

DEMOCRACY AND THE LIVING TREE CONSTITUTION

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I. INTRODUCTION

The Author approaches the task of engaging Professor Strauss's book with a somewhat unusual mixture of unease and comfort. The comfort can be explained by two factors. First, the theory Professor Strauss defends is one with which the Author is almost in complete agreement. The Author also believes constitutions are, or at the very least can be, living entities. There is a very important sense in which a constitution is much more than a written text; it is both unnecessary and a mistake to restrict constitutional interpreters to original intentions and understandings. Even those who profess or claim to practice originalism fail to abide by its strictures. Constitutions both can and should be allowed to grow and adapt so as to accommodate changing circumstances; and the best way to view this process of growth and adaptation is to think of it as embodying, or at the very least emulating, familiar forms of common law reasoning. In other

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words, interpretation and development of the more abstract, morally charged provisions of constitutions to a very large extent mirror the ways in which common law notions like “negligent,” “reasonable,” and “inherently dangerous” have been successfully developed within other areas of the law.¹ Furthermore, the Author also believes that though this process of determining the contours of the living constitution both can be and is undertaken by actors outside of courts, the leading players are invariably the judges who are called on to provide authoritative answers to constitutional questions in highly controversial cases. And finally, the Author also believes the use of common law reasoning in constitutional cases results in nothing remotely like what the undisciplined, judicial free-for-all critics of living constitutionalism sometimes accuse its adherents of courting. On the contrary, when pursued with Burkean humility and due respect for the competing needs of antecedent guidance and flexibility, common law constitutionalism exemplifies the enlightened pursuit of the rule of law.

The second reason for the Author’s comfort is that living constitutionalism has, for many decades now, been the accepted paradigm in Canadian constitutional theory and practice. This is evident when one examines Canadian legal history, in particular the views of the Canadian Supreme Court, the body most responsible for determining both how the relatively new Canadian Constitution is conceived and how the various provisions of its incorporated Charter of Rights and Freedoms are to be interpreted and applied in concrete cases.² Canadian courts have, almost without exception, explicitly rejected originalism and embraced the idea, first introduced into Canadian law in 1929, that the constitution is “a living tree.”³ So unlike the United States, where constitutional ideology and practice seem, at least through the eyes of an outside observer, deeply divided between those who espouse some form of originalism and those who, like Professor Strauss, promote some form of living constitutionalism, Canada represents a far safer haven for a theorist bent on defending the latter.

So much for the comfort with which the Author approaches his task.

1. Because controversies over constitutional interpretation almost always revolve around the abstract, morally charged civil rights provisions, the Author’s discussion will focus almost exclusively on them.

2. *See, e.g.,* *Edwards v. Canada (Att’y Gen.)*, [1930] A.C. 124 (P.C.) 136 (appeal taken from Can.) (describing Canada’s constitution as “a living tree capable of growth and expansion within its natural limits”).

3. *See id.*

What explains his unease? Somewhat paradoxically, the primary source of the Author's unease is one of the above factors also explaining his comfort. As an analytic philosopher, the Author feels more at home when responding to a position with which he disagrees philosophically or when defending his own views against critics who see things differently. But as just noted, that is not the case here; the Author is in almost complete agreement with Professor Strauss. Further, the Author is neither an American lawyer nor an American legal scholar. As a result, he is hesitant to offer anything approaching critical commentary on the very interesting and enlightening chapters where Professor Strauss carefully traces the history of the First Amendment⁴ and the various legal and political events leading up to and following *Brown v. Board of Education*⁵ and *Roe v. Wade*.⁶ The Author will, however, venture to say that at least from the perspective of an untrained eye, it is difficult to see how the story Professor Strauss tells is anything but persuasive. It is also difficult to see how it could do anything but convince the most obstinate opponent that the living constitution is a fact of life within American constitutional practice. The Author shall have to leave it at that, however, and applaud Professor Strauss for the care and remarkable lucidity with which he accomplishes his objectives in these chapters.

Part II begins by discussing a pertinent part of Canadian constitutional history, starting with *Edwards v. Attorney-General for Canada*, a famous case decided by the United Kingdom's Privy Council in 1929, well before the new Canadian constitution and its Charter of Rights and Freedoms were formally adopted in 1982.⁷ Next, more recent history will be discussed, focusing on the somewhat tortured process leading up to the adoption of the Canadian Charter of Rights and Freedoms (Charter)⁸ and on a handful of early landmark cases in which the Supreme Court struggled to define and defend its approach to the application and interpretation of that transformational legal instrument. As will be seen, the court continued to explicitly embrace the idea of living

4. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 51–76 (Geoffrey R. Stone ed., 2010).

5. See *id.* at 77–80, 85–91 (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

6. See *id.* at 92–97 (discussing *Roe v. Wade*, 410 U.S. 113 (1973)).

7. *Edwards*, [1930] A.C. 124.

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

constitutionalism articulated in *Edwards*.⁹ It also continued to endorse the method of constitutional interpretation most naturally associated with that particular constitutional theory—what the court referred to as “purposive analysis.”¹⁰ In embracing living tree constitutionalism and purposive interpretation, the Justices were compelled to answer a variety of objections, many of which are addressed well by Professor Strauss. However, among the most prominent and influential of these objections, one that Professor Strauss acknowledges but does not deal with as successfully as he might, is the apparent undemocratic nature of living tree constitutionalism and, in particular, the practices of charter review¹¹ and interpretation with which it has come to be associated. Unlike Professor Strauss, the Canadian Court has been keen to repudiate the charge that judicial review under a living constitution is inherently undemocratic, but the Author believes it has not done so in a particularly convincing way. The court has relied almost exclusively on the undeniable premise that the Charter was not created and imposed by the courts themselves, but was the product of the legitimate democratic processes through which it was created and which seemed, almost by default, to leave much of its development and interpretation to the judiciary. This defense against the democratic objection has, somewhat understandably, left opponents of living constitutionalism almost completely unsatisfied, and it is not hard to see why. After all, that a society has for some reason chosen, through legitimate democratic means, to submit itself to tyrannical, one-man rule, would hardly be enough to establish the latter as a democratic form of government, let alone a legitimate one. More generally, that a form of government or process of decision making has been chosen by democratic means does not mean the object chosen automatically enjoys democratic legitimacy; this also goes for constitutions and charter review.

So far as can be determined, Professor Strauss also takes the democratic objection seriously, but he takes a decidedly different approach in answering it.¹² His response, so far as the Author can determine, is to say this: though there is nothing in the common law approach to its

9. See *infra* Part II.A (discussing *Edwards v. Attorney-General of Canada*).

10. *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, para. 21 (Can.).

11. For stylistic reasons, the phrase “charter review” will be used to refer to any practice whereby the judiciary is charged with assessing legislation and other acts of government for conformity with the abstract rights of political morality typically found in a constitutional charter or bill of rights.

12. See STRAUSS, *supra* note 4, at 46–49 (“There is certainly something undemocratic . . . about the U.S. constitutional system. . . . [However,] there is nothing intrinsically undemocratic about the common law approach . . .”).

constitution that renders the American constitutional system undemocratic, there is indeed something in a constitution itself, especially when its interpretation and application are coupled with the strong form of charter review introduced in *Marbury v. Madison*,¹³ that makes it so.¹⁴ And this, he seems to suggest, is just something we have to live with.¹⁵ Part III is an attempt to show why this all-too-easy concession to the democratically inspired opponents of living constitutionalism can be blunted if not avoided altogether. There are plenty of resources within the idea of a common law constitution and charter review which could have been utilized by Professor Strauss in answering his critics—to explain how and why constitutionalism of the living tree variety need not conflict with the fundamental principles of democracy.

II. SOME CANADIAN CONSTITUTIONAL HISTORY

A. *Edwards v. Attorney-General of Canada*

One of the most famous and influential cases in Canadian legal history is undoubtedly *Edwards v. Attorney-General of Canada*, which was decided by the Judicial Committee of the United Kingdom's Privy Council in 1929 and is now commonly referred to as "The Persons Case."¹⁶ At issue in *Edwards* was a key question of interpretation involving The British North America Act (BNA Act) of 1867, an Act of the U.K. Parliament that created the Dominion of Canada and defined its various government bodies and offices.¹⁷ When Alberta social activist Emily Murphy was appointed in 1916 as the first female police magistrate in Alberta, the appointment was challenged on the ground that women were not persons under the BNA Act.¹⁸ According to section 24 of the BNA Act,

The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and

13. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

14. STRAUSS, *supra* note 4, at 47.

15. *See id.* at 48–49.

16. *Edwards v. Canada (Att'y Gen.)*, [1930] A.C. 124 (P.C.) (appeal taken from Can.).

17. *See id.* at 126. This Act was originally cited as *The British North American Act, 1867*. However, as of 1982, the Act may be cited as the *Constitutional Act, 1867*. *Constitution Act, 1867*, 30 & 31 Vict., c. 3, § 1 (U.K.).

18. *Edwards*, [1930] A.C. at 126–27.

a senator.¹⁹

In 1917, the Alberta Supreme Court ruled that women were indeed persons, but that ruling applied only within the province of Alberta.²⁰ Many years later, Ms. Murphy allowed her name to stand as a candidate for the Canadian Senate, but Prime Minister Borden rejected her candidacy on similar grounds, citing the fact that she was not, for purposes of the BNA Act, a person, and thus did not qualify for Senate membership.²¹ In 1927, Ms. Murphy, together with four other prominent Alberta women's rights activists, now immortalized in Canada as "the Famous Five," challenged the Prime Minister's decision before the Supreme Court of Canada.²² The court ruled against them.²³ The Chief Justice, together with three other members of the court, relied mainly on "the common law disability of women to hold public office and from a consideration of various cases which had been decided under different statutes as to their right to vote for a member of Parliament."²⁴ Justice Duff agreed with the majority's final conclusion, but his argument was based on the narrower ground that a close examination of the BNA Act's wording revealed "the word 'persons' in s[ection] 24 is restricted to members of the male sex."²⁵ The end result was the same, however, and the Justices unanimously ruled the word "persons" did not include women; Ms. Murphy, though qualified in every other respect, was therefore ineligible for appointment to the Senate.²⁶

Undeterred by this result, the Famous Five appealed to the U.K.'s Judicial Committee of the Privy Council—the highest court of appeal under Canadian law at the time.²⁷ On October 18, 1929, Lord Sankey, Lord Chancellor of the Council, announced "the word 'persons' in s[ection] 24 includes members both of the male and female sex, and . . . that women are eligible to be summoned to and become members of the Senate of

19. *Id.* at 126 (quoting Constitution Act, 1867, c. 3, § 1).

20. *See R. v. Cyr* (1917), 38 D.L.R. 601, 611–12 (Can. Alta. S.C.).

