CONSTITUTIONAL IDEOLOGIES

*Patrick Macklem**

> Our present is like being lost in the wilderness, when every pine and rock and bay appears to us as both known and unknown, and therefore as uncertain pointers on the way back to human habitation.
>
> *George Grant, TIME AS HISTORY*

I. INTRODUCTION

Canadian constitutional law is a conversation about the constitution of our society. Like all conversations, its medium is language. Through language, law gives meaning to and partially constitutes the relationship between the individual and the community.[1] While it could be said that

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[1] *See* J.B. White, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (Chicago: University of Chicago Press, 1984) at x. *See also* C. Taylor, *Interpretation and the Science of Man* (1971) 25 REV. METAPHYSICS 3.

Critical theory stressing the constitutive element of language and discourse can be divided into two camps: the first argues that there is no meta-language which can provide us with ultimate truth about social reality; the second argues that theory can transcend, criticize and change values implicit in social discourse. Perhaps the classic exponent of the first approach is H. Gadamer, TRUTH AND METHOD, G. Barden & J. Cumming, trans. and eds. (London: Sheet & Ward, 1975) (all acts of understanding are embedded in a context of cultural meanings which cannot be exhausted by rational explanation); for modern variants, *see* J. Lyotard, *The Postmodern Condition: A Report on Knowledge*, G. Bennington & B. Massumi, trans. (1984) 10 THEORY & HIST. OF LIT. (philosophy as narrative and significance as cultural sensibility); R. Rorty, PHILOSOPHY AND THE MIRROR OF NATURE (Princeton: Princeton University Press, 1970) (philosophy only another mode of interpretation). For the opposite view, *see* J. Habermas, THEORY AND PRACTICE, J. Viertel, trans. (London: Heinemann, 1974). For useful summaries of the debate, albeit sympathetic to the latter perspective, *see* C. Norris, THE CONTEST OF FACULTIES: PHILOSOPHY AND THEORY AFTER DECONSTRUCTION (London: Methuen, 1985); J.B. Thompson, STUDIES IN THE THEORY OF IDEOLOGY (Berkeley: University of California Press, 1984). For the implications of the first approach on legal theory, *see* A.C. Hutchinson, *From Cultural Construction to Historical Deconstruction* (1984) 94 YALE L.J. 209.

This essay does not purport to align itself on, or defend, either side of this debate. Its aim simply is to give a useful interpretation of constitutional law, starting from the premise that language partially constitutes our social reality - a premise which, I think, both sides share.

all law can be viewed in this manner, the constitutive dimension of law is perhaps more readily apparent in constitutional discourse, insofar as constitutional discourse self-consciously and explicitly deals with fundamental questions relating to the organization of social and political life. The insights it offers define and make real the society "out there" and, in so doing, help to provide us with a sense of who we are and who we might become.

Particular stances taken in this conversation reinforce and are reinforced by competing pictures of individuality and community. Vying for the mantle of truth and the honour of being translated into reality, these pictures of politics and the self represent the limits and possibilities of our current constitutional imagination. As possibilities, they make the construction of opinion possible. As limits, they serve to exclude, or marginalize, alternative ways of imagining and realizing ourselves and our relations with others.

Although constitutional law can be seen as articulating and shaping conceptions of individuality and community, the dominant view in academic circles, at least until the enactment of the Canadian *Charter of Rights and Freedoms*, appears to have been that Canadian constitutional law did little of the sort.[2] Prior to 1982, constitutional law in Canada, with a few exceptions,[3] was limited to disputes between levels of gov-

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[2] For a recent articulation of this view, *see* P.J. Monahan, *At Doctrine's Twilight: The Structure of Canadian Federalism* (1984) 34 U.T.L.J. 47 at 94-95 (federalism does not implicate any concerns about the relationship between the individual and the community). For a similar view of federalism from an American perspective, *see* J. Choper, JUDICIAL REVIEW OF THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (Chicago: University of Chicago Press, 1980) at 196.

[3] *See* the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93 (rights and privileges of denominational schools); ss. 96-100 (guaranteeing the tenure of superior court judges); s. 133 (guaranteeing English and French languages in legislative and judicial proceedings); s. 20 (annual session of Parliament); ss. 50, 91(1) (5 year limit to Parliament); ss. 51, 51A, 52 (representation by population); s. 86 (annual sessions of Ontario and Quebec Legislatures); s. 125 (no taxation of Crown land or property); and s. 121 (free admission of goods to provinces).

As well, under the *Canadian Bill of Rights*, S.C. 1960, c. 44, individuals could raise quasi-constitutional claims against the state. *See Robertson and Rosetanni* v. *The Queen* (1963), [1963] S.C.R. 651, 41 D.L.R. (2d) 485 (freedom of religion); *R.* v. *Drybones* (1970), [1970] S.C.R. 282, 9 D.L.R. (3d) 473 (equality before the law); *Curr* v. *The Queen* (1972), [1972] S.C.R. 303, 26 D.L.R. (3d) 603 (due process and the right against self incrimination); *R.* v. *Appleby* (1972), [1972] S.C.R. 303, 21 D.L.R. (3d) 325 (presumption of innocence); *Duke* v. *The Queen* (1972), [1972] S.C.R. 917, 28 D.L.R. (3d) 129 (right to a fair hearing); *Brownridge* v. *The Queen* (1972), [1972] S.C.R. 926, 28 D.L.R. (3d) 1 (right to counsel); *Lowry and Lepper* v. *The Queen* (1974), [1974] S.CR. 195, 26 D.L.R. (3d) 224 (right to a fair hearing); *A.-G. Canada* v. *Lavell* (1974), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 (equality before the law); *R.* v. *Burnshine* (1975), [1975] 1 S.C.R. 693, 44 D.L.R. (3d) 584 (equality before the law); *Hogan* v. *The Queen* (1975), [1975] 2 S.C.R. 574, 48 D.L.R. (3d) 427 (right to counsel); *A.-G. Ontario* v. *Reale* (1974), [1975] 2 S.C.R. 624, 58 D.L.R. (3d) 560 (right to a fair hearing); *A.-G. Canada* v. *Canard* (1976), [1976] 1 S.C.R. 170, 52

ernment, and did not extend to disputes between the individual and the state. Parliament and the provincial legislatures, each within its respective sphere of authority as determined by the judiciary, were seen as supreme as against the individual and groups in society. When Parliament or a legislature acted, the individual had little recourse.[4]

This characterization of constitutional law, however true, hides an important insight. The relative absence of constitutional claims by individuals against the state prior to 1982 indicates the presence of a collectivistic picture or pictures about individuality and community which gave meaning to and legitimated that absence. In this sense, constitutional law, even prior to 1982, can be seen as intimately concerned with giving meaning to ourselves and our relations with others. Moreover, assumptions about individuality and community which served to legitimate and give meaning to both the supremacy of Parliament and legislatures and the limited role of the Canadian judiciary in constitutional law continue to ground particular stances taken in contemporary constitutional discourse. In this essay, I refer to one such set of assumptions about politics and the self as conservatism, or toryism.[5]

While the dominant approach to constitutional law prior to the enactment of the *Charter* was one of parliamentary and legislative supremacy, there were, as stated, exceptions. Parliament and the provincial legislatures were only supreme within their respective spheres of authority as determined by the judiciary. And in certain, limited circumstances, an individual could challenge the validity of legislation.[6] With the en-

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D.L.R. (3d) 548 (equality before the law); *Mitchell* v. *The Queen* (1976), [1976] 2 S.C.R. 570, 61 D.L.R. (3d) 77 (right to a fair hearing); *Bliss* v. *A.-G. Canada* (1979), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417 (equality before the law). Although these rights could be asserted, they were rarely the basis of a successful appeal. *See generally* P.W. Hogg, CONSTITUTIONAL LAW OF CANADA (Toronto: Carswell, 1977) at 431-43.

Finally, the Supreme Court of Canada jurisprudence has hinted at an "implied bill of rights". *See Reference Re Alberta Statutes* (1938), [1938] S.C.R. 100, [1938] 2 D.L.R. 82, *per* Duff C.J.C. and Cannon J.; *Saumer* v. *City of Quebec* (1953), [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641, *per* Rand, Kellock and Locke JJ.; and *Switzman* v. *Elbling* (1957), [1957] S.C.R. 285, 7 D.L.R. (2d) 337, *per* Rand, Kellock and Abbott JJ.

[4] It is true that the constitutionality of legislation can be challenged on division of powers grounds by an individual whose interest it is to avoid the effect of its provisions. And interested citizens can challenge the constitutionality of legislation if certain requirements are met. *See Thorson* v. *A.-G. Canada (No. 2)* (1975), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors* v. *McNeil* (1976), [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632; and *Minister of Justice of Canada* v. *Borowski* (1981), [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588. These principles recently have been extended to non-constitutional challenges in actions for a declaration to statutory authorities for public expenditure or other administrative action. *See Minister of Finance of Canada* v. *Finlay* (1986), [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321.

[5] *See* text accompanying notes 22-49, *infra*.

[6] *See supra*, note 4.

actment of the *Charter*, of course, the exceptions have become the rule.[7] These exceptions, and now the rule, indicate the co-existence of a profoundly different vision of the individual and the community, one which emphasizes individualism and a plurality of spheres of authority. I will refer to this orientation or political vision as liberalism. Within liberalism, two variants are mapped out.[8] The first is referred to as classical liberalism,[9] the second as pluralist liberalism.[10] Classical liberalism is profoundly individualistic, pluralist liberalism less so. Classical liberalism is more distrustful of group activity, including but not limited to state activity, than its pluralist counterpart. Both emphasize individualism, however, and both can be seen as playing a major role in shaping the form and content of modern constitutional law.

Just as individualism can be seen as entailing two variant visions of social and political life, so too can collectivism. The first, mentioned previously, is the conservative strain in Canadian society. The second is socialism.[11] Both stress the community over the individual, although the latter rejects notions of hierarchy and privilege embraced by the former. The collectivist orientation which these two otherwise competing political visions share is indicated by the hostility some proponents of each had toward the elevation of individual rights against the state to the level of constitutional ideal.[12]

It is my view that the form and content of constitutional law can be structured and given meaning by reference to these four competing ideological visions of political and social life.[13] Articulating these visions

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[7] With a new exception, *see* s. 33(1) of the *Charter* (Parliament or a provincial legislature can override ss. 2 and 7-15 of the *Charter*). Whether a legislative use of the "override" provision will in turn be subject to judicial scrutiny is an open question. One possibility would be judicial scrutiny of federal and provincial legislation according to the "implied bill of rights". *See Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.* (1986), [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 for an apparent affirmation of the implied bill of rights. Another possibility would be judicial scrutiny of federal legislation under the *Canadian Bill of Rights*. *See R.* v. *Beauregard* (1986), [1986] 2 S.C.R. 56 at 107, 30 D.L.R. (4th) 481 at 519, *per* Beetz J. dissenting, for the view that judiciary should not confine itself to traditional interpretations of the *Bill of Rights* ("this Court is not . . . prevented from adopting a more egalitarian approach"). Even the majority in *Beauregard*, *per* Dickson C.J.C., applied the traditional *Bill of Rights* approach looking at whether the legislation in question has a "valid federal objective"; *ibid.* at 90. *See also R.* v. *Burnshine*, *supra*, note 3. It should be noted, however, that s. 2 of the *Bill of Rights* itself contains provision for legislative override.

