadvantages that result from circumstances that are unchosen and thus are beyond their control ... though they can be legitimately required to suffer the disadvantages that result from their free choices."[22] In a democratic society, majoritarian processes will tend to aggregate social resources to favour the majoritarian culture. Members of a minority culture, then, suffer from disadvantages they have not chosen, and which they do not deserve to suffer. Ameliorative action to ensure the viability of minority cultures is therefore justified.[23] Russell argues that his position does not entail "Balkanization." The "minority cultures" that may claim special status are "nationalistic minorities" — "minority cultures ... bound together by ties of sentiment and a distinctive history and tradition."[24] Russell considers Quebec and the

---

14 *Ibid.* at 185.

15 *Ibid.* at 185, 186.

16 *Ibid.* at 195.

17 "French-speaking Quebeckers already have a viable and secure cultural context of choice and standards of living that are roughly comparable to other parts of Canada" (Russell, *supra* note 5 at 230-31).

18 *Ibid.* at 231.

19 *Ibid.* at 209.

20 *Ibid.* at 210.

21 *Ibid.*

22 *Ibid.* at 216.

23 *Ibid.*

24 *Ibid.* at 209, 219.

First Nations to be "nationalistic minorities" and the *Charter* to be open to an interpretation which accommodates their rights.[25]

Tully and Russell's arguments are a direct challenge to the liberal common citizenship ambition that seems to have inspired the framers of the *Charter*. In a time when Canada is a house divided, some may not welcome Tully and Russell's conclusions, but their arguments are well worth consideration.

The *Charter's* relationship to democratic politics is also ambiguous. Democracy is protected, some argue, by bills of rights and judicial review:

> The democratic principle requires that everyone have a voice in the political process and that it be possible for the minority of today to become the majority of tomorrow. If basic rights such as the freedoms of speech, of opinion, of association could be limited, without due process, by the majority of the day, the very democratic principle would be impaired.... Thus constitutional justice, far from being inherently anti-democratic and anti-majoritarian, emerges as a pivotal instrument for shielding the democratic and majoritarian principles from the risk of corruption.[26]

The *Charter*, particularly ss. 2 and 7 - 14, can be used to control the "tyranny of the majority," and to keep the state from improperly interfering with individual liberty.[27] Section 15 of the *Charter* is a means of correcting distortions in power relations that subvert democracy. The *Charter* is one of the few practical political weapons available to minority groups, groups that cannot rely on majoritarian, dominant, or elite institutions to protect their interests.[28]

Others argue, however, that the *Charter* is inimical to democratic institutions, both substantively and practically.[29] Substantively, *Charter* skeptics of the right see the *Charter* as the basis for the overturning of political decisions duly produced by our traditional parliamentary majoritarian institutions; in place of democracy, the *Charter* supports a form of judicial minority rule.[30] *Charter* skeptics of the left see the *Charter* as establishing old power relations in a new guise. The courts refuse to extend the *Charter* to sources of real power imbalance and thereby legitimate those *Charter*-free areas of life. Where the *Charter* does apply to invalidate state action, its effects are only rhetorical and no material changes follow. The *Charter* frequently validates pre-existing legal rules, legitimating them under descriptions like "fundamental justice," so that far from correcting oppression, the *Charter* entrenches it. Furthermore, the *Charter* may be used to roll back legislative developments designed to overcome oppression.[31]

---

25 *Ibid.* at 209, 231.

26 M. Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989) at 206-07.

27 Elliot, *supra* note 4 at 133.

28 Russell, *supra* note 3 at 37; Gagnon, *supra* note 3 at 48; Simpson, *supra* note 3 at 54; Smith, *supra* note 3 at 75.

29 Dean Smith sketches the positions of *Charter* skeptics of the left and right (Smith, *ibid.* at 64-65). See Russell, *ibid.* at 40-42.

30 Monahan, *supra* note 4 at 109.

31 *Ibid.* at 108, 111.

Practically, *Charter* skeptics of both the left and the right perceive *Charter* litigation to be a diversion from proper political activity, specifically grass-roots political organizing. In the *Charter* skeptics' view, the courts are not the appropriate forum for the resolution of political issues. The very framing of issues in the language of the law, not to mention the limitations of the adversary system, the biases of judges and lawyers, and the high cost and slow pace of litigation, prevent adequate resolutions from ever emerging from the courts.[32]

Dean Smith provides a sensible and clear-eyed antidote to *Charter* skepticism. In the course of arguing that s. 15 of the *Charter* "has done more good than harm for less advantaged persons and groups in Canadian society, and for the Canadian democratic system as a whole,"[33] she makes three key points. First, a simple point, nonetheless sometimes ignored by both the left and right is that: "the *Charter* and judicial review of government action [are] a *fait accompli* — whether or not we would have been better off without the *Charter*, it is now a part of our legal and constitutional world."[34] Second, given "the world as it is," *Charter* litigation should not be disdained *a priori*: "it is sensible to attempt ... to use the *Charter* in addition to (not in substitution for) ordinary political work designed to bring about legislative or administrative policy change in furtherance of egalitarian goals."[35] The costs and benefits of *Charter* litigation must be weighed, either against alternative forms of political activity, or as part of a coordinated group of tactics. *Charter* litigation may prove to be an intelligent course of action. Third, the *Charter* may have beneficial consequences — it may do "more good than harm." But for the *Charter* skeptics, this might have been an uncontroversial point. Dean Smith is sensitive to the difficulties of empirically evaluating legal successes. Win-loss statistics do not measure the strength or weaknesses of cases; moreover, it is difficult to assess whether legal change would have occurred without litigation, whether even unsuccessful litigation may "rouse political activity," or whether *Charter* successes lead to material improvements in affected persons' lives.[36] At the very least, Dean Smith reminds us to keep an open mind about the facts.