21. ROBERT J. SHARPE & PATRICIA I. MCMAHON, *THE PERSONS CASE: THE ORIGINS AND LEGACY OF THE FIGHT FOR LEGAL PERSONHOOD* 3 (2007).

22. *See Edwards*, [1930] A.C. at 126–27; *see generally Persons Case—Background Information*, GOVERNMENT OF ALBERTA: CHILDREN AND YOUTH SERVICES, <http://www.child.alberta.ca/home/1069.cfm> (last visited Aug. 3, 2011).

23. *Edwards*, [1930] A.C. at 127.

24. *Id.*

25. *Id.*

26. *See id.*

27. *See The "Persons" Case*, THE FAMOUS 5 FOUNDATION, http://www.famous5.ca/w_personscase.html (last visited Aug. 3, 2011).

Canada.”²⁸ The Council further ruled “[t]he exclusion of women from all public offices [was] a relic of days more barbarous than ours. . . .”²⁹ Additionally, the Council stated, “[T]o those who ask why the word [persons] should include females the obvious answer is why should it not?”³⁰ Thus, *Edwards* is famous and important for two reasons: first, it established women are indeed “persons” and are therefore eligible for appointment to public offices such as the Canadian Senate;³¹ second, and equally important, it also introduced into Canadian constitutional law the “living tree” metaphor.³² This idea is repeatedly endorsed by Canadian courts and lies behind key features of Canada’s constitution and the approach Canadian courts have taken to constitutional interpretation and development.³³ The metaphor was developed throughout the Council’s decision.³⁴

The Famous Five faced two substantial hurdles in making their case. First, nowhere in the BNA Act does one actually find mention of women or female persons.³⁵ Indeed, the statute used the word “persons” when the intention was clearly to refer to more than one person, and the word “he” was employed when the intended referent was a single person.³⁶ Second, and perhaps more importantly, women, with a few notable exceptions, were not generally deemed capable of exercising public functions under nineteenth century common law.³⁷

In England no woman under the degree of a Queen or a Regent, married or unmarried, could take part in the government of the state. A woman was under a legal incapacity to be elected to serve in Parliament and even if a peeress in her own right she was not, nor is, entitled as an incident of peerage to receive a writ of summons to the

28. *Edwards*, [1930] A.C. at 143.

29. *Id.* at 128.

30. *Id.* at 138.

31. *See id.* at 143.

32. *See id.* at 136.

33. *See, e.g.*, *Law Soc’y of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357, para. 10 (Can.) (quoting *Edwards*, [1930] A.C. at 136) (referencing the Privy Council’s statement regarding a “living tree”).

34. *See, e.g.*, *Edwards*, [1930] A.C. at 136 (“The British North American Act planted in Canada a living tree capable of growth and expansion within its natural limits.”).

35. *See* Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.).

36. *Edwards*, [1930] A.C. at 125, 134, 141.

37. *See id.* at 128–29, 134.

House of Lords.³⁸

Hence, it seemed obvious the original legal understanding of “persons” in 1867 was such as to preclude women from holding public office, except in highly unusual cases of which this was not an instance.³⁹ For a number of reasons, the Council refused to base its decision on this understanding. The notable reasons were the Council’s views concerning the special nature of constitutions, even those of ordinary statutory origin, as this one was;⁴⁰ its belief that such instruments are deliberately designed to facilitate evolution so as to meet changing social circumstances and moral and political views;⁴¹ and its observation that the place of women within society had evolved considerably since the nineteenth century.⁴²

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. “Like all written constitutions it has been subject to development through usage and convention”

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house⁴³

Quoting Clement’s Canadian Constitution, the Committee went on to add the following:

“The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament’s real intent if applied to an Act passed to

38. *Id.* at 128.

39. *Id.* at 128–30.

40. *See id.* at 136–37.

41. *See id.*

42. *See id.* at 142–43.

43. *Id.* at 136 (quoting ROBERT BORDEN, CANADIAN CONSTITUTION STUDIES 55 (1922)).

ensure the peace, order and good government of a British Colony.”⁴⁴

And finally, the Committee added, ““That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words.””⁴⁵

The living tree conception introduced in *Edwards* continued to exert considerable influence in Canadian courts and was instrumental in shaping the Supreme Court’s initial response to the groundbreaking Charter of Rights and Freedom. Indeed, distinct echoes of *Edwards* can be found in *Skapinker*, the very first case decided under the new constitutional regime.⁴⁶ Before discussing *Skapinker*, discussion of a pre-Charter case dealing with the legitimacy of government attempts to introduce the new Canadian constitution in the 1980s may be very instructive.

B. *The Patriation Reference*

During the period from 1867 to 1982, Canadian constitutional law revolved mainly around application and interpretation of the BNA Act of 1867. As noted earlier, this was an instrument that had been formally adopted (or approved or ratified) by neither the people of Canada nor their elected representatives.⁴⁷ On the contrary, it was an ordinary statute of the U.K. Parliament, one that, to be sure, had the rather extraordinary task of establishing a new nation, albeit with strong colonial ties to the mother country.⁴⁸ Though for all practical purposes, Canada evolved into a fully independent state in the decades that followed its creation; strictly speaking, the country owed its continued legal existence to the good graces of the U.K.’s Parliament and courts.⁴⁹ In 1931, an Empire Conference was

44. *Id.* at 136–37 (quoting W.H.P. CLEMENT, *THE LAW OF THE CANADIAN CONSTITUTION* 347 (3d ed. 1916)).

45. *Id.* at 137 (quoting *St. Catherine’s Milling & Lumber Co. v. The Queen*, [1888] 14 App. Cas. 46, 50 (P.C.) (appeal taken from Can.)).

46. *See* *Law Soc’y of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357, para. 10 (Can.).

47. *See supra* text accompanying note 17.

48. *See supra* text accompanying note 17.

49. As noted above, in 1929, when *Edwards* was decided, the final court of appeal under Canadian law was the Judicial Committee of the Privy Council. The Judicial Committee’s superior appellate jurisdiction over Canada did not end until 1933 for criminal appeals and 1949 for civil appeals. It is also worth noting that the BNA Act was amended several times before 1982, usually at the request of the Canadian Federal government, acting on its behalf and on behalf of the provinces.

convened that included the leaders of all the countries within the British Empire. Among the notable results of that conference was the general agreement on the content of the Statute of Westminster, 1931, which was adopted formally by the U.K. Parliament later that year.⁵⁰ This statute, subject to ratification by the national legislatures of the Empire's member states, granted full independence to all existing dominions,⁵¹ replaced the British Empire with the Commonwealth of Nations,⁵² and was aimed at severing the BNA Act from its British roots.⁵³ The Canadian Parliament was among those dominions that immediately ratified the Statute of Westminster, but it requested delay for implementation because it could not secure the agreement of all provincial governments on the addition of an amending formula.⁵⁴ It would be another fifty years before nearly unanimous agreement on a new constitution could be achieved—before, that is, the BNA Act with an amending formula and charter of rights could be “patriated” to its new Canadian home as The Constitution Act, 1982.⁵⁵

The process leading up to patriation was far from easy.⁵⁶ The federal government of the day, led by Prime Minister Pierre Trudeau, was at a constitutional crossroads, not only because of the newly proposed amending formula but also, and principally, because of the government's proposal to include its newly minted charter of rights.⁵⁷ This addition would have radically transformed the Canadian system from one based largely on the Westminster model of unlimited parliamentary

50. Statute of Westminster, 1931, 22 Geo. 5, c. 4 (U.K.).

51. *See id.* § 4.

52. *See id.* § 1.

53. *See id.* §§ 1–9.

54. *Why, in 1931, Canada Chose Not to Exercise Its Full Autonomy as Provided Under the Statute of Westminster*, GOVERNMENT OF CANADA PRIVY COUNCIL OFFICE, <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=hist&sub=westminster&doc=westminster-eng>. (last modified Mar. 8, 2010).

55. *See* William C. Hodge, *Patriation of the Canadian Constitution: Comparative Federalism in a New Context*, 60 WASH. L. REV. 585, 589 (“Success resulted with the concurrence of nine of ten provinces and the passage of the constitutional package by the Canadian Commons on December 2, 1981. . . . [T]he new Canada Act became the Constitution of Canada on April 17, 1982.”).

56. *Id.* at 586–89 (describing “the legally significant stages in the patriation struggle”).

57. Bruce A. Ackerman & Robert E. Charney, *Canada at the Constitutional Crossroads*, 34 U. TORONTO L.J. 117, 125–26 (1984); *see also* Hodge, *supra* note 55, at 589 (noting “[p]rovincial leaders and federal ministers did struggle through fourteen months of negotiation on a charter of rights”). Hodge also explained: “Provincial opposition to the Charter, as promulgated, was considerable . . .” *Id.* at 619.

sovereignty—within spheres of federal and provincial jurisdiction, duly defined by the constitution—to one incorporating substantive moral limits on the powers of both parliament and the provincial legislatures.⁵⁸

The objections were predictable. Such a transformation would accord far too much political power to judges, thereby threatening the rule of law and undermining the principles of democracy.⁵⁹ The people and their representatives would now be held hostage to the ruminations of unelected judges who would, in applying the charter's abstract moral provisions, interpret them in accordance with their own personal moral beliefs and biases.⁶⁰ Resistance arose, bolstered by the claim that any such step without the prior agreement of the provinces—whose powers would be seriously affected—would be in serious violation of constitutional law.⁶¹ The end result was yet another landmark case, now commonly known as the *Patriation Reference*,⁶² in which a number of provinces petitioned the Canadian Supreme Court to declare the Trudeau government's possible unilateral move unconstitutional.⁶³ The court ruled somewhat paradoxically that such a request, though not in violation of constitutional law, would nonetheless be unconstitutional.⁶⁴

In so doing, the court gave further weight to the claim that, in Canada at least, things are as Professor Strauss suggests they are in the United States—that is, there is much more to the relevant constitution than any written document(s) upon which it revolves. In coming to its somewhat paradoxical decision—that the government's proposed action was unconstitutional, though not in violation of constitutional law—the court drew upon Dicey's distinction between *constitutional laws* and *constitutional conventions*:

The one set of rules are in the strictest sense “laws,” since they are rules which (whether written or unwritten, whether enacted by statute

58. See Ackerman & Charney, *supra* note 57, at 130–31.

59. See David Close, *Politics and Constitutional Reform in Canada: A Study in Political Opposition*, PUBLIUS, Winter 1985, at 161, 169 (“Underlying all of these objections, though, was the provinces’ concern about potential losses of legislative jurisdiction.”).

60. See Ackerman & Charney, *supra* note 57, at 125–26.

61. See Hodge, *supra* note 55, at 624–25.

62. *In re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (Can.) [hereinafter *Patriation Reference*].