[8] For a similar approach, *see* W. Christian, *Ideology and Canadian Politics*, in J.H. Redekop, ed., APPROACHES TO CANADIAN POLITICS (Scarborough: Prentice-Hall, 1978) 114-37 at 123 (business liberalism and welfare liberalism).

[9] *See* text accompanying notes 50-68, *infra*.

[10] *See* text accompanying notes 69-81, *infra*.

[11] *See* text accompanying notes 82-95, *infra*.

[12] *See* R. Sheppard & M. Valpy, THE NATIONAL DEAL: THE FIGHT FOR A CANADIAN CONSTITUTION (Toronto: Macmillan, 1982) at 174-96, 269.

[13] For a similar approach from the American perspective, *see* R. D. Parker, *The Past of Constitutional Law — And Its Future* (1981) 42 OHIO ST. L.J. 223.

will enable us to grasp the fluidity and make sense of constitutional discourse, for it is through the language of these visions that constitutional law articulates and shapes relationships between individuals and community. At the same time, however, these four political visions conflict with each other. Each purports to answer fundamental questions about the relationship between the individual and the community, but each does so in a manner which competes or is in conflict with the others. Thus constitutional law can be seen as a structure of disagreement among competing visions of social and political life.

Not only do these competing political visions or ideologies structure and animate constitutional discourse, but it is my view that they partially constitute our own current political and moral visions. And they do so in a conflictual sense. In other words, just as constitutional argument and doctrine can be given meaning by seeing them as involving a conflictual intermingling of these four competing political visions, so it is also the case with our political and moral judgment. The push and pull of our "interpretive commitments"[14] — the fact we find some decisions and arguments unpalatable and others worthy of praise — can be understood by reference to these political visions. Very few of us subscribe to one of these ideologies in its "pure" form all of the time; rather, we find certain elements of each at different times and in different contexts to be either intellectually or intuitively appealing. In this way, to the extent that it is informed by these competing political visions, constitutional law can also be seen as a rhetorical externalization of aspects of our current forms of moral and political consciousness.[15]

Part II of this essay is devoted to a description and examination of the constituent elements of these four competing visions, using federalism disputes to illustrate the notion that each generates a different conception of the mission of constitutional law. Part III is an attempt to demarcate the conflictual ways in which these ideologies are reflected in interpretations of the *Charter of Rights and Freedoms*. Conflict and contradiction in constitutional law, however, lie not only in the tendency to combine ideological visions of social and political life. Part IV argues that conflict and contradiction are present within each paradigmatic vision. My overall intent, therefore, is to map out the fluidity and contradictions of constitutional argument in a way that simultaneously structures the limits and possibilities of legal doctrine and our own moral and political judgment. The ultimate aim is to free our constitutional imaginations from the

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[14] R.M. Cover, *Foreword: Nomos and Narrative* (1983) 97 HARV. L. REV. 4 at 4-8 ("Law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify.").

[15] *See* G. Kress & R. Hodge, LANGUAGE AS IDEOLOGY (Boston: Routledge & Kegan Paul, 1979) at 13 ("language should be seen . . . as the medium of consciousness, its forms of consciousness externalized"); R. Unger, KNOWLEDGE AND POLITICS (New York: Free Press, 1975) at 149 ("[I]n every individual there will be a conflict among different kinds of consciousness.").

ideological and argumentative constraints which result from seeing social and political life as something other than a joint and often conflictual process of constructing reality through language.[16]

II. FEDERALISM AND THE RHETORIC OF SOCIAL LIFE

It is commonplace to see Canadian social and political life as being informed by competing ideologies.[17] Toryism, liberalism and socialism are familiar names in the history of Canadian political thought. Each generates a descriptive and prescriptive picture of social and political life and each can be said to offer different ways of reconciling individuality and community.[18] These pictures of reconciliation are painted by language and their complex relation gives meaning to our social and political institutions as well as our daily interactions with others. Through the rhetoric[19] of each, we make sense of our surroundings and enter into "a universe of common discourse".[20]

What is perhaps less commonplace, however, is the notion that these ideological visions generate different conceptions of the form and content of constitutional law. This Part is devoted to articulating in greater detail the constituent elements of the previously-outlined four political visions which dominate the rhetoric of social life so that ultimately they can be used to make sense of Canadian constitutional discourse. This is done

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[16] *See supra*, note 13 at 224. *See also* G.E. Frug, *The Ideology of Bureaucracy in American Law* (1984) 97 HARV. L. REV. 1277; R.D. Gordon, *New Developments in Legal Theory*, in D. Kairys, ed., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (New York: Pantheon, 1982) at 281-93.

[17] M.P. Marchak, IDEOLOGICAL PERSPECTIVES ON CANADA, 2d ed. (Toronto: McGraw-Hill Ryerson, 1981); R. Whitaker, *Images of the State in Canada*, in L. Panitch, ed., THE CANADIAN STATE: POLITICAL ECONOMY AND POLITICAL POWER (Toronto: University of Toronto Press, 1977) at 28-68; W. Christian & C. Campbell, POLITICAL PARTIES AND IDEOLOGIES IN CANADA: LIBERALS, CONSERVATIVES, SOCIALISTS, NATIONALISTS (Toronto: McGraw-Hill Ryerson, 1974); and G. Horowitz, CANADIAN LABOUR IN POLITICS (Toronto: University of Toronto Press, 1968) at 3-57.

[18] *See* D. Kennedy, *The Structure of Blackstone's Commentaries* (1979) 28 BUFF. L. REV. 205 at 211-21, for a more extended analysis of (legal) modes of denial and mediation of the contradiction between individuality and community. *See also* M.C. Regan, Jr., *Community and Justice in Constitutional Theory* [1985] WISC. L. REV. 1073, for an analysis at the level of American constitutional theory; and E.R. Fuhrman, *Morality, Self and Society: The Loss and Recapture of the Moral Self*, in M.L. Wardell & S.P. Turner, eds., SOCIOLOGICAL THEORY IN TRANSITION (Boston: Allen & Unwin, 1986) at 69-79, for a discussion of the treatment of this conflict in social theory.

[19] "Rhetoric" is meant to refer to "the logic of reasoned discourse, of argumentation, of justification of choices": *see* H.J. Berman, *Introduction* to C. Perelman, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING (Dordrecht, Holland: Reidel, 1980) at ix. *See also* B. McLeod, *Rules and Rhetoric* (1985) 23 OSGOODE HALL L.J. 306. For a similar use in constitutional theory, *see* M. Gold, *The Rhetoric of Constitutional Argumentation* (1985) 35 U.T. L.J. 154 at 172-73.

[20] R.M. Unger, PASSION: AN ESSAY ON PERSONALITY (New York: Free Press, 1984) at 97.

by sketching out synthetic, heuristic models of the discourse of Canadian social, political and legal thought.[21] The primary vehicle of explication is federalism. Competing visions of federalism are outlined for illustrative, not probative, purposes. There is always a danger of reducing complexity to simplicity in such an enterprise, a danger which, unfortunately, cannot be avoided. The models offered, however, are simply models: descriptions of the constituent elements of the dominant ways we construct, interpret and give meaning to social and political life. They necessarily involve a certain level of artificiality and their content is bound to be contestable. My hope is that, despite their generality and contestability, they will nonetheless be useful in beginning to understand *how* we understand constitutional law in Canada.

A. Toryism

In the debate over Confederation, one strand of thought vying for acceptance by the Framers was the idea that the *British North America Act* ought to provide for a centralized system of government to avoid what were seen as weaknesses of the American political system and to permit the central government to act decisively in the name of the common good.[22] According to some of its proponents,[23] this proposed hierarchical structure of authority, ultimately justified on grounds of convenience, did not automatically embrace the notion of a relatively independent judiciary

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[21] *See* Frug, *supra*, note 16 at 670-71 (merits of using ideal-type methodology in legal theory); C.B. Macpherson, THE LIFE AND TIMES OF LIBERAL DEMOCRACY (Oxford: Oxford University Press, 1977) at 2-9 (merits of using ideal-type methodology in political theory); M. Weber, ECONOMY AND SOCIETY, vol. 1, G. Roth & C. Wittich, eds., (New York: Bedminster, 1978) at 19-22 (merits of using ideal-type methodology in social theory).

[22] *See* the remarks of Jonathan McCully of Nova Scotia, *quoted in* J. Pope, CONFEDERATION: BEING A SERIES OF HITHERTO UNPUBLISHED DOCUMENTS BEARING ON THE BRITISH NORTH AMERICA ACT (Toronto: Carswell, 1895) at 85, 86; as well as the remarks of Sir John A. Macdonald during the introduction of the Resolutions in Parliament, in PARLIAMENTARY DEBATES ON THE SUBJECT OF CONFEDERATION OF THE BRITISH NORTH AMERICAN PROVINCES (Quebec: Parliamentary Printers, 1865). *See generally* J. Smith, *The Origins of Judicial Review in Canada* (1983) 16 CAN. J. POL. SCI. 115-59; Christian & Campbell, *supra*, note 17 at 84. *See also* J.R. Mallory, *The Five Faces of Federalism*, in P.A. Crepeau & C.B. Macpherson, eds., THE FUTURE OF CANADIAN FEDERALISM (Toronto: University of Toronto Press, 1965) at 3-15 (dominant vision of the relationship between the central and provincial governments at the time of Confederation was hierarchical); K.C. Wheare, FEDERAL GOVERNMENT, 4th ed. (New York: Galaxy, 1964) at 17-20 ("Canadian Constitution only 'quasi-federal' in law"). For a relatively modern defence of this vision, *see* D. Creighton, THE ROAD TO CONFEDERATION: THE EMERGENCE OF CANADA, *1863-1867* (Toronto: Macmillan, 1964).

In fact, Sir John A. Macdonald initially preferred a *legislative* (i.e., a unitary state), as opposed to a federal, union. *See* E.R. Black, DIVIDED LOYALTIES: CANADIAN CONCEPTS OF FEDERALISM (Montreal: McGill-Queen's University Press, 1975) at 31-32; and D.V. Smiley, THE FEDERAL CONDITION IN CANADA (Toronto: McGraw-Hill Ryerson, 1987) at 36-39.

[23] *Ibid.*

overseeing disputes between the two levels of government. The central government potentially could have performed this function, by vetoing provincial legislation through the use of its "disallowance" power.[24] In the end, the *British North America Act* did contain provision for the establishment of a "General Court of Appeal" for Canada,[25] although the Framers were far from agreed on the role and function of such a body.[26]

This institutional hierarchy apparent in the minds of at least some of the Framers at the time of Confederation re-emerged in the 1870s in the context of the legislative establishment of the Supreme Court of Canada. Speaking about an earlier proposal, Sir John A. Macdonald stated that, "this new Court should stand as regards the Provinces in a position analogous to that of the Queen in Council as regards the Colonies generally; and that the Procedure should be assimilated as far as possible to that of the Judicial Committee".[27] As Snell and Vaughan aptly put it, "the imperial government was to the Ottawa government as the Ottawa government was to the provincial governments, and this relationship was to be replicated in the judicial structure".[28]

Although the forces producing the division of authority in 1867 extended far beyond these notions of institutional and political hierarchy,[29] these ideas are central to toryism, which sees order necessary to hierarchy and hierarchy necessary to order. The imperial government was to the central government as the central government was to the provincial government, and this hierarchy is replicated in the relationship between the individual and the community. Authority flows downward, from the ruler to the ruled. The individual is imagined as part of a larger whole, which defines roles for and sets limits on social participants. Social roles provide

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[24] *Constitution Act, 1867*, s. 90. *See generally*, Smith, *supra*, note 22. *See also* J. Smith, *Reply to the Comments of Knopff and Strayer* (1983) 16 CAN. J. POL. SCI. 597. Macdonald used the disallowance power five times during his first term of office and forty-one times between 1878 and 1891. *See* Black, *supra*, note 22 at 36. *See* J.R. Mallory, SOCIAL CREDIT AND THE FEDERAL POWER IN CANADA (Toronto: University of Toronto Press, 1954) at 8-24, for a history of the disallowance power.