Monahan and Elliot might be understood to assuage some of the concerns of the *Charter* skeptics. They point to the evidence that the rate of successful *Charter* challenges to legislation is declining.[37] Section 1 of the *Charter* is increasingly used to subordinate rights claims to social interests protected by legislation. Monahan and Elliot note that the Supreme Court of Canada has sought to distinguish cases where deference to the legislature is appropriate (where legislation represents governmental mediation between the claims of competing groups),[38] from cases where the judiciary

---

32 Campbell, *supra* note 3 at 25-26; Smith, *supra* note 3 at 74-75.

33 Smith, *ibid.* at 60. Similar arguments might be constructed for other persons or groups, such as accuseds or convicts.

34 *Ibid.* at 61. One might add that the probability of repeal of the *Charter* is exceedingly low.

35 *Ibid.*

36 *Ibid.* at 65-67.

37 Monahan, *supra* note 4 at 114; Elliot, *supra* note 4 at 132.

38 *Irwin Toy Ltd.* v. *Quebec (A.-G.)*, [1989] 1 S.C.R. 927 at 993 [hereinafter *Irwin Toy*]; Monahan, *ibid.* at 114; Elliot, *ibid.* at 139-40.

considers itself competent to balance interests (particularly where legislation represents the government "as the singular antagonist of the individual whose right has been infringed").[39] Lajoie and Quillinan suggest, in a realist vein, that the Supreme Court's distinctions are based more on rhetoric and extra-legal factors than on principle.[40]

A last ambiguous contribution of the *Charter* is its gift to politics of the language of rights. The *Charter* is the source of our new "rights talk."[41] "Rights talk" has three main aspects. First, it tends to focus attention on rights-holders, on citizens. Russell refers to Alan Cairns' thesis that the *Charter*, "by shifting the focus of Canadian constitutionalism from the powers of governments to the rights of citizens, tends to convert 'a government's constitution to a citizen's constitution.'"[42] The *Charter* contributes to a less elitist, more democratic form of commonwealth. Second, rights talk gives the *Charter* pre-emptive effect. The *Charter* has infiltrated the legislative and executive branches of government. Legislation and executive policies are frequently designed to conform to *Charter* requirements: "the *Charter* belongs at least as much to the governments as it does to the courts."[43] Third, rights talk extends the influence of the *Charter* outside of *Charter* cases proper; the *Charter* has influenced the interpretation of human rights legislation, tort and family law.[44] One might say that the *Charter* has produced not only rights talk, but "rights thought."

While these aspects of rights talk may be valuable, the transformation of our interests into rights threatens to damage the Canadian fabric. We may assert rights interpreted as immunities or privileges, and claim "freedom from" social controls. The consequence of the assertion of such rights may be salutary liberty — or the avoidance of social responsibility. Rights may also be interpreted to impose duties on others to satisfy our needs. The consequence of the assertion of such rights may be the proper satisfaction of historically-denied interests — or the raising of the clamour of warring claims for shares of shrinking social resources. In any case, the difficulty with rights talk is that it tends not to be conducive to the negotiation and compromise required to keep a large and diverse multiplicity like Canada united. Simpson quotes Mary Ann Glendon:

> By indulging in excessively simple forms of rights talk in our pluralistic society, we needlessly multiply occasions for civil discord. We make it difficult for persons and groups with conflicting interests and views to build coalitions and achieve compromise, or even to acquire that minimal degree of mutual forbearance and understanding that promotes peaceful co-existence and keeps the door open to further communication.[45]

---

39 *Irwin Toy*, *ibid.* at 994; Monahan, *ibid.*; Elliot, *ibid.*

40 Lajoie & Quillinan, *supra* note 4 at 99-103.

41 Simpson, *supra* note 3 at 57.

42 Russell, *supra* note 3 at 34; citation omitted.

43 B. Slatterly, quoted by Smith, *supra* note 3 at 70; citation omitted.

44 *Ibid.* at 74. The *Charter* may also be an inspiration for developments in criminal law and evidence cases not directly involving the *Charter*.

45 Simpson, *supra* note 3 at 57; citation omitted.

We should not, of course, overestimate the intransigence of rights talk. Although Canada is planted thick with laws and rights, most civil and many criminal matters are resolved by negotiation.

National unity, democracy, and rights talk are all important issues, and none is now conceivable without the *Charter*. *Protecting Rights and Freedoms* provides challenging and disconcerting perspectives on these issues and our life with the *Charter*. The book is a stimulating companion to *Charter* study.

Wayne Renke
Assistant Professor
University of Alberta
Edmonton, Alberta