63. See *id.* at 762–63; see also Hodge, *supra* note 55, at 626–27.

64. See *Patriation Reference*, [1981] 1 S.C.R. at 909 (dissenting opinion).

or derived from the mass of custom, tradition, or judge-made maxims known as the common law) are enforced by the courts; these rules constitute “constitutional law” in the proper sense of that term, and may for the sake of distinction be called collectively “the law of the constitution.”⁶⁵

According to the law of the Canadian Constitution, so construed, there was absolutely nothing to prevent the Trudeau government from taking its formal request to the U.K. Parliament.⁶⁶ Nor was there anything to prevent the U.K. Parliament from acceding to it.⁶⁷ But there is more to a constitution than constitutional law, the court opined.⁶⁸ Discussing this, the dissenting Justices also turned to Dicey, this time quoting him at length.

“The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the ‘conventions of the constitution,’ or constitutional morality. . . . Under the English Constitution they have one point in common: they are none of them “laws” in the true sense of that word, for if any or all of them were broken, no court would take notice of their violation. . . . With conventions or understandings he [the lawyer and law teacher] has no direct concern. They vary from generation to generation, almost from year to year. Whether a Ministry defeated at the polling booths ought to retire on the day when the result of the election is known, or may more properly retain office until after a defeat in Parliament, is or may be a question of practical importance. The opinions on this point which prevail to[]day differ (it is said) from the opinions or understandings which prevailed thirty years back, and are possibly different from the opinions or understandings which may prevail ten years hence. Weighty precedents and high authority are cited on either side of this knotty question The subject, however, is not one of law but of politics, and need trouble no lawyer or the class of any professor of law. If he is concerned with it at all, he is so only in so far as he may be called upon to show what is the connection (if any there be) between the

65. *Id.* at 854 (quoting ALBERT V. DICEY, *THE LAW OF THE CONSTITUTION* 23–24 (10th ed. 1959)).

66. *See id.* at 808 (majority opinion).

67. *See id.*

68. *See id.* at 876–77 (dissenting opinion).

conventions of the constitution and the law of the constitution.”⁶⁹

Given the discussion of Dicey’s views on the nature and role of constitutional conventions, it was open to the court simply to note the distinction and leave it at that.⁷⁰ The court could have declined to deal with the further question of whether the Trudeau government’s action was in violation of constitutional convention. After all, as the court noted, such conventions are not enforceable in courts.⁷¹ But the court chose not to take this easy route and instead let it be known that, in its view, the Trudeau government’s proposed course of action would seriously violate an important constitutional convention, thus rendering the action unconstitutional.⁷² No doubt the court took this route because of its stated belief that some constitutional conventions are in fact more important than many constitutional laws⁷³—and a convention bearing directly on this case was one of them.⁷⁴ The court stated,

It should be borne in mind however that, while they are not laws, *some conventions may be more important than some laws*. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system. They come within the meaning of the word “Constitution” in the preamble of the *British North America Act, 1867*: “Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united . . . with a Constitution similar in Principle to that of the United Kingdom[]” . . .

That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it

69. *Id.* at 854–55 (first alteration in original) (quoting DICEY, *supra* note 65 at 23–24, 27, 30–31); *cf.* *Edwards v. Canada (Att’y Gen.)*, [1930] A.C. 124 (P.C.) 136 (appeal taken from Can.) (quoting ROBERT BORDEN, *CANADIAN CONSTITUTIONAL STUDIES* 55 (1922) (remarking constitutional documents are “subject to development through usage and convention”).

70. *See Patriation Reference*, [1981] 1 S.C.R. at 878–80 (citations omitted) (noting Dicey coined and developed the term “conventions of the constitution”).

71. *See id.* at 880–82 (citations omitted).

72. *See id.* at 909 (“[T]he passing of this Resolution without such agreement would be unconstitutional in the *conventional* sense” (emphasis added)); *see generally id.* at 883–909 (citations omitted) (providing the justification and analysis of the court’s decision to rule on the constitutionality of the resolution based on a constitutional convention).

73. *See id.* at 883.

74. *See id.* at 900, 909.

entails no direct legal consequence. But the words “constitutional” and “unconstitutional” may also be used in a strict legal sense, for instance with respect to a statute which is found *ultra vires* or unconstitutional. The foregoing may perhaps be summarized in an equation: *constitutional conventions plus constitutional law equal the total constitution of the country.*⁷⁵

Adding further weight to its claim that some constitutional conventions are much more important than many constitutional laws, the court noted,

[M]any Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the most familiar because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the constitution. For instance it is a fundamental requirement of the constitution that if the opposition obtains the majority at the polls, the government must tender its resignation forthwith. But fundamental as it is, this requirement of the constitution does not form part of the law of the constitution.⁷⁶

Later, the court added this observation, which was relevant to the issue of whether constitutions are living entities:

The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period. For example, the constitutional value which is the pivot of the conventions stated above and relating to responsible government is the democratic principle: the powers of the state must be exercised in accordance with the wishes of the electorate⁷⁷

Among the most important constitutional conventions of Canada was the long-standing convention that “the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces.”⁷⁸ The

75. *Id.* at 883–84 (emphasis added).

76. *Id.* at 877–78.

77. *Id.* at 880.

78. *See id.* at 870. This convention is now formalized in the amending formula attached to the new constitution:

An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so

dissent added, “The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition.”⁷⁹ But it was clear that the Trudeau government did not have a reasonable measure of substantial agreement from the provinces.⁸⁰ As a result, the government went back to the drawing board and once again attempted to garner the support of the provinces.⁸¹ An agreement was ultimately reached that incorporated certain key features into the new constitution designed to placate the most forceful and influential critics.⁸² Among those features were two provisions commonly referred to as “the reasonable limitations clause” and “the notwithstanding clause.”⁸³ The reasonable limitations clause, found in section 1 of the Charter, states that it “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.”⁸⁴ This provision was likely intended to leave Parliament and the provincial legislatures considerable room to pursue valid social objectives without the looming threat of judges thwarting their legitimate efforts out of an inflated concern for the protection of individual rights. The notwithstanding clause provided an even greater safeguard. Section 33 states: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”⁸⁵ With

authorized by

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, Part V, 38(1)(a)–(b) (U.K.).

79. *Patriation Reference*, [1981] 1 S.C.R. at 870.

80. *See id.* at 762 (noting three provinces challenged the potential resolution); *see also* Ackerman & Charney, *supra* note 57, at 133 (“[T]he separatist defeat in the Quebec referendum did not imply that the provincial government was obligated to accept the terms proffered to it by the rest of Canada. . . . [T]he requirement of ‘substantial’ agreement placed a cloud on the entire process of repatriation.”).

81. *See* Ackerman & Charney, *supra* note 57, at 133.

82. *See* Hodge, *supra* note 55, at 632.

83. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, §§ 1, 33(1) (U.K.).

84. *Id.* § 1.

85. *Id.* § 33.

the addition of these key features, the agreement of all provinces save one, Quebec, was eventually secured.⁸⁶ In 1982, the parliaments of the United Kingdom and Canada passed parallel acts—the Canada Act, 1982, and the Constitution Act, 1982; at a formal ceremony on Parliament Hill in Ottawa, Queen Elizabeth II formally signed both acts into law on April 17, 1982, thus patriating the constitution of Canada and solidifying its legal status as a fully independent nation.⁸⁷

C. The Law Society of Upper Canada v. Skapinker

As noted above, the very first case decided under the new constitutional regime was *The Law Society of Upper Canada v. Skapinker*.⁸⁸ Joel Skapinker was a citizen of South Africa residing in Canada when his application to the Ontario bar to practice law was refused on the ground that Ontario's Law Society Act required Canadian citizenship.⁸⁹ Skapinker sought to have the relevant provision of the Act declared inoperative on the ground that it violated section 6(2)(b) of the Charter,⁹⁰ which stipulates "[e]very citizen of Canada and every person who has the status of a permanent resident of Canada has the right . . . to pursue the gaining of a livelihood in any province."⁹¹ At trial, Skapinker's claim was denied.⁹² Following a successful appeal to the Court of Appeal for Ontario,⁹³ the case found its way to the Supreme Court, which in turn ruled that Skapinker's Charter rights had not been violated.⁹⁴ In coming to its decision, the court cited the following reasons—reasons which reveal the court's continued endorsement of living tree constitutionalism:

There are some simple but important considerations which guide a Court in construing the *Charter* The *Charter* comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it

86. Hodge, *supra* note 55, at 632. To this day, Quebec has declined formally to assent to the Constitution Act, 1982.

87. *Id.*

88. *Law Soc'y of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357 (Can.).

89. *Id.* at para. 2.

90. *Id.* at para. 3.

91. *Id.* at para. 9 (quoting Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 6(2)(b) (U.K.)).

92. *See id.* at para. 3.

93. *See id.* at para. 4.

94. *See id.* at paras. 32–34.

“is the supreme law of Canada”: *Constitution Act, 1982*, s[ection] 52. It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The *Charter* is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*). With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.⁹⁵

Interestingly, the court went on to invoke the American experience with specific reference to *Marbury* and *McCulloch*.⁹⁶ Of particular relevance, for our purposes here, is the following quotation from the latter:

“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . In considering this question, then, we must never forget, that it is *a constitution* we are expounding.”⁹⁷

D. *R. v. Big M Drug Mart Ltd.*

Skapinker dealt with mobility rights and the right to pursue a livelihood in any province.⁹⁸ *R v. Big M Drug Mart Ltd.*, the next key decision for the court and its evolving understanding of the Charter, brought to the fore even thornier issues surrounding, in this instance,

95. *Id.* at para. 11.

96. *See id.* at paras. 12–13 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

97. *Id.* at para. 13 (quoting *McCulloch*, 17 U.S. at 407).