Other aspects of the *Constitution Act, 1867* which embody this institutional hierarchy include the fact the lieutenant-governors of the provinces (s. 58) and superior, district and county court judges (s. 96) were to be federal appointees, and that Parliament was given the authority to bring local works within exclusive federal legislative jurisdiction by declaring them to be "for the general advantage of Canada" (ss. 91(29) and 92(10)(c)).

[25] *Constitution Act, 1867*, s. 101.

[26] Smith, *supra*, note 22. *See also* J.G. Snell & F. Vaughan, THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION (Toronto: Osgoode Society, 1985) at 3-5.

[27] National Archives of Canada, Sir J.A. Macdonald Papers no. 64610, *quoted in* Snell & Vaughan, *ibid.* at 6.

[28] *Ibid.*

[29] For a detailed analysis of the conditions of colonial politics in Canada, *see* G.T. Stewart, THE ORIGINS OF CANADIAN POLITICS: A COMPARATIVE APPROACH (Vancouver: University of British Columbia Press, 1986).

and ground individual identity.[30] This hierarchical, organic vision of the relationship between the individual and the community spawns a deferential approach to political life; the rulers of society are figures of authority and, as such, should be treated with trust and respect. In turn, political leaders owe duties to their constituents to act in their best interests and further the common good, which is something more than the sum of the more particular interests of individuals and groups in society. The tory conception of government is not that it is government by the people but government by the ministers of the Crown for the people.[31]

This political vision stems from older, feudal notions about the relationship between the individual and the community. In the older version, the purpose of authority and hierarchy was to foster the common good; this is achieved by maintaining harmony between and among the various elements of social life. The feudal hierarchy of authority was seen as part of a greater "chain of being",[32] which reached from inanimate matter up to "the infinite wisdom of God".[33] Humans were seen as occupying a mid-way point along this chain, although humanity had its own hierarchy and authority, with monarchs "called Gods, . . . even by God himself".[34] This led to a vision of the monarchy as an institution

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[30] A. McIntyre, AFTER VIRTUE, 2d ed. (Notre Dame: University of Notre Dame Press, 1984) at 33-34, defines individuals in pre-modern society as "inherit[ing] a particular space within an interlocking set of social relationships; lacking that space, they are nobody, or at best a stranger or an outcast". Similarly, W.L. Morton, *Canadian Conservatism Now*, in H.D. Forbes, ed., CANADIAN POLITICAL THOUGHT (Toronto: Oxford University Press, 1985) at 301, describes toryism as involving respect for authority and tradition. With respect to the latter, he states:

> This is not ancestor worship, but merely the realization that, important as the individual is, he is what he is largely in virtue of what he is by blood and breeding, and of what he has absorbed, consciously or unconsciously, formally or informally, from home, church, school, and neighbourhood. He subscribes, in short, to Burke's definition of the social contract as a partnership in all virtue, a partnership between the generations, a contract not made for all time, but one perennially renewed in the organic processes of society, the birth, growth, and death of successive generations.

[31] Horowitz, *supra*, note 17 at 20-21. *See also* Morton, *ibid.*

[32] A.O. Lovejoy, THE GREAT CHAIN OF BEING (Cambridge: Harvard University Press, 1936).

[33] Sir Walter Raleigh, HISTORY OF THE WORLD, *as quoted in* E.M.W. Tillyard, THE ELIZABETHAN WORLD PICTURE (London: Chatto, 1956) at 9.

[34] C.H. McIlwain, THE POLITICAL WORKS OF JAMES I (Cambridge: Harvard University Press, 1918) at 307. This gives rise to a distinct approach to the relationship between religion and politics. *See* Reverend J. Strachan, *On Church Establishment*, in Forbes, ed., *supra*, note 30 at 10-17 ("It is to religion that [the British nation] owes her pre-eminence — it is this that throws a holy splendour round her head, makes her the hope of every land, and urges her to achieve the evangelization of mankind."). Strachan states, at 15, that it is "the duty of every State to provide for the religious instruction of its people". In nineteenth-century Quebec, ultramontanism was even more direct. The *Programme Catholique of 1871*, written by Adolphe-Basile Routhier, Francois Trudel and others, under the direction of Ignace Bourget, Bishop of Montreal, in Forbes,

which rightly represented the public good or public interest, in constrast to the more specific interests of the constituent elements of social and political life. Social life in turn was structured in an orderly fashion, with each class performing its assigned function and being rewarded proportionate to its status.

This feudal justification of hierarchy and order gradually shifted from one of divine plan to one of convenience. Cosmological justification gave way to the view that a hierarchical society was the kind of society that worked best. Edmund Burke dismissed the notion that the monarchy has "more of a divine sanction than any other mode of government".[35] At the same time, however, Burke justified the monarchy on the grounds of convenience:

> No experience has taught us, that in any other course or method than that of an *hereditary crown* our liberties can be regularly perpetuated and preserved sacred as our *hereditary right* . . . the undisturbed succession of the crown [is] a pledge of the stability and perpetuity of all the other members of our constitution.[36]

Other institutions, such as the established church, were similarly justified.[37]

What Burke did to political theory, William Blackstone did to law.[38] Blackstone derived a series of legally recognized relationships which cumulatively defined the social structure of eighteenth-century England from a set of absolute rights of the individual regardless of his or her rank or status in social life. The hierarchical nature of these relationships, while seemingly contrary to the emerging liberal principle of equality of right, was nonetheless derived by Blackstone from that principle on

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supra, note 30 at 94, states:

> No one can deny that politics and religion are inextricably related, and that the separation of Church and State is an absurd and impious doctrine. This is particularly true of the constitutional regime that, by granting the Parliament complete legislative power, puts in the hands of its members a double-edged and potentially terrible weapon. This is why it is necessary that those who exercise the legislative power be in perfect accord with the teachings of the Church.

For the historical context of ultramontanism, *see* D. Moniere, IDEOLOGIES IN QUEBEC: THE HISTORICAL DEVELOPMENT (Toronto: University of Toronto Press, 1981) at 146-76; and R. Knopff, *Religious Freedom and Party Government: The Galt-White Debate of 1876*, in S. Brooks, ed., POLITICAL THOUGHT IN CANADA (Toronto: Irwin Publishing, 1984) at 23-48.

[35] *Reflections on the Revolution in France*, in THE WRITINGS AND SPEECHES OF EDMUND BURKE, vol. 3 (Toronto: George N. Morang, 1901) at 265.

[36] *Ibid.* at 263-65.

[37] *Ibid.* at 353-54. The previous discussion owes much to S.H. Beer, MODERN BRITISH POLITICS: PARTIES AND PRESSURE GROUPS IN THE COLLECTIVIST AGE (New York: W.W. Norton, 1982) at 3-13.

[38] COMMENTARIES ON THE LAWS OF ENGLAND (1769).

grounds of convenience and implied consent. As a result, Blackstone's work, in a language wholly foreign to our current conceptions of the structure of law, yet with devices quite familiar to twentieth-century styles of legal reasoning, legitimated a set of hierarchical rules not by reference to feudal notions of natural status and rank but to liberal conceptions of equality of right.[39]

This uneasy Burkean/Blackstonian alliance of ordered hierarchy and equality of right can be seen as the conceptual framework through which the tory political vision structures and makes sense of social life. While appeals to natural order and divinity have receded from the forefront of legal, political and social justification,[40] "peace, order and good government",[41] together with deference to the established social structure and political actors, an acceptance of one's place in the larger matrix of social life, and a conception of the public good of the community which transcends the private interests of the individual, remain deeply ingrained in the rhetoric and fabric of Canadian social life.

This picture of politics and the self gives rise to a certain vision of the proper form and content of constitutional law and of the relationship of law to politics. The latter can be articulated by again examining the Confederation debates. To reiterate, at the time of Confederation there was significant support for the notion that the central government, and not the judiciary, would be the body which would rule on the constitutionality of provincial legislation.[42] Although provision was made for the establishment of a general Court of Appeal, the role that such a court would play in terms of the constitutionality of legislation was far from clear. The initial role for the Supreme Court of Canada envisioned by at least some of its proponents was primarily instrumental. An earlier bill establishing a Supreme Court would have permitted the central government to refer provincial legislation to the Court for determination, but would have exempted acts or bills of Parliament from such consideration.[43] The Court thus established would have been in line with the idea that the central government was in a hierarchical relationship with the provinces; the Court would have been an instrument available to the

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[39] Kennedy, *supra*, note 18.

[40] *But see* G. Grant, PHILOSOPHY IN THE MASS AGE (Toronto: Copp Clark, 1959) at 81, where he states that:

> [t]he idea of God, having been discarded as impossible and immoral, comes back in the twentieth century as men recognize that if there is no theoretical limit there is no practical limit, and any action is permissible.

See also the preamble of the *Charter*, which states that "whereas Canada is founded upon principles that recognize the supremacy of God. . .".

[41] *Constitution Act, 1867*, s. 91(1).

[42] *See* text accompanying notes 22-26, *supra*.

[43] Bill C-49, *An Act to establish a Supreme Court for the Dominion of Canada*, 2d Sess., lst Parl. 1870.

central government to ensure this result.[44] And in the draft legislation that did become law, the instrumental nature of the Court persisted as a result of the retention of reference procedure provisions, and it might be suggested that its instrumentality was actually enhanced, insofar as the earlier bill was amended to permit the central government to request the Court to advise it on the constitutionality of its proposed legislation. Perhaps most importantly, in contrast to this supplementary role, there was no explicit conferral of jurisdiction to strike down federal legislation.[45]

Thus, one element of the tory vision of the relationship between law and politics is that the former, at least at the level of constitutional law, is subservient to and an instrument of the latter. I have already established the idea that within the political realm, a dominant strand of the tory vision at least initially involved the idea that the provincial legislatures are subservient to Parliament.[46] The intersection of this relationship with the legal-constitutional realm is that the judiciary plays an instrumental role at each level of the Canadian political hierarchy. It is not an independent institution operating to adjudicate and police the boundaries between two autonomous spheres of authority, each claiming constitutional justification for their actions.[47] Rather, constitutional law plays more of an advisory, supplementary role in relation to politics. In the tory vision, law and politics are not separate conceptual institutions; politics involves the supreme articulation of the common good and (constitutional) law necessarily is facilitative and respectful of, and subservient to, that supremacy.

With respect to the form and content of law engendered by the tory vision of political life, one would expect to find a combination of the

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[44] Snell & Vaughan, *supra*, note 26 at 7; Smith, *supra*, note 24.

[45] *The Supreme Court and Exchequer Court Act*, S.C. 1875, c. 11. Macdonald rejected the notion that the Supreme Court could "in any degree override the Parliament of Canada": *see* Canada, H.C. *Debates* at 289 (1875). *See generally* Smith, *supra*, note 15 at 3-27.

This is not meant to imply that Macdonald was a "tory". *See supra*, text accompanying notes 14-15. I only mean to suggest that his approach to the relationship between Parliament and the judiciary can readily be interpreted by reference to a conservative vision of the proper organization of society. That his approach equally could be interpreted by reference to classical or pluralist liberal notions does not render the former interpretation meaningless. Instead, it demonstrates simultaneously the fluidity of political and legal discourse and the utility in heuristic structure. That heuristic structuring may itself be arbitrary does not detract from its utility in attempting to understand that discourse.

[46] *See* text accompanying notes 17-23, *supra*.

[47] For an historical account of the rise of this way of seeing the relationship between the judiciary and government in the United States, first at the level of federalism disputes, and second at the level of disputes between individuals and government, *see* D. Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940* (1980) 3 RES. IN LAW & SOC. at 3-24.

aforementioned deference to parliamentary supremacy and the central tenets of toryism regarding its treatment of the relationship between the individual and the community. Although in its pristine form, the tory vision at the level of constitutional law precludes explicit, independent judicial consideration of individual constitutional rights against the state, the common law — that area of legal relations between the individual and the community untouched by legislative restrictions — ought to tell a different story.[48] The Blackstonian/Burkean alliance of hierarchy and equality engenders a legal discourse preoccupied with the maintenance of those common law rules which legitimate the hierarchical relations and institutions which in turn constitute and reproduce the tory ideal society. As a result, the individual is legally treated as a function of status and rank defined by and subsumed under the web of social and legal relations which constitute a graduated and authoritarian social life.[49]

B. Classical Liberalism

In 1879, a scant four years after its establishment, the Supreme Court of Canada took an approach radically different from the tory vision of the Court's role in the structure of the Canadian polity in particular and of constitutional law in general. In *Valin* v. *Langlois*,[50] a seemingly innocuous case where the federal *Dominion Controverted Elections Act* was held to be constitutional, the Court asserted the power to review the constitutionality of federal legislation. Without any fanfare, Chief Justice Ritchie wrote the following:

> In view of the great diversity of judicial opinion that has characterized the decisions of the provincial tribunals in some provinces, and the judges in all, while it would seem to justify the wisdom of the Dominion Parliament, in providing for the establishment of a Court of Appeal such as this, where such diversity shall be considered and an authoritative declaration of the law be enunciated, so it enhances the responsibility of those called on in midst of such conflict of opinion to declare authoritatively the principles by which both federal and local legislation are governed.[51]

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[48] For historical analyses of nineteenth-century judicial philosophies and modes of judicial reasoning in "private" law immediately prior to and during industrialization, *see* G. B. Baker, *The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire* (1985) 3 LAW & HIST. REV. 219; D. Howes, *Property, God and Nature in the Thought of Sir John Beverley Robinson* (1985) 30 McGILL L.J. 365; R.C.B. Risk, *The Law and the Economy in Mid- Nineteenth Century Ontario: A Perspective*, in D.H. Flaherty, ed., ESSAYS IN THE HISTORY OF CANADIAN LAW, vol. 1 (Toronto: Osgoode Society, 1981) at 88; J. Nedelsky, *Judicial Conservatism in the Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930*, in Flaherty, *ibid.* at 281; R.C.B. Risk, *The Last Golden Age: Property and Allocation of Loss in Ontario in the Nineteenth Century* (1977) 27 U.T.L.J. 199.

[49] *See* text accompanying notes 38-39, *supra*.

[50] (1880), 3 S.C.R. 1.

[51] *Ibid.*

With this assertion of judicial power, the Court embraced an approach to the relationship between law and politics which I will call classical liberalism. That its logic is illogical (the need for judicial uniformity could as easily be satisfied by an authoritative statement that the courts are not entitled to strike down federal legislation) is for my purposes ultimately unimportant; the upshot of the decision was that the judiciary thereafter would play a role of constitutional umpire between two constitutional rights-bearing entities, each possessing powers absolute within their respective spheres of authority. As Lord Haldane wrote of Lord Watson's contribution to classical legal liberalism at the level of disputes between the two levels of government, "[t]he provinces were recognized as of equal authority co-ordinate with the Dominion".[52]

This vision of the judiciary as constitutional umpire is a core principle behind classical liberalism, which imagines social life as an aggregation of rights-bearing individuals, each absolute within his or her sphere of authority. The formal judicial function in the context of disputes between individuals is analytically identical to its function in federalism disputes: namely, to draw a line between conflicting assertions of power to act.[53] It does so by reference to law, which is separate from politics — the latter being the process by which the public interest is articulated, not as something which transcends private interests, but merely as the sum of its parts.[54]

More specifically, political life is pictured as an arena in which private interests clash with each other in an endless series of struggles between and among individuals, each attempting to use government to serve his or her interests. But political life is not imagined as possessing an immanent ordering principle which would contain and check the potential for domination. Thus there is a need for exogenously-imposed limits upon political life to protect the individual from the spectre of group tyranny. This desire to protect the dignity of the individual and enhance his or her opportunities to realize his or her conception of the good manifests itself in law in the discourse of rights. Rights are viewed as individual trump cards which protect the individual from the collectivity or collectivities in areas most central to the individual's self-definition.

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[52] Lord Haldane, *The Work for the Empire of the Judicial Committee of the Privy Council* (1923) 1 CAMBRIDGE L.J. 10. *See generally* A.C. Cairns, *The Judicial Committee and its Critics* (1971) 4 CAN. J. POL. SCI. 301. That this liberalization was accomplished primarily through the effort of imperial courts is an ironic example of the continuing presence of hierarchical toryism at the institutional level of constitutional law.

[53] *See* Kennedy, *supra*, note 47. For an historical account of the "classical" period in England, *see* D. Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, in W. Twining, LEGAL THEORY AND THE COMMON LAW (Oxford: Oxford University Press, 1986) at 26-61.

[54] *See* Horowitz, *supra*, note 17 at 5-6; Christian & Campbell, *supra*, note 17 at 33-75.

In the classical liberal vision, this protection is accorded by law primarily to individual economic activity.[55]

The reason for this emphasis upon the economic sphere is due to the fact that, unlike the political marketplace, the economic market is seen as containing an immanent ordering principle as long as participants do not act collectively. Thus established,[56] it operates in such a manner that each individual is treated in a formally equal fashion and rewarded according to his or her labour embodied in the commodity that the individual has offered for sale, the price being determined by the sum of the outcome of individual market activity.[57] In the long run, social welfare will thereby be maximized.[58] Thus classical liberalism inverts the tory primacy of politics over economics and constrains and explains the former by reference to the latter. Status and rank theoretically no longer determine one's rewards in social life. Rather it is the survival of the fittest, with the role of the state and of law being to ensure that fitness is not obtained by means other than individual skill and self-reliance.

I have already alluded to the vision of law engendered by this descriptive and prescriptive approach to social life.[59] The judicial approach is to recognize the aforementioned rights as adhering to individuals as individuals and where there is a conflict either between individuals or between individuals and the state, it ought to draw a line between the two competing spheres of authority in such a way that treats them as formal equals and does not favour one's theory of the good over the other to the detriment of the basic facilitative organizing principles of the economic market. The form of law under the classical liberal vision is likely to be formalistic: that is, as a determinative, quasi-scientific application of rules and principles developed through precedent.[60]

This approach to organizing legal reality further assumes that in delineating boundaries between the various spheres of entitlement by this apolitical (read legal), formalistic method, the judge does not have to

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[55] *Ibid. See also* D. Kennedy, *Form and Substance in Private Law Adjudication* (1976) 89 HARV. L. REV. 1685 at 1713-16, 1767-71. Perhaps the classic statement in this vein is J. Locke, TWO TREATISES OF GOVERNMENT, P. Laslett ed., 2d ed. (London: Cambridge University Press, 1967). William Lyon Mackenzie's draft constitution, published in 1837, called for freedom of contract (s. 15A), private property rights (s. 20) and the vesting of "[t]he Judicial power of the State . . . in a Supreme Court" (s. 65).

[56] *See* A. Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, vol. 2, ed. by E. Cannan (Chicago: University of Chicago Press, 1976) at 208-09 (the three functions of state activity). *See also* K. Polanyi, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME, 2d ed. (New York: Rinehart, 1957) at 69.

[57] *See* P.S. Atiyah, THE RISE AND FALL OF FREEDOM OF CONTRACT (Oxford: Clarendon Press, 1979) at 294-304.

[58] The classic exposition of this view is J. Bentham, THE THEORY OF LEGISLATION, Ogden, ed. (New York: Harcourt, Brace, 1931) at 119-22.

[59] *See* text accompanying note 52, *supra*.

[60] On the role of formalism in private law jurisprudence in the nineteenth century, *see* Nedelsky, *supra*, note 48 at 281-83.

choose one sphere over another. The assumption is that the rights of one individual do not overlap or conflict with those of another.[61] This vision of individual rights and judicial authority thus can be seen as a juridical articulation of the distinction between self-regarding and other-regarding behaviour.[62] That is, self-regarding behaviour is the domain of the sovereignty of the individual and the realm of individual rights and, as such, is to be protected against interference. Other-regarding activity (activity which interferes with the interests of others), on the other hand, justifiably can be limited by the legislature (and by the judiciary when such action interferes with another individual's rights). Thus, as Sugarman puts it, "the object of the legal system [is] to maximize the 'self-regarding' behavior of individuals consistent with the 'self-regarding' behavior of other individuals".[63] In this way, the judiciary, by assigning to itself the regulation of the domain of individual rights, is able to distance itself from the immediacy of the dispute at hand and avoid the appearance that it has advanced one theory of the good at the expense of another — in short, avoid the charge that it is a political institution.

At the level of constitutional law, it is easy to see how this political vision would lead to the constitutionalization of the aforementioned individual rights against legislative initiatives enacted in the name of the common good; one need only look to constitutional jurisprudence in the United States during the early part of this century for a representative picture of the form and content of law according to the classical liberal vision.[64] But we need not look that far. As stated, its form is apparent

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[61] *See* Monahan, *supra*, note 2 at 55-56.

[62] J.S. Mill, ON LIBERTY, C.V. Shields, ed. (Indianapolis: Bobbs-Merrill, 1956) at 13.

[63] D. Sugarman, *The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science* (1983) 46 MOD. L. REV. 102 at 108. *See also* R. Gordon, *Book Review* (1981) 94 HARV. L. REV. 903 at 908-10. Or, as Sir Wilfrid Laurier put it in a speech entitled *Political Liberalism*, delivered in Quebec City in 1877, *reprinted in* Forbes, ed., *supra*, note 30 at 148: "We have no absolute rights amongst us. The rights of each man, in our state of society, end precisely at the point where they encroach upon the rights of others."

For a defence of the thesis that the strategy of the Supreme Court has been to defend this vision of rights in the areas of competition policy and the federal trade and commerce power, *see* P.J. Monahan, *The Supreme Court and the Economy* in THE SUPREME COURT OF CANADA AS AN INSTRUMENT OF POLITICAL CHANGE, vol. 47 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985) at 105.