98. *See id.* at paras. 7–8.

freedom of religion.⁹⁹ At issue was The Lord's Day Act, which required most businesses to close on Sunday.¹⁰⁰ The court observed the intended purpose of this statute was clearly to maintain the Christian Sabbath as a holy day.¹⁰¹ The main question became whether such a purpose caused the statute to infringe upon section 2(a) of the Charter, which guarantees "freedom of conscience and religion."¹⁰² The court ruled that it did.¹⁰³ As the court saw things, "[t]he meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood . . . in light of the interests it was meant to protect."¹⁰⁴ The court stated,

[T]he purpose of a right or freedom . . . is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.¹⁰⁵

Furthermore, "[t]he interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection."¹⁰⁶ "At the same time," the court added, "it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in [*Skapinker*] illustrates, be placed in its proper linguistic, philosophic and historical contexts."¹⁰⁷

So while the Supreme Court was happy to count as significant a range of factors, including original, historically ascertained meanings and intentions, such factors were in no way dispositive.¹⁰⁸ To treat them as dispositive would

99. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, para. 2 (Can.).
100. See *id.* at paras. 2, 5 (quoting Lord's Day Act, R.S.C. 1970, c. L-13, §§ 2, 4).
101. *Id.* at para. 78.
102. *Id.* at paras. 31, 79.
103. *Id.* at para. 151.
104. *Id.* at para. 116.
105. *Id.* at para. 117.
106. *Id.*
107. *Id.*
108. See *id.*

“stunt the growth of the law and hence the community it serves.”¹⁰⁹ In other words, it would be like forgetting one of the central lessons of *Edwards* and *McCulloch*: it is a *constitution* that is being expounded.¹¹⁰

E. In re B.C. Motor Vehicle Act

Next up was *In re B.C. Motor Vehicle Act*,¹¹¹ a case that once again raised fundamental questions of constitutional theory, including the nature and very legitimacy of charter review.¹¹² It also raised fundamental questions concerning the validity “of various techniques of constitutional interpretation.”¹¹³ At issue in *B.C. Motor Vehicle* was the constitutional validity of a provision creating an absolute liability driving offense.¹¹⁴ According to the Motor Vehicle Act, anyone who drove while legally prohibited from doing so was guilty of an offense and liable to either fine or imprisonment.¹¹⁵ The Act “create[d] an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.”¹¹⁶ The case had been referred earlier by the British Columbia Lieutenant-Governor to the British Columbia Court of Appeal, which found section 94(2) of the Act to be of no force or effect due to its inconsistency with section 7 of the Charter.¹¹⁷ That provision states, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹¹⁸ The court of appeal held that absolute liability driving offenses were not compatible with the principles of fundamental justice in any way.¹¹⁹ Unhappy with this result, the British Columbia

109. Law Soc’y of Upper Can. v. Skapinker, [1984] 1 S.C.R. 357, para. 11 (Can.).

110. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *Edwards v. Canada (Att’y Gen.)*, [1930] A.C. 124 (P.C.) 136 (appeal taken from Can.).

111. *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (Can.).

112. *Id.* at para. 10.

113. *Id.*

114. *Id.* at para. 6 (quoting Motor Vehicle Act, R.S.B.C. 1979, c. 288, § 94, as amended by Motor Vehicle Amendment Act, 1982 (B.C.), c. 36, § 19).

115. See Motor Vehicle Act, R.S.B.C. 1979, c. 288, § 94, as amended by Motor Vehicle Amendment Act, 1982 (B.C.), c. 36, § 19).

116. See *id.* at § 94(2).

117. *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at paras. 4–5, 8.

118. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 7 (U.K.).

119. See *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at para. 8 (citations omitted).

Attorney General referred the case to the Canadian Supreme Court, which affirmed the British Columbia Court's earlier judgment.¹²⁰ Once again, however, of particular importance for our purposes is not the final result, but rather how the court viewed its task and the manner in which it set out to justify its decision.

Writing for the court, Chief Justice Lamer began by noting the case once again brought to the fore "fundamental questions of constitutional theory, including the nature and the very legitimacy of constitutional adjudication under the *Charter* as well as the appropriateness of various techniques of constitutional interpretation."¹²¹ He further observed that "[t]he novel feature of the *Constitution Act, 1982* . . . [was] not that it ha[d] suddenly empowered courts to consider the content of legislation. This the courts have done for a good many years when adjudicating upon the *vires* of legislation."¹²² Instead, "values subject to constitutional adjudication now pertain to the rights of individuals as well as the distribution of governmental powers."¹²³ Therefore, "it is the scope of constitutional adjudication which [was] altered rather than its nature, at least, as regards the right to consider the content of legislation."¹²⁴ Expanding on these crucial points, Justice Lamer observed, "Section 7, like most of the other sections in the *Charter*, limits the bounds of legislative action. It is the function of the Court to determine whether the challenged legislation has honoured those boundaries. This process necessitates judicial review of the content of the legislation."¹²⁵

So far, so good: charter review necessitates assessment of the content of legislation to determine whether that content can be reconciled with the rights enshrined in the Charter.¹²⁶ But does this also require courts to assess the wisdom of legislative choices made by those duly authorized in a democracy to make such choices? This was the view of many who continued to despair over the inclusion of the Charter in the new constitution and those who wished to restrict its effects as much as possible. The court recognized this fear:

[I]n the context of s[ection] 7, and in particular, of the interpretation of

120. *Id.* at paras. 4, 96–98.

121. *Id.* at para. 10.

122. *Id.* at para. 12.

123. *Id.* at para. 13.

124. *Id.*

125. *Id.* at para. 15 (quoting Attorney General for Ontario, *factum*).

126. *See id.*

“principles of fundamental justice,” there has prevailed in certain quarters an assumption that all but a narrow construction of s[ection] 7 will inexorably lead the courts to “question the wisdom of enactments”, to adjudicate upon the merits of public policy.¹²⁷

The court continued:

From this have sprung warnings of the dangers of a judicial “super-legislature” beyond the reach of Parliament, the provincial legislatures and the electorate. The Attorney General for Ontario, in his written argument, stated that, . . . “the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.”¹²⁸

In answering this popular objection, Justice Lamer drew upon the unsatisfactory line of defense to which the Author drew attention above:

This is an argument which was heard countless times prior to the entrenchment of the *Charter* but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.¹²⁹

So in the court’s view, questions surrounding the legitimacy of judicial review under the Charter must be put to rest on the ground that both the process and its inevitable consequences were, in effect, chosen by the people’s elected representatives.¹³⁰ Of course, that only begins to answer the concerns of those worried about issues of legitimacy because the mere fact that courts, in assessing legislation, must apply a charter leaves open the question of *how* this should be done. In other words, it leaves open how to conceive of the constitutional constraints imposed by a charter and how judges are to go about interpreting those constraints when engaged in the process of charter review. It was here that the court once again firmly

127. *Id.*

128. *Id.* at para. 16 (quoting Attorney General for Ontario, factum).

129. *Id.*

130. *See id.*

committed itself to living tree constitutionalism and rejected explicitly anything remotely like a robust originalist theory.

The pivotal question in *B.C. Motor Vehicle* was how to interpret section 7, in particular, its reference to “the principles of fundamental justice.”¹³¹ Was this phrase to be understood as only contemplating pure procedural justice, or did it extend to significant principles of substantive justice?¹³² The court ultimately decided the phrase encompassed more than pure procedure but had to fend off the concern that opening up section 7 in this way would reintroduce questions of democratic legitimacy.¹³³ As Justice Lamer observed:

The overriding and legitimate concern that courts ought not to question the wisdom of enactments, and the presumption that the legislator could not have intended [the] same, have to some extent distorted the discussion surrounding the meaning of “principles of fundamental justice”. This has led to the spectre of a judicial “super-legislature” This in turn has also led to a narrow characterization of the issue and to the assumption that only a procedural content to “principles of fundamental justice” can prevent the courts from adjudicating upon the merits or wisdom of enactments. If this assumption is accepted, the inevitable corollary, with which I would have to then agree, is that the legislator intended that the words “principles of fundamental justice” refer to procedure only.¹³⁴

The court’s response was multifaceted. First, it noted, the phrase “principles of fundamental justice” connotes a conceptually wider category than the phrase “principles of procedural (or natural) justice.”¹³⁵ Second, common law courts have historically considered more than natural or procedural justice when assessing statutes.¹³⁶ “Since way back in time and even recently the courts have developed the common law beyond procedural safeguards without interfering with the ‘merits or wisdom’ of

131. See *id.* at para. 10. The question mirrors debates in the United States regarding whether the Due Process Clause contemplates substantive due process. Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 172 (2003).

132. See *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at paras. 17–18.

133. See *id.* at paras. 19–20.

134. *Id.* at para. 19.

135. See *id.* at paras. 19, 32.

136. See *id.* at para. 20 (citing *Kienapple v. The Queen*, [1975] 1 S.C.R. 729 (Can.)).

enactments.”¹³⁷ So there were neither conceptual nor legal impediments to the court at least considering the question whether section 7 should be interpreted so as to refer to substantive as well as procedural justice. That brought the court right back to the fundamental questions of interpretation addressed in *Skapinker* and *Big M Drug Mart* where, as we have seen, the court wholeheartedly embraced living tree constitutionalism and purposive interpretation.¹³⁸

“The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. . . . The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter’s* protection.”¹³⁹

So what were the particular “interests” section 7 was meant to protect? The answer was, in part, provided in sections 8–14, which “address specific deprivations of the ‘right’ to life, liberty and security of the person in breach of the principles of fundamental justice It would be incongruous to interpret s[ection] 7 more narrowly than the rights in s[ections] 8 to 14.”¹⁴⁰ And “[c]learly, some of those sections embody principles that are beyond what could be characterized as ‘procedural.’”¹⁴¹

The court seemed to realize these appeals to conceptual analysis, common law history, internal textual evidence, and the court’s earlier commitment to living tree constitutionalism would not be enough to placate its critics. There would be those who continued to object on originalist grounds:

A number of courts have placed emphasis upon the Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution in the interpretation of “principles of fundamental justice” In particular, the following passages dealing with the testimony of federal civil servants from the Department of Justice, have been relied upon:

137. *Id.* (citing *Kienapple*, [1975] 1 S.C.R. 729).

138. *See supra* notes 97, 108–11 and accompanying text; *see also In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at paras. 21–22 (citations omitted).

139. *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at para. 22 (quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 344 (Can.)).

140. *Id.* at para. 28.

141. *Id.* at para. 29.

Mr. Strayer (Assistant Deputy Minister, Public Law):

Mr. Chairman, it was our belief that the words “fundamental justice” would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to policy of the law in question.¹⁴²

The court’s response to Strayer echoes Professor Strauss’s response to similar claims concerning the probative value of appealing to original intentions. First, “speeches and declarations by prominent figures are inherently unreliable.”¹⁴³

[T]he Charter is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the *Charter*. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?¹⁴⁴

Second,

[w]ere th[e] Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, *i.e.*, the intention of the legislative bodies which adopted the *Charter*. In view of the indeterminate nature of the data, it would . . . be erroneous to give these materials anything but minimal weight.¹⁴⁵

Third, it was clearly open to the authors of the constitution to use the phrase “principles of natural justice” instead of “principles of fundamental justice”; but they did not.¹⁴⁶ In pursuing the originalist option, the court explained the following:

[R]ights, freedoms and values embodied in the *Charter* in effect

142. *Id.* at para. 35–36 (quoting Assistant Deputy Minister, Public Law, testimony).