[64] One can see its influence in American cases involving individual rights against the state, federalism disputes and disputes over the separation of powers during this era. For cases involving individual rights, *see Lochner* v. *New York*, 198 U.S. 45 (1905) (freedom of contract); *Adair* v. *United States*, 208 U.S. 161 (1908) (freedom of contract); *Coppage* v. *Kansas*, 236 U.S. 1 (1915) (freedom of contract). For cases involving federalism disputes, *see Carter* v. *Carter Coal*, 298 U.S. 238 (1936) (commerce clause); *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918) (commerce clause); *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20 (1922) (federal taxing power); *United States* v. *Butler*, 297 U.S. 1 (1936) (federal spending power). For cases involving the separation of powers, *see generally* W. Gellhorn, C. Byse & P.L. Strauss, ADMINISTRATIVE LAW: CASES AND COMMENTS, 7th ed. (Mineola, N.Y.: Foundation Press, 1979) at 52-63.

in the way the judiciary has approached federalism disputes.[65] And although there was no constitutionalization of the classical liberal vision in Canada at the level of individual rights against the state prior to 1982, that vision does give meaning to our long tradition of adhering to the rule of law in the context of the exercise of administrative authority.[66] By making government accountable to law under the same terms and before the "ordinary courts of the land", and requiring that no person be punished except for a clear breach of law established before the judiciary, Dicey saw the rule of law as protecting values of individualism and self-reliance against the tyranny implicit in the extension of public authority.[67]

Thus, the concept of the rule of law can be seen as a major expression of the classical liberal vision of the form and content of law. As stated, Dicey viewed the unchecked growth of government as a threat to the sanctity of the individual and his or her self-reliance.[68] Law is separate from and transcends politics and as a result of this separateness and autonomy, it is able to check the potential for tyranny inherent in political life. In this sense, the notion of the rule of law can be seen as a particular expression of the more general classical liberal vision with its attendant insistence on sharply-drawn lines between separate spheres of authority and its concomitant emphasis on individualism and self-reliance.

C. Pluralist Liberalism

Unlike the classical version, the pluralist liberal political vision pictures social life as complex and highly interdependent, laced together by the competing and overlapping demands of its individual members. On the one hand, political life is still seen as a competition among individuals and groups seeking to further their interests and conceptions of the good, but it is imagined as containing an internal ordering principle

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[65] Monahan, *supra*, note 2. *See also* Mallory, *supra*, note 22 (discussion of "classical federalism").

[66] *See* A. Dicey, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION, 10th ed. (London: Macmillan, 1959) at 188. For an example of the profound influence Dicey's thought has had on legal thought in Canada, *see* The Report of the Royal Commission on an Inquiry into Civil Rights in Ontario (Toronto: Queen's Printer, 1968) (the McRuer Report). *See also Roncarelli* v. *Duplessis* (1959), [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

[67] *Ibid. See also* P. Nonet, ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY (New York: Russell Sage Foundation, 1969) at 4. Interestingly, Dicey saw the rule of law as also meaning that constitutional principles are generated not as a result of abstract constitutional definitions of individual rights, but out of the more concrete context of judicial decisions determining the rights of individuals in particular cases brought before the judiciary. However, the functional effect would be the same: to reduce an unwritten constitution to a partially written code of individual rights. *See* Sugarman, *supra*, note 63 at 110.

[68] *Ibid. See also* A. Dicey, LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY, 2d ed. (London: Macmillan, 1962); Sugarman, *supra*, note 63 at 110.

which will regulate and check the potential for economic hegemony. On the other hand, the economic sphere is no longer seen as the means by which individual initiative and self-reliance will be axiomatically rewarded in a fair and just manner; pluralist liberalism acknowledges that if left on its own, the economic market will generate injustice and inequality. In this sense, pluralist liberalism inverts the classical liberal vision of the political and the economic spheres: it sees the latter, and not the former, as requiring exogenous limits to check potential market disequilibrium. Pluralist liberalism, then, to a limited extent, reintroduces the tory primacy of politics over economics, insofar as it embraces governmental interference in the economic sphere to achieve the conditions necessary for market equilibrium and a fairer distribution of wealth, resources and rewards.

For this reason, group activity to a certain degree is also seen as legitimate. Groups are imagined as conducive to preventing tyranny by either market participants, singly or collectively, or by government. As Rand J. stated, "the very multiplicity of groups, at the moment at least, appears as a safeguard against any dominant power".[69] Groups are also imagined as major vehicles for individual self-realization. Thus group activity is treated instrumentally. That is, such activity is seen as an effective means of achieving stability in the economic sphere and of enhancing the ability of individuals to further their conceptions of the good. Although collective elements enter into the pluralist liberal imagination, they do so in an instrumental manner; individualism remains the core organizing principle of social life.[70]

Paralleling this transformation in ways of understanding and giving meaning to the economic and political spheres is a shift in emphasis on what constitutes a threat to individuality. As stated, individualism is still central to the pluralist approach; the demands of the collectivity are still perceived as threatening to the sanctity and integrity of the individual. But the integrity of the individual is no longer imagined as being fundamentally rooted in principles of formal economic liberty. Economic liberty is as much of a threat to, as it is facilitative of, principles of individualism and autonomy. The content of constitutional law at the level of the discourse of rights thus shifts from an emphasis on individual economic liberty to a political inquiry. That is, constitutional protection of the individual against legislative initiatives is conceived less in terms of an inquiry into the effect of economic redistribution upon an individual's ability to realize his or her conception of the good through property and contract, and more in terms of a need to facilitate and protect the individual's formal ability to enter the political marketplace and partic-

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[69] I. Rand, *Responsibilities of Labour Unions*, in SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA (Toronto: Richard De Boo, 1954) 27 at 42.

[70] For a more extended analysis of group activity under the classical and pluralist versions of liberalism, *see* C. Sheppard, *Freedom of Association and Labour Unions in Canada* (LL.M. Thesis, Harvard Law School, 1985) [unpublished].

ipate therein, conceding as it does the need for regulation of the economy by the political process.[71] Thus the content of constitutional law under the pluralist liberal vision can be seen as being simultaneously shaped by a certain degree of deference to political regulatory initiatives insofar as political outcomes can generally be trusted to be a fair compromise among competing demands of political participants, and by a parallel emphasis on a need to maintain the basic formal "entry conditions" of the political marketplace facing the individual on his or her voyage of self-realization. Pluralist liberalism thus emphasizes freedom of expression, religion and association and equality of opportunity, and downplays freedom of contract and property rights, seeing as it does the need for limited state regulation of the latter.

The form of constitutional law under the pluralist vision also pays service to the interdependence and complexity of social life. Rather than assuming, as does the classical vision, that legal actors are inviolate

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[71] This is not meant to imply that pluralist liberalism imagines constitutional rights solely in instrumental, or procedural, terms. Freedom of expression, for example, can be seen as valuable because it is an essential aspect of a certain normative conception of the individual. In *Switzman* v. *Elbling*, *supra*, note 3, for example, Rand J., at 306, stated the following:

> This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence.

More generally, *see* L. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories* (1980) 89 YALE L.J. 1063 (substantive values are more fundamental than procedural values).

Or constitutional rights can be seen in instrumental, or procedural, terms: they are important because they are necessary preconditions to an effective political process. Also in *Switzman* v. *Elbling*, *ibid.*, for example, Abbott J., at 326, stated the following:

> The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.

More generally, *see* J.H. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Cambridge: Harvard University Press, 1980).

That the procedural/substantive distinction is difficult to sustain — attaching value to process seems to be an inherently substantive act, and once process is imagined in substantive terms, then the distinction begins to unravel – is an idea which is not new to constitutional theory: *see* Parker, *supra*, note 13 at 236-39; P. Brest, *The Substance of Process* (1981) 42 OHIO ST. L.J. 130. My point in claiming that pluralist liberalism, in contrast to classical liberalism, stresses politics over economics at the level of constitutional law is not to argue that they align themselves on opposite sides of the above debate. Rather, the idea I wish to convey is simply that the pluralist prescriptive vision of the content of constitutional rights imagines itself downplaying economic freedoms and emphasizing procedural political freedoms. That the latter are legitimated in procedural or substantive terms does not, I think, undermine this claim.

spheres of authority, that the entitlements of each do not overlap with others, and that the judge's role is simply to draw a line setting out the boundaries between or among legal entities, the pluralist approach is to recognize the complexity and interdependence of social relations and to imagine social and legal actors as possessing competing and conflicting entitlements. To decide in favour of one sphere of right necessarily involves the transgression of another. While the classical liberal vision would treat such a transgression as something to be rectified before it could be called "law" (and until then, a trespass), the pluralist liberal approach is to imagine such transgressions as an inevitable by-product of the judicial function.

This shift in understanding parallels a transformation in the form of constitutional adjudication. The pluralist liberal approach to the form of law is one of balancing and interest analysis.[72] Balancing and interest analysis involve recognition of the idea that, on its face, a dispute cannot legitimately be resolved by simply drawing a bright line between spheres of legal entitlement, with the assumption that under the law these spheres do not overlap. Instead, a judge is seen as having to choose between competing and overlapping entitlements. One way to do this is to deny the necessity of choice. This can be done by determining that the interests at stake in the litigation in fact do not conflict. But this only defers the necessity of choice to the level of determining which interests are worthy of protection and which are not. A more explicit recognition of the interdependence of social activity and of the overlapping of competing spheres of entitlement manifests itself in judicial attempts at balancing the interests outright. This entails assigning weight to the competing interests behind the various legal claims and choosing to cloak some of those interests with a mantle of legitimacy and to render others invalid or insufficiently weighty.[73]

For example, it will be recalled that the classical liberal approach to federalism disputes was characterized as involving the judiciary drawing sharp lines between the two levels of government, the background assumption being that the two levels were "watertight compartments" of legal entitlement.[74] In contrast, the pluralist approach is a more or less explicit consideration and evaluation of the consequences of deciding in

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[72] *See* Hart & Sacks, THE LEGAL PROCESS (Harvard Law School, 1958) [unpublished].

[73] For exponents of this view, in varying degrees, *see* W. Lederman, *Classification of Laws and the British North America Act, reprinted in* W. Lederman, THE COURTS AND THE CANADIAN CONSTITUTION (Toronto: McClelland & Stewart, 1964) at 177; B. Laskin, *Tests for the Validity of Legislation: What's the Matter?* (1955) 11 U.T.L.J. 114; and *see generally* Monahan, *supra*, note 2 at 64-68.

[74] The phrase is Lord Atkin's. *See A.G. Canada* v. *A.G. Ontario* (1937), [1937] A.C. 326 at 354, [1937] 1 D.L.R. 673 at 684 (P.C.) ("While the ship of state now sails in larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.").

favour of one level of government at the expense of the other.[75] Aspects of this form of constitutional decision-making are implicit in the landmark case of *Attorney- General for Ontario* v. *Canada Temperance Foundation*,[76] where Viscount Simon of the Privy Council upheld the constitutionality of the federal *Canada Temperance Act*[77] on the ground that it was a constitutionally legitimate exercise of the federal power to legislate in matters involving "peace, order and good government". Viscount Simon held that if "the real subject matter of the legislation" is such that

> it goes beyond local or provincial concerns or interests and must from its inherent nature be the concern of the Dominion as a whole then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order, and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.[78]

As Monahan points out, the test articulated by the Privy Council is a far cry from the classical liberal approach of "policing the zones of absolute legal entitlement".[79] Determining what constitutes an issue of "national concern" entails that the judiciary analyze, weigh and balance the competing interests at stake.[80]

Like classical liberalism, however, the discourse of pluralist liberalism is steeped in individualism: both elevate values of individual freedom, liberty and autonomy against the claims of collectivities. They differ on means, not ends.[81] The former sees government as an institution which, by its very nature, is likely to restrict individual freedom; the latter looks to the government as an institution available to protect the individual from tyranny. Classical liberalism imagines the market as containing an ordering principle internal to its operations and thus capable of performing the functions of allocation and distribution of goods, resources and rewards in a fair and just way. Pluralist liberalism rejects this faith. These differences internal to liberalism spawn differing approaches to the form and content of constitutional law. Yet the differences do not overshadow their similarities. Both elevate individualism to a

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[75] As Lederman puts it, "[i]s it better for the people that this thing be done on a national level, or on a provincial level?" *See* Lederman, *supra*, note 73 at 189.