143. *Id.* at para. 50 (citing *In re Upper Churchill Water Rights Reservation Act*, [1984] 1 S.C.R. 297, 319 (Can.)).

144. *Id.* at para. 51.

145. *Id.* at para. 52.

146. *See id.* at para. 32.

become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the *Charter* debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the *Charter*, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. If the newly planted “living tree” which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth. As Estey J. wrote[:]

Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*). With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.¹⁴⁷

Fourth, and perhaps most importantly for purposes of this Article, section 7’s “words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s[ection] 7.”¹⁴⁸ In other words, section 7 will develop in the same common law manner as Professor Strauss claims provisions like the First Amendment have developed in U.S. constitutional practice.¹⁴⁹

F. *Conclusions*

So what does this brief, and admittedly selective, tale of recent Canadian constitutional history illustrate? What does it reveal that might be of use in grappling with the various philosophical issues raised by Professor Strauss, in his very fine book?¹⁵⁰ First, and most obviously, it

147. *Id.* at para. 53 (quoting *Law Soc’y of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357, 366–67 (Can.)).

148. *Id.* at para. 67.

149. *See generally* STRAUSS, *supra* note 4, at 51–76 (discussing the development of the First Amendment doctrine).

150. *See id.*

quite clearly reveals that the idea of living constitutionalism has, for some time now, been alive and well in Canadian courts.¹⁵¹ Though there have been those whose political leanings incline them toward some form of originalism and have pressed some variant of this view upon the courts, they generally have not succeeded in persuading Canadian courts to see things their way.¹⁵² The court has repeatedly rejected the view that anything but strict adherence to some robust form of originalism constitutes a serious threat to democracy and the rule of law.¹⁵³ From *Edwards* on, the Canadian legal system has repudiated any theoretical view that attempted to tie the meaning and effect of the constitution to original meanings or intentions.¹⁵⁴ To be sure, the Supreme Court sometimes talks of framers' intentions and often cautions an interpretation of some provisions of Canada's constitutional charter must be "placed in its proper linguistic, philosophic and historical contexts."¹⁵⁵ But the historical intentions that count are almost without exception the very broad, intended *purposes* of the Charter and its various provisions. These are routinely taken to be the various moral rights and freedoms the Charter purports to guarantee, thus converting the position endorsed into some form of living tree constitutionalism, or at the very least "faint-hearted originalism."¹⁵⁶ "The meaning of a right or freedom guaranteed by the *Charter*" is, as the court said in *Big M Drug Mart*, "to be ascertained by an analysis of the *purpose* of such a guarantee; it [is] to be understood . . . in light of the interests it was meant to protect."¹⁵⁷ The court has repeatedly

151. See *Edwards v. Canada (Att'y Gen.)*, [1930] A.C. 124 (P.C.) 136 (appeal taken from Can.) (describing Canada's constitution as a "living tree" in 1930).

152. See, e.g., *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at paras. 52–53 (criticizing originalism).

153. See, e.g., *id.* ("Another danger with casting the interpretation of s[ection] 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms, and values embodied in the Charter in effect become frozen in time . . .").

154. See *id.*

155. See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, para. 117 (Can.) (citing *Law Soc'y of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357 (Can.)).

156. See STRAUSS, *supra* note 4, at 17. Professor Strauss notes Justice Scalia characterizes himself as a "fainthearted originalist" who is "willing to abandon originalism when it leads to implausible results . . ." *Id.* In explaining his faint heartedness, Scalia provocatively, but instructively, says: "'I'm an originalist—I'm not a nut.'" *Id.* To this Strauss rightly observes: "That way of putting it is disarming, but it seems fair to respond: if following a theory consistently would make you a nut, isn't that a problem with the theory." *Id.*

157. See *Big M Drug Mart*, [1985] 1 S.C.R. at para. 116.

made plain that these rights are not the rights *as originally understood* by those whose intention it was to afford constitutional protection.¹⁵⁸ To view rights in this way would have serious untoward effects. As the court opined in *Skapinker*, its very first case under the Charter,

The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The *Charter* is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves.¹⁵⁹

III. THE DEMOCRATIC CHALLENGE

One of the most popular objections to charter review is that it is deeply inconsistent with the fundamental tenets of democracy.¹⁶⁰ Not only do constitutional charters limit the choices open to legislative bodies in significant ways, but the limits imposed are both entrenched and almost invariably interpreted and enforced by unelected and democratically unaccountable judges. Such an arrangement, the argument continues, serves to thwart the will of the people as expressed through their elected representatives and confers upon judges a power they ought not have. It is not enough simply to reply—as the Canadian Supreme Court has on occasion done—that the people themselves have chosen to impose these judicially interpreted and enforced limits on their democratic power. The reasons are two in number.

First, there is the reason above: the sheer fact that a process or form of decision making, *X*, has been chosen democratically does not automatically render *X* democratic. It certainly does not automatically confer upon it anything but the faintest hint of democratic legitimacy. Second, the reply has a modicum of plausibility when those who have chosen to limit the relevant powers are the same people who must live with its consequences, but this response loses all credibility when these two groups are not identical. This is typically the case when it comes to

158. See, e.g., *In re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at paras. 52–53 (noting the rights would become “frozen in time”).

159. *Skapinker*, [1984] 1 S.C.R. at para. 11.

160. See, e.g., STRAUSS, *supra* note 4, at 47 (noting the democratic objection to living constitutional interpretative theory actually stems from judicial review).

constitutional charters, where the entrenched limits on government power giving rise to a charter challenge have often been established by groups of people from long ago. This difficulty is compounded by the fact it is well nigh impossible, as is the case in the United States and Canada, to muster the political will and resources required to bring about formal constitutional amendment to release the bonds imposed so long ago. All this gives rise to a question demanding a convincing answer: what could possibly justify a scenario whereby *the people now* are so severely restricted in their current choices by the decisions *the people then* might have believed were appropriate limits to entrench in a constitutional charter and place in the hands of judges?

Though a problem for all proponents of constitutional charters,¹⁶¹ the challenge of answering this question is especially acute when the charter in question is wedded to a robust form of originalism—a form of originalism that either restricts judicial interpreters to enforcing original, concrete understandings of the abstract moral phrases found within constitutional charters, or at the very least, places a very heavy presumption against departing from such understandings whenever they are reasonably discernible.¹⁶² Such a practice seems flatly inconsistent with the notion of ongoing self-government—the notion that lies at the very heart of democratic ideals. Instead of being slaves to a king or despot, we become slaves to previous generations and their specific moral and political views. And some of those views—for example, opinions concerning the moral legitimacy of slavery or the nonlegal status of women—are ones to which most, if not all of us, are now deeply opposed. Adopting an entrenched constitutional charter, as required by originalism, represents an insulting admission that we, the people now, are for some reason better off relying on earlier generations to make decisions of political morality for us, even in cases where we disagree profoundly with the thoughts of those earlier generations. Whatever else might be said in favor of such an arrangement, there is no denying it is anything but democratic. Nor is it anything less

161. Professor Strauss explicitly admits living constitutionalists are no exception here. *See id.* at 47.

162. Faint-hearted originalists do not face this particularly acute challenge, of course. But as Professor Strauss rightly points out, faint-hearted originalism is actually a version of living constitutionalism. *See id.* at 28–29; *see also* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 95 (2009) (arguing “[o]riginalism follows necessarily from premises that virtually all participants to the debate accept—such as that judges should engage in ‘interpretation’ not ‘making-it-all-up’ and that we do and should treat the Constitution as binding”).

than morally irresponsible. Stability and consistency with the past are often worth pursuing for a variety of reasons, including Burkean humility, fairness, protected expectations, and values contained within the ideal of government, which we call the rule of law. But it is morally irresponsible to wed ourselves to positions we now regard as morally reprehensible.

The task of addressing the democratic challenge is not, I stress once again, reserved for originalists. The democratic challenge applies in a somewhat different, but equally forceful way, to living constitutionalists. In other words, the democratic challenge comes in two distinct forms. First, there is the dead-hand concern just addressed that an entrenched constitutional charter ties the people now too strictly to decisions made by the people then. This will be referred to as “the intergenerational problem.” Second, there is the no less worrisome concern that, in adopting a constitutional charter, we assign unelected, accountable judges unbridled discretion in the task of interpreting and applying what are, in effect, open-ended provisions. It assigns judges, not the people *then*, let alone the people *now*, the essentially unrestrained task of answering our most fundamental moral and political questions for us. Let this be called “the discretion problem.” Living constitutionalism provides an answer to the first prong of the constitutional dilemma arising from the democratic challenge, that is, the intergenerational problem. But it is not clear whether and how it is able to deal successfully with the second one—the discretion problem. Here is why.

Living constitutionalism revolves around four basic claims:

- a constitution is an instrument with abstract moral provisions that *can* grow and adapt to its ever-changing environment—moral, social, and political—without losing its identity and guidance function;¹⁶³
- a constitution’s abstract provisions *should be* allowed to grow and adapt to its—or their—environment(s);¹⁶⁴

163. Indeed, that is why abstract provisions are chosen in the first place; they allow for growth as concrete views change.

164. Many of the reasons for constitutional adaptation and growth were articulated by the Judicial Committee of the U.K.’s Privy Council in *Edwards* and endorsed and elaborated on by the Supreme Court of Canada in its early attempts to construct a principled approach to interpreting and otherwise dealing with the Canadian Charter. *See supra* Part II (discussing the acceptance and development of the living constitution interpretive theory in Canadian caselaw).

- this process can take place through genuine constitutional interpretation, not construction or formal amendment;¹⁶⁵ and
- this growth process facilitated by interpretation can occur legitimately.

As Part II demonstrated, the Canadian Supreme Court has endorsed each of these claims.¹⁶⁶ These claims also constitute the core of living constitutionalism as defended by Professor Strauss, who draws on each claim to defend his position. In so doing, he is able to fashion a very plausible—and to my mind, compelling—answer to the intergenerational problem. Pursuing this line of defense leaves both Professor Strauss and the Supreme Court open to the second prong of the democratic dilemma: the discretion problem.

It is the sharpness of this prong in the dilemma that partially explains both the underlying unease many have with living constitutionalism and the intuitive appeal of originalism among many constitutional theorists and practitioners—even those faint-hearted endorsers, like Justice Scalia, for whom the appeal is an uneasy one. Leaving aside its serious weaknesses in addressing the intergenerational issue, originalism still has some merit. It purports to place in the hands of contemporary judges a task not fundamentally different from the task they undertake to perform in ordinary, run-of-the-mill cases. It requires that they try to the best of their limited abilities to interpret and apply the intentions and understandings of others promulgating constitutional law. It also requires that they do so in a manner that is as impartial, objective, and morally neutral as humanly possible. Judges no doubt have some measure of discretion in constitutional cases, even using the originalist option, but it is not significantly different from the discretion they routinely exercise when they

165. The Author defines “construction” fairly consistent with Professor Keith Whittington’s definition of the term. In his view, a constitution serves to guide and constrain political actors in the process of making public policy. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* ix–x (1999). In so doing, a constitution is also dependent on political actors—both to formulate authoritative constitutional requirements and to enforce those fundamental settlements in the future. Professor Whittington describes this construction process versus interpretation, by which constitutional meaning is shaped within politics at the same time politics are shaped by the Constitution. See *id.* (summarizing the argument that the constitution shapes politics while being shaped by politics).

166. See *supra* Part II.

attempt to apply ambiguous or vague statutes.¹⁶⁷ Discretion in these latter cases is almost regarded as acceptable—a price we must pay for the sake of achieving a reasonable balance between democratic legitimacy and the pursuit of an enlightened rule of law.¹⁶⁸ But with living constitutionalism, it might seem that the most the authors can be said to have achieved is the creation of a highly abstract moral blueprint, the details of which must be filled out by later decision makers as they attempt to implement and apply that blueprint to ever-changing circumstances. Yet this raises a different and possibly more worrisome concern. Instead of being slaves to previous generations with their own distinctive—and to the modern mind, deeply problematic—perspectives on certain important moral and political questions, we now seem to be slaves to democratically unaccountable philosopher kings who drape themselves in judicial robes and set about issuing sober moral pronouncements from the bench, all the while making it appear as though they are doing nothing more than interpreting norms created and endorsed by others with the acknowledged authority to do so.¹⁶⁹ Adopting a constitutional charter—understood and applied as living constitutionalists recommend—might seem to place far too much discretionary power in the hands of these judges. Indeed, it represents nothing more than an insulting admission that we, the people of today, are better off relying on neither ourselves nor previous incarnations of ourselves, but on contemporary judges, masquerading as philosopher kings, to make our most fundamental moral and political decisions. Whatever else might be said in favor of such an abdication of moral responsibility, there is no denying it is anything but democratic. Any hope of justifying such an institutional arrangement must ultimately rest, it would seem, on the undeniably false assumption that judges are better able than the people and the elected legislators that speak on behalf of the people to deal responsibly with the deeply complex and controversial issues of morality that constitutional charters bring to the fore.

167. Though not of a different *kind*, the discretion involved may be of a significantly different *degree* than is typically present when statutes are in play. After all, the questions usually raised in constitutional charter cases are more deeply moral than those that arise in run-of-the-mill cases involving vague or ambiguous statutes. In addition, the factors upon which judges might draw—such as original understandings—may not be as historically accessible in the case of constitutions created decades or centuries ago. Judges are probably no better at playing the history game than they are at playing the moral theory game.

168. See generally W.J. WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE* (2007) (providing extensive arguments in support of this conclusion).

169. See generally *id.* at 162–63 (discussing the “philosopher kings” objection).

There is absolutely no reason to accept this assumption. Judges are no better than anyone else at deciding moral questions concerning things like the nature and limits of free expression, the appropriate demands of moral equality, or fundamental justice. Though well-schooled in the law, judges are, in no sense of the word, moral authorities—nor are they experts in the various fields of social policy with which government actions typically deal. Judges most certainly do not exhibit degrees of intellectual and moral acumen superior to the levels enjoyed by the government authorities upon whose actions the courts are called to sit in moral judgment. So why should we call on *them* to decide our deepest and most difficult questions of political morality?

Thus, the discretion problem—the second prong of the constitutional dilemma arising from the democratic challenge—looms large for living constitutionalists. The strategy employed by Professor Strauss to deal with the problem is to draw on the long-established practice and legitimacy of common law reasoning, which seems to contain the resources to cabin judges' discretionary power and render us less vulnerable to the shifting sands of their moral decision making.¹⁷⁰ Despite its well-known adaptability—a property that often allows judges the flexibility to avoid being too strictly bound to the past in morally problematic cases—it is always important not to underestimate the ability of the common law to provide stability and antecedent guidance. H.L.A. Hart had this to say on the matter: “Notwithstanding [the ability of courts to distinguish or overrule precedents] the result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule.”¹⁷¹ The degree of fixity and constraint Hart ascribes to the common law has been challenged.¹⁷² And even if Hart's characterization is correct, it remains true that common law regimes can, and perhaps sometimes do, pursue flexibility and adaptability to a far greater extent than Hart describes, thereby according judges a degree of freedom that reintroduces the discretion problem in all its fury. But whatever blend of constraint and flexibility a system embodies, the point remains that the common law has a long-established history of more or less successfully combining these two properties. Think here of the law of torts and the development of a notion

170. See STRAUSS, *supra* note 4, at 43–46.

171. H.L.A. HART, *THE CONCEPT OF LAW* 135 (2d ed. 1994).

172. See A.W.B. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE* 77, 83–84 (A.W.B. Simpson ed., 2d ed. 1973).

like “inherently dangerous,” so nicely chronicled by Professor Strauss.¹⁷³ So there is good reason to look to the common law as a model for understanding the duly constrained and disciplined role that judges can play in implementing the abstract moral limits on government powers one finds in constitutional charters. We can view a constitutional charter as setting the stage for a duly controlled, common law jurisprudence of the moral rights it enshrines.

So by drawing on the discipline imposed by common law reasoning, living constitutionalists are able to successfully deal with at least part of the discretion problem. But not all of it—and for one simple reason. It is true that coupling living constitutionalism with common law methodology allows one to avoid turning the former into the arbitrary exercise of political power its opponents often portray it to be. That is, it avoids rendering us slaves to the moral whims of individual judges in individual cases. Judicial discretion will no doubt continue to exist, as it will on any constitutional theory, including originalism. But it is significantly cabined by the requirement that whatever discretionary decision a judge may end up making in a particular case, it must in some way be reconciled with previous decisions in similar cases. Even in those cases where the decision is to depart from long-established precedent, a convincing case must be made either that those earlier decisions were demonstrably wrong, or as will more likely be the case, that they were made in circumstances relevantly different from those now facing the court. All of this is well and good and goes a long way toward solving the discretion problem. But a far deeper problem remains—the constraints imposed by the discipline of common law reasoning still seem to originate in the decisions of these very unaccountable judges whose decision making power is at issue. These are individuals who, according to those who press the democratic challenge against living constitutionalists, should not be in the business of answering our fundamental moral and political questions for us. We may not, with a common law constitution, be slaves to the discretionary decisions of an individual judge who decides an individual case because her decision must always remain faithful to the past, even when she departs from it. But we nevertheless remain slaves of the judiciary as a whole over the long run. Put simply, if all the inputs into a decision making process lack democratic legitimacy, the output will as well.

It is at this point that Professor Strauss seems willing to concede charter review, even when coupled with his common law constitutionalism,

173. See STRAUSS, *supra* note 4, at 80–85 (citations omitted).

is inherently undemocratic:

There is certainly something undemocratic, in a sense, about the U.S. constitutional system. But it is not the common law approach that makes our system undemocratic. What makes our system undemocratic is judicial review: the practice of allowing the courts to have the last word on most issues of constitutional law. And, at a deeper level, the Constitution itself is in some ways undemocratic. It will sometimes prevent the majority from having its way if, for example, the majority wants to suppress political dissent or discriminate against racial minorities. While there is a persistent and powerful strand of thought that condemns judicial review, most of us think that these “undemocratic” features of our system are a good thing.¹⁷⁴

So the democratic element of the discretion problem continues to loom large for the living constitutionalist. If one views judges, incrementally over time and on a case-by-case basis, as supplying content to the abstract moral provisions included in constitutional charters, one appears to counsel the surrender of our deeply cherished democratic principles. And this, in the view of many, is reason enough to abandon living constitutionalism, even when coupled with the rational discipline and genius of the common law. The remainder of this paper will sketch one possible way out of this impasse, one that the Author developed and defended at much greater length in previous work and which could be drawn on by living constitutionalists like Professor Strauss to ward off the democratic challenge: constitutional morality.

IV. CONSTITUTIONAL MORALITY¹⁷⁵

Let us begin by making explicit an assumption upon which the discussion has thus far been premised: constitutional charters make reference to rights of a decidedly moral nature. With this assumption clearly in place, let us now consider the following question: to what kind of morality does a constitutional charter direct a judge’s attention when the judge is asked to apply that charter against potentially conflicting acts of government? Is it what we might call Platonic morality—that is, the supposedly objective or true morality which philosophers, theologians, and

174. *Id.* at 47.

175. Some of the material in the following section derives from W.J. Waluchow, *On the Neutrality of Charter Reasoning*, in *NEUTRALITY AND THEORY OF LAW* (J. Ferrer & Giovanni Ratti eds., forthcoming 2011).

students in neighborhood pubs have long attempted to discover or articulate in developing their philosophical theories? Or, could it be what the early legal positivists called positive morality—that is, the moral values, beliefs, and principles widely endorsed or practiced by members of a community? Perhaps it is some other kind of morality, possibly one which is somehow embedded in the constitutional practices of a community the same way legal principles are embedded in law. The purpose of these questions is not to determine which moral theory provides a better account of the moral norms of equality referred to in section 15 of the Charter, but whether moral norms of the kind pursued by philosophers are the moral norms to which judges should direct their attention when applying their living constitution.¹⁷⁶ It seems obvious to some that moral norms of this latter kind should in no way be allowed to play a role in charter cases. To permit them to do so would be to assign judges the role of philosopher kings, a role to which they are not well-suited and would seriously compromise our democratic commitments. Constitutional charters, it might be said, can be rendered consistent with democracy only if they are viewed as incorporating the widely accepted tenets of positive morality—that is, the morality of the community, the existence and content of which can be empirically discovered and applied by judges without imposing their own subjective moral views on us.¹⁷⁷ Of course, this position is not without its own set of difficulties. For instance, it seems to presuppose a level of consensus that is simply not evident in modern, pluralistic societies. More importantly, it may well defeat one of the defining purposes of constitutional charters. How can the goal of protecting minorities from overzealous and misguided majoritarian governments be achieved if the charter's moral provisions are interpreted in terms of positive morality, and thus, in favor of the majority itself?

We are left, then, with an uncomfortable choice. If a constitutional charter's abstract moral provisions are thought to incorporate the norms of

176. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 15 (U.K.).

177. There is a third alternative: originalism. According to one version of that theory, a constitutional charter's moral norms are established in neither true nor positive morality. Rather, they are established by the "intentions" of its authors. The moral norms *they* intended to entrench are the ones referenced by the charter, whether or not these accord with either Platonic morality or with the norms of contemporary, positive morality. According to a second originalist variation, these norms are to be found in the community's original understandings at the time of the constitutional charter's adoption. Since my focus in this section is how common law constitutionalism answers the democratic challenge, I will leave these originalist options aside.