[76] (1946), [1946] A.C. 193, [1946] 2 D.L.R. 1 (P.C.).

[77] R.S.C. 1927, c. 196.

[78] *Supra*, note 76 at 205, [1946] 2 D.L.R. 1 at 5.

[79] Monahan, *supra*, note 2 at 71.

[80] For an analogous case involving the federal trade and commerce power, *see Reference Re The Farm Products Marketing Act* (1957), [1957] S.C.R. 198, 7 D.L.R. (2d) 257. *See generally* Monahan, *supra*, note 2 at 74-76. Imagining the judicial function in these terms has led some commentators to question the legitimacy of judicial review of federalism disputes, insofar as the judicial actor is seen to engage in "essentially the same mode of reasoning as other actors in the governmental system". *See, e.g.*, P. Weiler, IN THE LAST RESORT: A CRITICAL STUDY OF THE SUPREME COURT OF CANADA (Toronto: Carswell, 1976), c. 6.

[81] *See* Christian, *supra*, note 8.

constitutional ideal and generally subject political and collective activity to the rigours of that ideal. In so doing both demand that law be separate from politics, so that the constraints imposed on the latter by the former can be seen as legitimate.

D. Socialism

While liberalism stresses individualism, socialist discourse, like toryism, is collectivistic. The individual is imagined not as a self-determining atomistic entity; he or she is seen as a member of a community, with the public good treated as something more than the sum of the parts. The community is pictured as defining the individual instead of the individual defining his or her place in social life. But like liberalism, and unlike toryism, there is a deep commitment in socialist discourse to egalitarian principles. Whereas liberalism sees equality largely in terms of equality of opportunity, facilitating every individual's capacity to further his or her personal conception of the good, socialist discourse is rooted in notions of equality of condition.[82] This gives rise to a deep criticism of traditional tory values of hierarchy and the class structure of social and economic life.

The economic sphere is defined as constituted by relations of production — relations between classes which emerge out of the necessity of satisfying basic needs connected with the reproduction of the species.[83] Socialist discourse imagines these relations as the foundational constituents of social life. They ground, explain and generate social institutions, including the structure of political life and law. Moreover, relations of production determine the ideas, values and beliefs of individuals. The ways we imagine our world are ultimately dependent on material circumstances. In this sense, individuals are seen as being defined by their material situations and by the community in which they live.[84] Transformations in ways of giving meaning to the human situation are characterized as a series of responses to transformations in the relations of production, spurred on by the natural ingenuity of the human subject.[85]

While toryism imagines harmony in the organicism of a hierarchical society, socialist discourse about contemporary social life is shot through with imagery of conflict and contradiction. Conflict is ultimately traced

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[82] Horowitz, *supra*, note 17 at 5-6.

[83] *See* K. Marx, THE POVERTY OF PHILOSOPHY (Moscow: Foreign Languages Press, [1956]) at 96. Marx saw the relations of production in capitalist society as "the specific form in which unpaid surplus labour is pumped out of the direct producers" and, as such, exploitative: *see* CAPITAL (Moscow: Foreign Languages Press, 1971) vol. 3 at 791.

[84] *See* K. Marx & F. Engels, THE GERMAN IDEOLOGY (New York: International, 1939) at 15 ("Life is not determined by consciousness, but consciousness by life.").

[85] K. Marx, *Preface to a Contribution to the Critique of Political Economy* in L. Colletti, ed., EARLY WRITINGS (London: Penguin Books, 1974) at 424; Marx & Engels, *ibid.*

to capitalist relations of production, where the working class — those who produce — and the capitalist class — those who own the means of production — are locked in a struggle over the maintenance or abolition of those relations. Contradiction is ultimately traced to the notion that current forms of the relations of production are governed by an expansionary logic which simultaneously causes the means of production to be owned by fewer and fewer people, to encroach upon more and more areas of social life, and to increasingly exploit the working class in an ongoing search for profit — a logic which, if left unchecked, will lead to class struggle of crisis proportions.

Political life is seen as both an attempt to mediate[86] and a manifestation of this complex of economic conflict and contradiction.[87] It becomes embroiled in the very phenomena which historically led to its establishment and entrenchment.[88] But to the extent that socialist discourse embraces the idea of participating in political life and legal discourse in order to attempt to ameliorate the condition of the working class in social and economic life and transform society from within, it does so in a manner informed by a collectivist and classless prescriptive vision of community, where cooperation has eclipsed conflict, where a centralized, planned economy has superceded the market, and where

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[86] At the descriptive level, socialist theory offers a variety of interpretations on the relationship between the state, law and the interests of the capitalist class, ranging from the view that law, as the output of the state, is a reflection of capitalist relations of production: *see* F. Engels, LUDWIG FEUERBACH AND THE END OF CLASSICAL GERMAN PHILOSOPHY (New York: International, 1941) at 53-54; that law is created by the capitalist class to further their interests, *see* V. Lenin, THE STATE AND REVOLUTION (Peking: Foreign Languages Press, 1976); to the notion that law is enacted pursuant to the dominant ideology arising out of social practices in the relations of production, which ideology, in a capitalist system, is sympathetic to the (long-term) interests of the capitalist class. This latter view in turn has spawned a number of interpretations, focussing on the "relative autonomy" of the state and law from the economic sphere. *See, e.g.*, R. Miliband, THE STATE IN CAPITALIST SOCIETY (London: Quartet Books, 1973) at 161-95. For a distinctly Canadian perspective, *see* L. Panitch, *The Role and Nature of the Canadian State* in L. Panitch, ed., *supra*, note 17 at 3-27. Despite the apparent heterogeneity of these approaches, they are nonetheless unified insofar as they see the economy, in the last instance, as determinate. For a detailed analysis of the socialist perspective on law, *see* H. Collins, MARXISM AND LAW (Oxford: Clarendon Press, 1982).

[87] As Marx stated in CAPITAL, *supra*, note 83:

> It is always the direct relationship of the owners of the conditions of production to the direct producers — a relationship always naturally corresponding to a definite stage in the development of the methods of labour and thereby its social productivity — which reveals the innermost secret, the hidden basis of the entire social structure, and within it . . . the corresponding specific form of the state.

[88] *See, e.g.*, D. Wolfe, *The State and Economic Policy in Canada, 1968-75* in L. Panitch, ed., *supra*, note 17 at 251-88; *see generally* J.R. O'Connor, THE FISCAL CRISIS OF THE STATE (New York: St. Martin's Press, 1973).

fraternity and equality of condition have replaced competition and social and economic inequality.[89]

Thus the picture of constitutional law painted by a socialist vision of social life is likely to be simultaneously informed by two seemingly contradictory images of law and social life. The first image sees law generally as a structural or ideological (though perhaps relatively autonomous) manifestation of the relations of production and, as such, unable to serve as a vehicle of liberation and social and economic transformation.[90] The second, more optimistic, image sees law as a possible repository of those collectivist values which inspire socialist rhetoric. This image imagines law in primarily instrumental terms; that is, as a means, albeit limited by individualistic and ultimately hierarchical legal forms, of protecting individual and group activity aimed at achieving a more egalitarian and collectivist society. Similarly, it may also be viewed as a potential vehicle of protecting legislative initiatives and institutional structures which might assist in the realization of those same egalitarian and collectivist ends. Constitutional law under this second approach, then, is treated as part of a more general strategy of social change.[91]

This instrumental approach to institutional structures which contain the possibility of assisting in the realization of a more egalitarian and collectivist society can be illustrated by reference to socialist discourse on federalism. Spokespersons for the Canadian left during the 1930s and 1940s decried the decentralizing tendencies of decisions of the Judicial Committee of the Privy Council, seeing provincial governments as "reactionary supports for the business community".[92] The federal govern-

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[89] The Co-operative Commonwealth Federation's *Regina Manifesto*, adopted in 1933, states the following in its preamble:

> We aim to replace the present capitalist system, with its inherent injustice and inhumanity, by a social order from which the domination and exploitation of one class by another will be eliminated, in which economic planning will supercede unregulated private enterprise and competition, and in which genuine democratic self-government, based on economic equality will be possible.

[90] *See, e.g.*, E.B. Pashukanis, LAW AND MARXISM: A GENERAL THEORY, *trans.* B. Eichorn (London: Ink Links, 1978) (law is a type of social relationship specific to capitalism).

[91] There is a third position offered by socialist theory, which would seem to ally itself with the second image of constitutional law (although perhaps not necessarily): *i.e.*, that even under a socialist regime, constitutional law in general and individual (and group) rights in particular will still be required. *See, e.g.*, E.P. Thompson, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT (London: Penguin Books, 1975) at 258-69 (the rule of law as an "unqualified human good"). For a useful summary of the differences, *see* A. Chase, *The Left on Rights: An Introduction* (1984) 62 TEX. L. REV. 1541. For a detailed examination of the implications of the second (and third) approaches, *see* T. Campbell, THE LEFT AND RIGHTS: A CONCEPTUAL ANALYSIS OF THE IDEA OF SOCIALIST RIGHTS (London: Routledge & Kegan Paul, 1983).

[92] Cairns, *supra*, note 51 at 310-14.

ment, on the other hand, was presumably seen as a potential means of centralizing and rationalizing the economy and ensuring a fairer distribution of wealth. As J.R. Mallory wrote at the time:

> The force that starts our interpretive machinery in motion is the reaction of a free economy against regulation. . . . In short the plea of *ultra vires* has been the defence impartially applied to both legislatures by a system of free enterprise concerned with preventing the government from regulating it in the public interest.[93]

Since the federal government was taking the lead in progressive regulatory reform during this period, one can assume that the "impartial application" of the *ultra vires* doctrine had a disproportionate effect.[94] In a similar vein, F.R. Scott argued before a Special Committee on the *British North America Act* that "large economic interests" opposed to regulatory initiatives sought shelter through provincial governments, which were either less likely or less able to mount an effective attack against the injustices of an unregulated economy.[95]

Thus to the extent socialist discourse takes a primarily instrumental (and optimistic) approach to political institutions which contain the possibility of social and economic transformation, such as those which embody the federal structure of political authority, this instrumentalism is

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[93] J.R. Mallory, *The Courts and the Sovereignty of the Canadian Parliament* (1944) 10 CAN. J. ECON. & POL. SCI. 166 at 169.

[94] Most of the conservative government's attempts to introduce "New Deal" legislation during this era were ruled unconstitutional by the Privy Council in perhaps the most awesome display of imperial power ever contained in one volume of a law report: *see A.-G. Can.* v. *A.-G. Ont.*, *supra*, note 74 (Labour Conventions); *A.-G. Can.* v. *A.-G. Ont.* (1937), [1937] A.C. 355, [1937] 1 D.L.R. 684 (Unemployment Insurance); *A.-G. B.C.* v. *A.-G. Can.* (1937), [1937] A.C. 368, [1937] 1 D.L.R. 688 (Price Spreads); *A.-G. B.C.* v. *A.-G. Can.* (1937), [1937] A.C. 377, [1937] 1 D.L.R. 688 (National Products Marketing); *A.-G. B.C.* v. *A.-G. Can.* (1937), [1937] A.C. 391, [1937] 1 D.L.R. 695 (Farmers' Creditors Arrangement); *A.-G. Ont.* v. *A.-G. Can.* (1937), [1937] A.C. 405, [1937] 1 D.L.R. 702 (Canada Standard Trade Mark).

[95] *Special Committee on British North America Act: Proceedings and Evidence Report* (Ottawa: Queen's Printer, 1935) at 82. *See generally* Cairns, *supra*, note 52 at 313-14. This argument, interestingly, is the converse of one employed by James Madison to justify the establishment of a federal system in the United States, insofar as he suggested that the transfer of jurisdiction from state governments to the federal government would *protect* freedom of contract and property rights. *See The Federalist*, no. 10 (Madison).

In 1935, the Research Committee of the League for Social Reconstruction published an exposition of the Canadian socialist viewpoint, SOCIAL PLANNING FOR CANADA (Toronto: T. Nelson, 1935), where this centralist approach to the federal nature of the Canadian state is also apparent. That optimistic socialist discourse sees federalism in instrumental terms is brought out in P.E. Trudeau, *The Practice and Theory of Federalism* in M. Oliver, ed., SOCIAL PURPOSE FOR CANADA (Toronto: University of Toronto Press, 1961), where it was argued that the Canadian socialist movement ought to exploit the opportunities presented by a federal structure of government. Trudeau argued that progressive reform could be carried out at the *provincial* level and that the provinces may carry more possibilities for electoral success.

replicated in its vision of the proper form and content of constitutional law and the relation between law and politics. Constitutional law ought to augment the political process to the extent that the latter is dedicated to the transformation of social life in a manner consistent with its vision of the ideal and criticize it when it is not. That ideal finds limited expression in liberal rights discourse. The optimistic socialist vision accordingly seeks to exploit the radical potential of that discourse to further its goals of fraternity and equality of condition.

III. Displacement and Re-Emergence in The Charter of Rights

At one level, the enactment of the *Charter of Rights and Freedoms* could be said to be the moment of political triumph of pluralist liberalism.[96] With its emphasis on fundamental freedoms, such as freedom of conscience and religion,[97] freedom of thought, belief, opinion and expression,[98] freedom of assembly[99] and freedom of association,[100] democratic[101] and mobility rights,[102] as well as what appears to be a deep commitment to equality before the law and equal protection,[103] the *Charter* seems to adopt the major tenets of the pluralist liberal vision of the proper relationship between the individual and the community. The *Charter*'s emphasis on rights and freedoms is offset only by what is easily portrayed as an open invitation to the judiciary, in conformity with the pluralist vision of the judicial function, to balance competing interests at stake in litigation, to the extent that the *Charter* is a guarantee of rights and freedoms "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[104]

But this view cannot be dispositive of the question of the effect of introducing a bill of rights into the structure of government and constitutional law. Even if it could be said that "[t]he fatal continuity of the image of the state [has been one of evolution] from nineteenth-century Toryism to twentieth-century Liberalism",[105] transformations in dominant ideological world-views seem not to be as clean as their scientific coun-

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[96] *But see* A. Petter, *Immaculate Deception: The Charter's Hidden Agenda* (1987) 45 Advocate 857, for the view that the *Charter* embodies the tenets of what I have termed classical liberalism; he states: "[t]he first thing that must be recognized about the Charter is that it is, at root, a 19th century document set loose on a 20th century welfare state".

[97] S. 2(a).

[98] S. 2(b).

[99] S. 2(c).

[100] S. 2(d).

[101] S.6.

[102] Ss. 7-14.

[103] S. 15.

[104] S. 1.

[105] Whitaker, *supra*, note 17 at 65.

terparts,[106] if only because ideologies are not phenomena easily refuted. Instead, it may be more useful to characterize the history of Canadian social, political and legal thought as involving an uneasy, but continual, flux among competing visions of social life; while one may obtain dominance at the others' expense in certain contexts and areas, such domination cannot be characterized as the achievement of complete ideological hegemony. Constitutional law, then, even after the introduction of the *Charter of Rights*, ought to be seen as a discordant structure of competing social and political visions.[107]

In this light, the enactment of the *Charter* can be characterized as the partial displacement of this discordance from one frame of discourse into another. The ways in which we construct reality thus re-emerge in the context of discourse about constitutionalized, individual rights against the state, framed but in no way determined by the dictates of the *Charter*. Just as our moral and political judgment occurs within a matrix of competing visions of social life, constitutional discourse aimed at giving meaning to abstract guarantees of rights and freedoms and the circumstances in which those rights and freedoms are to be held not absolute, is informed by the variety of conflictual ways we envision, speak about, and thereby construct, produce and reproduce our social reality.

This Part aims to map out legal reasoning in cases involving constitutional rights against the state in accordance with the paradigms developed earlier. Much of what follows was presaged in the previous Part, insofar as it attempted to address and structure in a general way conflictual approaches to the form and content of constitutional law by grounding them in different ways of imagining the relationship between the individual and the community. Two recent decisions of the Supreme Court of Canada form the focus of this Part. The first, *R.* v. *Big M Drug Mart Ltd.*,[108] is used to demonstrate how competing political visions inform the process of giving meaning to constitutional guarantees — in this case, religious freedom. The second, *R.* v. *Oakes*,[109] serves as an illustration

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[106] *See* T.S. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS, 2d ed. (Chicago: University of Chicago Press, 1962).

[107] For a somewhat similar thesis, *see* R.A. Macdonald, *Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice* (1987) 39 U. FLA. L. REV. 217 at 265 ("the specific terms of the Charter itself imply the same ideological heterodoxy found in other Canadian legal artifacts"); and P.J. Monahan, THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA (Toronto: Carswell, 1987) at 13 ("[a]lthough framed in the rhetoric of liberal individualism, the Charter simultaneously emphasizes communitarian values"). Macdonald and Monahan point to *Charter* guarantees regarding official languages and minority language education (ss. 16-23), aboriginal rights (s. 25), multiculturalism (s. 27) and denominational schools (s. 129), arguing that such guarantees embody communitarian values. My point, however, is not only based on the abstract wording of the text; as the following discussion demonstrates, competing ideological perspectives on social and political life shape not only the text but also the ascription of meaning to the text.

[108] (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M*].

[109] (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes*].

of how a similar process occurs in the construction and interpretation of appropriate limitations on constitutional guarantees.

A. Defining Freedom

The abstract guarantees of rights and freedoms in the *Charter* require judicial interpretation. A constitutional guarantee's "plain meaning" cannot be discerned without some understanding of its context, its purposes and the concerns which underlie it. And the act of giving meaning to a constitutional guarantee, including its context, purposes and underlying concerns, is dependent on broader ways in which the interpreter constructs and gives meaning to social and political life.[110] As Petter states, constitutional guarantees "are . . . amorphous unless and until they are infused with political content".[111]

This point can be illustrated by imagining a constitutional challenge, based on the *Charter*'s guarantee against "cruel and unusual punishment", to a law which permits state officials to incarcerate indefinitely individuals who have been found to have engaged in illegal activity. The phrase, "cruel and unusual punishment" is indeterminate until meaning is *given* to it. An interpreter can rely on a number of sources in determining its meaning: the intent of the framers, history, precedent, purpose and the context of the guarantee in relation to the rest of the text, to name but a few. Yet each of these sources reproduces the dilemma to be resolved. First, it is by no means clear that any one of these sources can provide an interpretation any more concrete than the guarantee sought to be interpreted. Unless the source offers a meaning which can operate as a concrete conclusion to the dispute at hand (that is, " 'cruel and unusual punishment' means a law which permits state officials to incarcerate indefinitely individuals who engage in activity proscribed by the statute at issue"), the source itself must be interpreted in a way which renders it useful to the object of the enterprise. Second, the fact that the source itself requires interpretation entails that it is open to competing interpretations. A reliance on one interpretation involves the suppression of another. The possibility of a multiplicity of sources gives rise to another difficulty. Even assuming that traditional judicial sources of meaning provide determinate content to abstract guarantees, unless they all point in one direction the interpreter must privilege one source over another, which immediately raises the problem of justification of choice. Why follow precedent?

In other words, the attachment of meaning to a constitutional provision is a process whereby the interpreter attempts to render determinate a concept by reference to indeterminate sources. The inherent paradox

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[110] P. Brest, "Constitutional Interpretation" in L. Levy, K. Karst & D. Mahoney, eds., *Encyclopedia of the American Constitution* (New York: McMillan, 1986) at 464.

[111] A.J. Petter, *The Politics of the Charter* (1986) 8 SUPREME COURT L. REV. 473 at 477.

is papered over by persuasion. Despite the indeterminacy surrounding the enterprise, the interpreter nonetheless attaches concrete meaning to a constitutional guarantee and simultaneously seeks to persuade him or herself and the reader that the interpretation offered makes sense. It is at this conceptual juncture where one can expect to find either implicit or explicit reliance on the broader ways in which the interpreter and reader imagine social and political life.

Big M[112] is a useful example of how constitutional interpretation can be seen as involving a conflictual structure of competing ideological visions. *Big M* involved the constitutionality of the federal *Lord's Day Act*,[113] a statute prohibiting work or commercial activity on Sundays and making such activity an offence punishable on summary conviction.[114] Big M Drug Mart was charged with unlawfully selling goods on a Sunday and it challenged the constitutionality of the legislation both in terms of the distribution of powers and the *Charter*'s guarantee of religious freedom. The Act was invalidated only on the latter ground. Chief Justice Dickson wrote for the majority; Madame Justice Wilson wrote a concurring judgment. There was no dissent.

There are two aspects to that part of Dickson C.J.C.'s decision dealing with the claim under the *Charter*.[115] The first is an attempt to articulate the purpose of the law. The second seeks to give meaning to "freedom of religion". Both serve to illustrate the idea that constitutional reasoning in general and the process by which meaning is given to constitutional guarantees in particular can be understood by reference to competing visions of the form and content of constitutional law, which in turn can be traced to competing visions of social life.

With respect to the first aspect, articulating the purpose of the legislation serves two functions. It permits an analysis of the distribution of powers claim, since the federal government is entitled to legislate in relation to criminal law. It has been well-established that the "ordinary but not exclusive ends [of the criminal law are] public peace, order, security, health and morality".[116] Thus, if the purpose of the *Lord's Day Act* is to safeguard public morality, then the distribution of powers claim can be dismissed. But the purposive analysis also serves another master. Dickson C.J.C. sees the task of determining whether a statute is contrary to the *Charter* as involving an inquiry into, first, the purpose of the

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[112] *Supra*, note 108.

[113] R.S.C. 1970, c. L-13.

[114] S. 11. The legislation was somewhat more complicated, as it permitted provincial governments and municipalities to exempt portions of its operation. Railways and work of necessity or mercy were also exempted.

[115] There are other elements to his decision on the merits of the *Charter* claim, such as the issues of standing and jurisdiction and the impact of section 1, but they are irrelevant for my purposes.

[116] *Reference re Validity of Section 5(a) of the Dairy Industry Act* (1948), [1949] S.C.R. 1 at 50, [1949] 1 D.L.R. 433 at 473, *per* Rand J.

legislation and, second, its effects.[117] He holds that either aspect could render a law invalid.