Platonic morality, then we end up being undemocratic and perhaps even foolish. We are undemocratic because we have empowered unaccountable judges to decide our deepest moral questions for us, and foolish because judges are not philosopher kings with a monopoly on objective moral truth. If, on the other hand, a constitutional charter incorporates nothing more noble than positive morality—understood as nothing over and above current consensus on the relevant moral issues—we achieve some measure of democratic legitimacy. These inputs to judicial decisions originate in the demos, thus providing at least a degree of legitimacy to the outputs. From this, we seem to end up being foolish because shared positive morality is sometimes either misguided, resulting from untoward factors like fear and ignorance, or more frequently nonexistent, widespread differences of moral opinion. The result is also unfair because we will have failed to offer adequate protection for minorities and other highly vulnerable groups and individuals.

Thus, we find ourselves caught between a rock and a hard place—unless we can find a third alternative.¹⁷⁸ In previous works, the Author attempted to describe such an alternative by developing an account of the “community’s constitutional morality” or CCM. CCM is not the impoverished positive morality described above. That is, it is not a function of simple consensus on some moral question—for example, whether gay marriage should be recognized or whether swinger clubs should be allowed to operate discretely within a community like Montreal or New York.¹⁷⁹ Neither is it the personal morality, consisting of a set of general moral norms and particular moral judgments and opinions attributable to any specific person or institution like the Catholic Church, the Republican Party, or a judge who helps decide a constitutional case. Nor is it the morality decreed by God, inherent in the fabric of the universe or residing in Plato’s world of forms. Rather, it is a kind of community-based, positive morality consisting of the fundamental moral norms and convictions to which the community has actually committed itself and which have, in one way or another, acquired some kind of formal constitutional recognition. It is the political morality actually embedded in—or endorsed or expressed by—a community’s constitutional practices in much the same way principles and judgments of corrective justice might also be said to be embedded in—or endorsed or expressed by—the tort law

178. This third alternative is distinct from originalism, which has been left to the side.

179. See *R. v. Labaye*, [2005] 3 S.C.R. 728 (Can.) (exemplifying a case in which the latter question was addressed).

of Anglo-American legal systems. So construed, CCM is a subset of the wider class of moral norms and convictions that enjoy some measure of stable, reflective support within the community. It is not clear, however, how that support is indentified. Some members of this wider class of norms and convictions lack any legal recognition whatsoever.

Even if within the reflective and stable community there are moralities of most contemporary western societies—norms and convictions of positive morality governing non-political matters (such as friendship, gratitude, marital fidelity, and charitable giving) and norms governing political matters (such as the responsible, but legally unregulated exercise of political power by government authorities)—these are not, in the main, part of the CCM of those societies because they lack appropriate legal, let alone constitutional, recognition. Distinct and different norms and convictions concerning equality and fundamental justice are, on the other hand, characteristic elements of those communities' CCMs. In the United States, Canada, and many countries of the European Union, legal recognition of CCM norms includes, but is not limited to, enshrinement in a constitutional charter, and evidence in legislative history and jurisprudence that combine to flesh out the local understandings or Thomistic “determinations” of that particular community’s principles.¹⁸⁰

With this conception of constitutional morality in hand, the Author sets out to defend charter review as conceived by living constitutionalists against many of its most ardent critics—most notably, for our purposes here, those who view charter review as falling prey to the democratic challenge. Put simply, the Author’s thesis is that CCM, owing to its social origin, is a source of moral norms and fundamental convictions upon which judges can draw without compromising democratic legitimacy. A key premise in defense of this thesis is the claim that charter review includes, though is by no means limited to, the task of ensuring acts of parliament or congress do not, in ways that could not have been reasonably foreseen or avoided by legislators, infringe the fundamental moral norms of CCM to which the community has committed itself. If this is the role a judge plays in a particular instance of charter review, then democratic legitimacy need

180. See 1 THOMAS AQUINIS, *SUMMA THEOLOGICA* 1–4 (Fathers of the English Dominican Province trans., Benzinger Bros., Inc. 1947) (1265–1274) (discussing the theory of “determination of common notions”); see also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, 281–90 (H.L.A. Hart ed., 1980) (citations omitted); WILFRID J. WALUCHOW, *THE DIMENSIONS OF ETHICS: AN INTRODUCTION TO ETHICAL THEORY* 111–16 (2003). The role of determinations of common notion will be further discussed below. See *supra* AQUINIS, at pt. I-II, Q. 95, Art. 1–4.

not be compromised. The judge will, in effect, help to implement and render effective the democratic will, not impede it.

Furthermore, it will be possible to parry many other sorts of concerns surrounding charter review. For example, one can address the objection that charter review foolishly asks judges to serve as philosopher kings, discover Platonic moral truth in respect of matters of justice and equality, and enforce their understanding or interpretation of that elusive truth against the acts and erroneous interpretations of our democratically-elected legislators. Having judges perform such a task would, no doubt, be asking judges to accomplish the impossible due to reasonable pluralism within modern constitutional democracies together with the fact that judges, no less so than the rest of us, suffer the “burdens of judgment” in moral matters.¹⁸¹ Moreover, it would, as already observed, significantly transform the judicial task into something significantly different from the role judges have traditionally been thought to serve: namely, making a good faith attempt to engage in the impartial application of binding legal standards created by way of democratically respectable processes—that is, to play the role they are often called on to play in countless every day, run-of-the-mill legal cases. Judges would instead be asked to decide on the basis of what ends up being their own, possibly purely partisan, discretionary moral opinions about the demands of an ever elusive Platonic morality. No matter the high regard in which we hold our judges, such a practice simply cannot be tolerated in a liberal democracy. But if judges, in exercising charter review are not seeking—and inevitably failing—to apply Platonic moral truth, are instead seeking to hold the democratic community to its own constitutionally grounded, stable, and reflective moral commitments, and if, in addition to this, that set of commitments can often be discovered through a kind of morally neutral, impartial reasoning, then the sting of the democratic challenge can largely be avoided. Judges are not being asked to decide on the basis of their own best, discretionary judgments concerning the demands of Platonic moral truth. They are being asked to decide on the basis of what is, in effect, their own best judgments as to the democratic community’s best judgments concerning the demands of Platonic moral truth. Judges can be said, in such circumstances, to be doing nothing more contentious than trying their best to apply, in a fair, impartial manner, standards that originate from an entirely legitimate source—namely, the community’s own fundamental

181. See JOHN RAWLS, *POLITICAL LIBERALISM* 54–58 (1993) (discussing the burdens of judgment under which we labor in dealing with controversial issues of political morality).

moral commitments.

If only matters were this straightforward—but of course they are not, if only for the following simple reason. There is considerable room for disagreement and uncertainty, perhaps even indeterminacy, as to the demands of CCM, especially in the controversial constitutional cases in which disputes about its concrete requirements come fully to the fore.¹⁸² Yet if this is so, then judges, in choosing from among the various solutions on offer, will inevitably have to draw on their own personal moral opinions, which is a seemingly illegitimate source from which to draw in making constitutional decisions in a democracy. There is no getting around the fact that disagreement and the looming threat of indeterminacy threaten to undermine the democratic legitimacy of judges' attempts to justify their decisions by drawing on CCM. How can a judge's decision to apply a CCM norm in a particular way be viewed as reflective of the democratic will if there is so much partisan disagreement about its proper understanding or interpretation—especially if judges are, as a consequence, forced to base their choices on their own personal preferences among the various views on offer? What else could they do in such circumstances short of simply declining to make a decision at all, which of course they cannot do?

Things are not quite as bleak as might appear at first blush for defenders of living constitutionalism. In numerous CCM cases, there is much more of a basis for agreement and consensus than initially meets the eye. In other words, the limits of justification do not extend only so far as Canadians find explicit agreement on some particular question. Drawing on the notion of reflective equilibrium, most closely associated with the political philosophy of John Rawls,¹⁸³ the Author argues Canadians' considered judgments concerning the commitments of CCM can often, or at the very least can sometimes, be brought into a kind of reflective equilibrium with one another. When this happens, a community can be led to see that its members actually agree, or are *committed* to agreeing, on more than they think they do. They can, in other words, be led to recognize an implicit basis for explicit agreement on the meaning and implications of the relevant CCM norms when initially this might not have seemed possible. The Author posits that the judge's role in a charter case—enforcing the commitments of CCM—will often lead her to draw on

182. See, e.g., *Edwards v. Canada (Att'y Gen.)*, [1930] A.C. 124 (P.C.) (appeal taken from Can.) (determining whether women are persons under the Canadian Constitution).

183. See RAWLS, *supra* note 181, at 8 (footnote omitted).

these bases of agreement and to decide accordingly. When such a basis is found and a decision is made on its footing, the fact of disagreement will sometimes be replaced by reasonable agreement. The Author suggests this is the case with respect to the question of same-sex marriage in Canada.

Despite these attempts to fend off the democratic challenge, there is no getting around this further point: it is distinctly possible that in some CCM cases, especially those where passions and controversy run deepest and differences are rooted in significantly different comprehensive moral and political views,¹⁸⁴ CCM provides no uniquely correct answer for judges—just answers. One might reasonably ask what judges are to do if they encounter a case in which this appears so. The Author's view is judges should—and in fact often do—engage in common law reasoning. Judges should and do creatively develop or construct the norms of CCM in an incremental, case-by-case way, in much the same manner as common law judges have historically developed, incrementally, and in a case-by-case manner, the principles of negligence and the concept of an “inherently dangerous object.”¹⁸⁵ Admittedly, in doing so, they often engage in Thomistic determinations of common notions, deciding among available solutions, none of which is uniquely determined by the relevant CCM norms, but each of which is more or less consistent with the relevant norms and previous efforts by judges and legislators to shape them through the process of determination. One might think of such attempts as having set CCM precedents. Judges will, in such cases, no doubt exercise discretion to choose from nonexcluded solutions. But, in the Author's view, there is no better way to proceed in these circumstances.¹⁸⁶

Now, if we acknowledge that a process of determination is indeed what should be—and perhaps is—going on in many such cases, then we once again encounter the democratic challenge. That challenge, and the reason we face it yet again, should be fairly obvious by now: by developing CCM in this way, a judge can no longer straightforwardly be viewed as attempting to *follow* in a fair, impartial manner the standards previously set by others possessing the democratic authority to set them. On the contrary, it is the judge herself who will be setting the relevant standards.

184. Obvious examples include abortion and same-sex marriage.

185. See WALUCHOW, *supra* note 168, at 180–270 (citations omitted) (discussing the development of legal principles including negligence through the common law); see also STRAUSS, *supra* note 4, at 80–85 (citations omitted) (discussing the common law development of negligence in products liability cases).

186. See WALUCHOW, *supra* note 168, at 180–272 (discussing a full-scale defense of this view).

At the very least she will be deciding what the authoritatively established standards mean and imply in the particular kind of situation in which the constitutional question has arisen. Simply, the judge will be involved in the *creation* or *construction* of law, not its discovery and application. So admitting what appears all but certain—that CCM is not always fully determinate—threatens to reintroduce the democratic concern that charter review, as common law constitutionalism conceives it, cannot possibly be justified in a democracy. It appears to assign judges a role—the creative construction of CCM—that renders us no longer masters in our own houses.

If, despite this concession, we continue to ask judges to make the kinds of discretionary determinations that sometimes seem necessary, then we appear to be left with two options. First, we can abandon all pretense of reconciling living constitutionalism with the demands of democratic legitimacy. We can, that is, reject that view altogether or attempt to justify it by way of competing values, justice, or other values closely associated with the rule of law—the view seemingly endorsed by Professor Strauss.¹⁸⁷ Alternatively, one can develop a more nuanced account of what it is that judges are and should be up to when and if they engage in the discretionary construction of CCM by way of common law reasoning. The Author argues discretionary constructions of CCM can be rendered consistent with liberal democracy if we place significant restrictions on the *kinds* of reasons upon which judges may legitimately draw when they engage in the discretionary process. These restrictions are inspired by the theory of public reasons developed by John Rawls, most notably in Lecture VI of *Political Liberalism*.¹⁸⁸ Here is not the place to provide an extensive analysis of the theory of public reasons. Nor is it the place to address the views of those who question their existence or who doubt their value in political argumentation, including charter adjudication. But this much can be said to explain the nature and appeal of public reasons. Public reasons are not reasons everyone within the community would endorse under ideal conditions of deliberation. Nor are they reasons that every reasonable person in such circumstances would consider particularly strong or ideally worthy of support but for the fact of reasonable pluralism. Rather they are reasons, as Rawls puts it, that such persons would judge to be, at the very least, “not unreasonable” in the sense that those who oppose them can at least understand how reasonable persons could affirm them. In drawing

187. See STRAUSS, *supra* note 4, at 46–49 (noting judicial review itself is undemocratic).

188. RAWLS, *supra* note 181, at 212–54.

exclusively from such reasons,

[j]udges must cast their constitutional arguments in ways that might appeal to reasonable dissenters . . . [—]a person who is willing to be persuaded by the better argument, assumes that reasonable moral disagreement will characterize difficult constitutional cases, and will conclude that [the act] in question is publicly justified only when the state has produced sufficiently public reasons on its behalf.¹⁸⁹

Public reasons, so construed, are “typically . . . as neutral as possible with respect to the wide range of reasonable conceptions of the good and normative political ideologies that currently exist in the [community]. They should be uncontroversial, which means that an ideal reasonable person could not reasonably reject them.”¹⁹⁰ Nonpublic reasons, on the other hand, are usually “based on perfectionist standards of human flourishing, on contested theories of political morality, or on controversial empirical claims.”¹⁹¹ Further:

[a]n argument that incorporates a premise that a particular way of life is sinful, unpopular, unnatural, unconventional, misguided, silly, or idiotic is exactly the kind of argument that the state must eschew. An argument that contains a premise that a particular way of life is superior to others or that certain people are by nature inferior is also insufficiently public.¹⁹²

The above account of public reasons may be summarized in the following way: a reason is public, and hence a legitimate basis upon which a court can draw when engaging in discretionary constructions of CCM, when it is a reason to which no reasonable dissenter could object given the duty of civility to which all members of democratic communities are bound.¹⁹³ It is one that such a dissenter could, despite his differences,

189. RONALD C. DEN OTTER, *JUDICIAL REVIEW IN AN AGE OF MORAL PLURALISM* 11 (2009).

190. *Id.*

191. *Id.*

192. *Id.* at 12 (citing BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10–11 (1980)).

193. The duty of civility is one that applies to everyone in a democracy marked by the circumstances of reasonable pluralism. Each person, so situated, will realize garnering the benefits of civil society almost inevitably requires that most everyone settle for less than their ideal choice on some political question. Each will also acknowledge the requirement that an acceptable compromise from her vantage point must also be an acceptable compromise for others whose fundamental moral and political views suggest quite a different order of preference.

accept as “good enough,” or at the very least, “not unreasonable.”

So how can the employment of such reasons be brought to bear on questions concerning the justification of charter review as living constitutionalism conceives it? As many critics of living constitutionalism have pointed out, the idea is hard to reconcile with the fundamental principles of democracy. It appears to take the power of decision away from citizens and their democratically chosen representatives, past or present, and places it in the hands of a small group of democratically unaccountable judges. It is these judges, not the people themselves or their past or present elected representatives, who ultimately end up setting the fundamental standards of political morality governing the exercise of public power in their society. In any case in which the demands of CCM appear to be indeterminate, judges will be forced to exercise discretion and determine or creatively construct the norms of CCM—norms that they then set about applying to the cases on which they are called to sit in moral judgment. In other words, judges will be forced to engage in the discretionary creation of norms, not their fair, impartial application. And this leads back to the democratic challenge—that charter review under a living constitution cannot possibly be justified in a modern, liberal democracy.

Hopefully it can be seen that restricting judges to public reason in such cases provides a promising route for warding off this latest incarnation of the democratic challenge. The discretionary decisions judges are sometimes called on to make will be consistent with democratic principles because they appeal to reasons that no reasonable dissenter within the democratic community could object to, given the duty of civility to which all members of a democratic community who find themselves in a state of reasonable moral pluralism are committed. Such a dissenter could no more object to a decision based on such reasons than he could object to a decision properly made by way of a duly constituted democratic decision procedure with which he disagrees. In both cases, the dissenter might prefer that a different decision had been made. Indeed, he might profoundly disagree with the decision on moral grounds. But in each case, the dissenter must be prepared to recognize the legitimacy of the decision actually made, despite any displeasure he might experience over its substance. Requiring that a judge always make a good faith effort to base a discretionary decision squarely on some acceptable array of public reasons permits each citizen, including those who strongly but reasonably dissent from the decision made, to nevertheless take ownership of the decision and see it as the product of a decision making process which appeals to

democratically legitimate inputs and to which she could not reasonably object.

In concluding this brief foray into the realm of public reasons, it should be noted that the proposals sketched and defended herein hardly add up to a recipe for unbridled judicial activism of a sort that should worry those concerned about the democratic challenge. Judges who make a decision after a sincere attempt to offer justification in terms of CCM or, failing that, in terms of a CCM construction justified by way of some reasonable balance of relevant public reasons, need not be viewed as an alien force compelling democratic citizens to act independently of their deepest convictions. Rather, the decision should be viewed by each and every member of the democratic community as an exercise of public power to which none of them, reasonable dissenters included, can reasonably object, given their joint commitment to the duty of civility. To repeat, this is not to say each member of the community will always agree with the decisions made, nor will they always agree with the balance of public reasons on which a court might rely in justifying the construction it chooses to act on. But insofar as, and to the extent that the decision is based on a good faith attempt to strike a reasonable balance of what is sincerely taken to be relevant public reasons, and given that this step is taken only after all other resources have, in the opinion of the court, been exhausted, it is one that all reasonable citizens in a democracy can accept as “good enough.” Each citizen can view the decision as one that allows her to continue to maintain ownership of every decision regarding the proper exercise of public power in her democratic community including, importantly, decisions made by judges in the exercise of charter review under a living constitution.

V. CONCLUDING THOUGHTS

The Author set out to do a number of things. First and foremost, the Author declared his support for the line of argument fashioned by Professor Strauss in his splendid new book.¹⁹⁴ In prose that is clear and elegant, and with the support of arguments that are cogent and powerful, he has provided a compelling defense of common law living constitutionalism. Second, an attempt was made to substantiate the claim that there is at least one regime in which the view defended by Professor Strauss has been, for many decades now, alive and well. Living constitutionalism took root in Canada in the early part of the twentieth

194. See STRAUSS, *supra* note 4.

century when the English Privy Council chose to depart from any original understanding there might have once been in the U.K. and Canada as to the status of women as nonpersons.¹⁹⁵ The view that the constitution is a living document, now officially referred to as the living tree doctrine, was the primary basis of the Council's landmark decision.¹⁹⁶ This doctrine was also officially endorsed in 1984 in the very first case to be decided under the newly patriated Constitution Act, 1982 with its revolutionary Charter of Rights and Freedoms.¹⁹⁷ As the Supreme Court made plain in *Skapinker*, "The fine and constant adjustment process" of the Charter's moral provisions was left "of necessity to the judicial branch."¹⁹⁸ In pursuing this process, the court explained,

Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The Charter is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves.¹⁹⁹

This endorsement of a common law conception of living tree constitutionalism, first introduced in *Edwards* and endorsed in *Skapinker*, continues to this day and has profoundly shaped the approach the Canadian courts have taken in discharging their responsibilities under the Charter.

Third, the Author tried to meet the democratic challenge raised by this particular approach to constitutional charters and their interpretation and implementation. Unlike Professor Strauss, who seems willing to simply admit the whole process is inherently undemocratic but nevertheless justifiable on other grounds,²⁰⁰ and unlike the Canadian Supreme Court, which seems content to suggest the process was chosen by democratic means,²⁰¹ the Author sketched a conception of the morality, CCM, to which a constitutional charter can reasonably make reference. This explanation succeeds in providing a sufficient degree of democratic legitimacy to a charter

195. *Edwards v. Canada (Att'y Gen.)*, [1930] A.C. 124 (P.C.) (appeal taken from Can.).

196. *Id.* at 136.

197. *See supra* Part II.C (discussing *Law Soc'y of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357 (Can.)).

198. *Skapinker*, [1984] 1 S.C.R. at para. 11.

199. *Id.*

200. *See STRAUSS, supra* note 4, at 45–49.

201. *See supra* Part II.

and its review. The basis for judicial decisions are found in the moral commitments of the democratic community, not the ever-elusive norms of Platonic morality or an unadulterated—and possibly misguided and nonexistent—simple moral consensus. It resides in the norms and convictions that find their place in stable community commitments, significantly constrained and duly corrected by the requirements of reflective equilibrium and, if necessary, public reason. It is true, of course, that the final decisions made on these grounds often remain with unelected judges who are not democratically accountable unlike their elected peers.²⁰² This is a price we should pay for having a constitutional charter understood, interpreted, developed, and applied as recommended by living constitutionalism.

202. This, however, is not always the case. In Canada, section 33 of the Charter override can be invoked by Parliament or a provincial legislature in order to deny judges the final word on charter matters. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 33 (U.K.).