Dickson C.J.C. appreciates the fact that the law could be seen to have two purposes: one religious, the other secular. The first stems from the fact that it secures public observance of the Christian institution of the Sabbath; the second from the fact that it provides a uniform day of rest from work. Blackstone, who defended such laws on both grounds in characteristically tory terms, is quoted by Dickson C.J.C. for the proposition that there are both secular and religious elements in Sunday observance legislation:

> [B]esides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping of one day in the seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labour; without any stated times of recalling them to the worship of their Maker.[118]

"Despite this *inevitable intertwining*," Dickson C.J.C. states, "it is necessary to identify the 'matter' in relation to which such legislation is enacted."[119]

This categorical, bright-line mode of organizing social reality, it will be recalled, is paradigmatic of the classical liberal vision of the role and function of the judiciary.[120] The judicial task in such a vision, as Monahan puts it, is "to identify and police the boundaries separating the various zones of absolute entitlement from each other"; the concern is "with tracing out this conceptual 'map' of jurisdiction, not with arriving at a result conducive to social welfare".[121] The latter concern can be seen as the approach more properly taken upon a pluralist liberal realization[122] that spheres of entitlement involve an "inevitable intertwining" — a realization which Dickson C.J.C. articulates but opts not to pursue to its logical conclusion. His insistence that the legislation can be identified

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[117] It is on this point which Wilson J. disagrees with the majority decision. That is, she would reverse the inquiry, beginning with an effects analysis. Only when the effects are held valid would she then look to the constitutionality of the legislative purpose. *Supra*, note 108 at 360-61, 18 D.L.R. (4th) at 372-73.

[118] *Supra*, note 108 at 317, 18 D.L.R. (4th) at 339.

[119] *Supra*, note 108 at 317, 18 D.L.R. (4th) at 339 (emphasis mine).

[120] *See* text accompanying notes 60-63, *supra*.

[121] *Supra*, note 2 at 55.

[122] *See* text accompanying notes 72-80, *supra*.

as having one sole purpose[123] — the compelling of sabbatical observance — despite the fact that there is "inevitable intertwining" is itself indicative of a conflictual intermingling of classical and pluralist liberalism at the level of constitutional law.

The manner in which Dickson C.J.C. gives meaning to the guarantee of religious freedom is equally instructive. It also involves a purposive analysis. That is, Dickson C.J.C. states that

> [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 other words, in the light of the interests it [is] meant to protect.[124]

This relatively straight-forward pluralist liberal approach to constitutional analysis, however, is thereafter complicated by the injection of tory, classical and pluralist liberal content into its form. This is due to the fact that, upon announcing that the mode of interpretation is to be one of balancing and interest analysis, Dickson C.J.C. then states that such a purposive approach calls for an inquiry into, among other things,[125] "the historical origins of the concepts involved".[126] Three purposes behind the guarantee of religious freedom are thereafter articulated. The first is the historical, organic, deeply religious tory notion that "[a]ttempts to compel belief or practice denied the reality of individual consciousness and dishonoured the God that had planted it in His creatures".[127] No attempt is made to distance the Court from such a justification. The second and third purposes are quite different. They correspond to two related pluralist liberal approaches to the relationship between the individual and the community. The former corresponds to attempts to legitimate fundamental rights in substantive terms; the latter to procedural justificatory attempts.[128] The first is identified as the "centrality of individual conscience" and the "valuation of human dignity that motivates such unremitting protection".[129] This substantive vision of individual rights — rights as an expression of the notion that individuals are ends unto them-

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[123] He states later in his decision that "[a] finding that the *Lord's Day Act* has a secular purpose is, on the authorities, simply not possible." *Supra*, note 108 at 331, 18 D.L.R. (4th) at 349.

[124] *Ibid.* at 344, 18 D.L.R. (4th) at 359, *referring to Hunter* v. *Southam Inc.* (1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 (the proper approach to defining constitutional guarantees is to be a purposive one). *See* McLeod, *supra*, note 19 at 320-29, for a reading of *Hunter* v. *Southam Inc.* as an exercise in classical, or "Lockean", liberalism.

[125] Such as: "the character and the larger objects of the Charter itself, . . . the language chosen to articulate the specific right or freedom, . . . [and] the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter". *Ibid.* at 344, 18 D.L.R. (4th) at 359-60.

[126] *Ibid.* at 344, 18 D.L.R. (4th) at 360.

[127] *Ibid.* at 345, 18 D.L.R. (4th) at 361.

[128] *See supra*, note 71.

[129] *Supra*, note 108 at 346, 18 D.L.R. (4th) at 361.

selves — fits neatly into the broader pluralist liberal vision of social life. The second purpose Dickson C.J.C. identifies is an instrumental one. He states:

> an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government.[130]

And yet the conclusion at which Dickson C.J.C. arrives can be characterized as a quintessentially classical liberal one. He states that the aforementioned interests generate the conclusion that

> every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, *provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.*[131]

This vision of the judicial function, it will be recalled, assumes contrary to the pluralist approach that the rights of one individual do not overlap or conflict with those of another; or, put differently, that the realm of individual rights governs only self-regarding behaviour and that this kind of activity can be distinguished on principled grounds from other-regarding behaviour.[132] Dickson C.J.C., perhaps wisely, makes no claim of "inevitable intertwining" in this purposive analysis.[133]

Thus *Big M* is an example of the idea that the process by which meaning is attached to specific guarantees of the rights and freedoms contained in the *Charter* can be understood as involving a conflictual intermingling of different ways of seeing, speaking about and constituting social reality. That a pluralist liberal approach may dominate should surprise few. Indeed, the fact that the issue was cast in terms of freedom of religion instead of freedom of contract suggests that classical liberalism is not at the forefront of contemporary constitutional argumentation. At

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[130] *Ibid.*

[131] *Ibid.* (emphasis mine).

[132] *See* text accompanying notes 60-63, *supra.*

[133] An alternative conclusion could be gleaned from the text, which complicates the matter even more. Earlier in his decision Dickson C.J.C. writes:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

Supra, note 108 at 337, 18 D.L.R. (4th) at 354. The injection of communitarian considerations — such as (public) morality — into the process by which the content of a right is derived threatens the stability of the rest of his decision insofar as it would be difficult to articulate *which* morals ought to be seen as legitimate. Does public morality dictate sabbatical observance?

the same time, however, both tory and classical liberal elements are reintroduced into the rhetorical process of giving meaning to constitutional guarantees. The next section serves to illustrate the notion that a similar phenomenon can be said to occur in judicial determinations of the circumstances in which limitations can be placed on those constitutional guarantees by the state.

B. Confining Freedom

Oakes[134] can also be characterized as manifesting a tension between classical and pluralist liberalism. At the same time, however, it also serves as an example of how liberal rights discourse can be seen as containing the possibility of egalitarian and collective social change and thus as an illustration of how socialist discourse can give rise to an optimistic vision of constitutional law. *Oakes* dealt with a provision in the federal *Narcotic Control Act*,[135] which provided that when a court finds an accused in possession of a narcotic, he or she is presumed to be in possession for the purpose of trafficking. The provision was challenged on the grounds that it violated the presumption of innocence, entrenched in subsection 11(d) of the *Charter*.[136] Chief Justice Dickson again wrote for the majority. After an extensive review of authorities, he found that the provision establishing the "reverse onus" was in fact a violation of the right to be presumed innocent until proven guilty and thus went on to consider whether it could be characterized as a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society".[137]

Dickson C.J.C. begins his section 1 analysis by setting out what he sees to be two "contextual element[s] of interpretation".[138] The first is the notion that section 1 serves two functions: to guarantee the rights and freedoms listed in the *Charter* and to delineate "the exclusive justificatory criteria (outside of section 33[139]) against which limitations on those rights and freedoms must be measured".[140] The second contextual consideration is the principle that the purpose of the entrenchment of the

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[134] *Supra*, note 109.

[135] R.S.C. 1970, c. N-1, s. 8.

[136] Section 11 states:

> Any person charged with an offence has the right
> . . .
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent tribunal.

[137] *Charter*, s. 1.

[138] *Supra*, note 109 at 136, 26 D.L.R. (4th) at 225.

[139] Section 33 provides that Parliament or a legislature may expressly declare in legislation that the act or provision thereof shall operate notwithstanding ss. 2 or 7-15 of the *Charter*. *See supra*, note 7.

[140] *Supra*, note 109 at 135, 26 D.L.R. (4th) at 224-25.

Charter is to enable "Canadian society . . . to be free and democratic".[141] This consideration provides a guide for the role and function of the judiciary. Dickson C.J.C. then states the following:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[142]

Apart from its profound and dramatic articulation of a new vision of the role and function of the Canadian judiciary, what is interesting about the above passage is its ambiguity about the circumstances in which it is appropriate for the judiciary to uphold limitations on constitutional rights and freedoms. Cultural and group identity are said to be essential to a free and democratic society. The passage thus appears to contain a commitment to collectivist, egalitarian values and can be interpreted to mean that collective or group activity, in certain circumstances, ought to be protected as an end unto itself — even when such activity threatens the assertion of individuality. In other words, individual rights may in some circumstances merely be a means of realizing more fundamental, collectivist goals.

This instrumental interpretation is bolstered by what follows the above passage. Dickson C.J.C. writes:

> The underlying values and principles of a free and democratic society are the *genesis* of the rights and freedoms guaranteed by the *Charter* and *the ultimate standard* against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[143]

Cultural or group identity, in other words, generates, or is a source of, constitutional rights and freedoms. The potential elevation of collectivist and group concerns over individualistic legal forms contained in these passages is an example of why it is that socialist discourse can generate an optimistic vision of constitutional law. Despite its view that legal forms are ultimately dependent in the last instance upon the relations of production and the structure of the economic sphere,[144] optimistic socialist discourse sees constitutional law as a potential repository of collectivist values and a possible ally in its struggle to transform social and economic life to better reflect its ideals of fraternity and equality of condition. To the extent that the above passages can be seen as embracing those ideals, *Oakes* is an example of how constitutional law provides a ray of hope for collectivist social transformation.

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[141] *Ibid.* at 136, 26 D.L.R. (4th) at 225.
[142] *Ibid.*
[143] *Ibid.* (emphasis mine).
[144] *See* text accompanying notes 83-89, *supra.*

The ambiguity of the above passages is multiplied by the fact that it appears that the same imperative — that Canadian society be free and democratic — is to inform both the process of defining and confining freedom. The constituent elements envisioned in that imperative — individual dignity, social justice and equality, ideological pluralism, cultural and group identity, and participatory politics — are seen as "the genesis of . . . rights and freedoms . . . *and* the ultimate standard" by which limitations are to be judged.[145] Limitations on rights and freedoms ought to be tested against the same values which can be said to give rise to those rights and freedoms. One would expect, therefore, that the decision would articulate a test or a series of tests under section 1 which would make it relatively easy for the court to uphold legislation which is sympathetic to and reflective of these concerns. But legislation which could be characterized as such is subject to the same level of scrutiny as legislation which runs counter to those ideals.[146] And the level of scrutiny is strict indeed. According to Dickson C.J.C., laws which infringe upon a fundamental right or freedom first must have "an objective relat[ing] to concerns which are pressing and substantial".[147] Second, the means employed must be demonstrably justified. This involves "balanc[ing] the interests of society with those of individuals and groups"[148] which in turn involves three elements: the means "must not be arbitrary, unfair or based on irrational considerations"; they must "impair 'as little as possible' the right or freedom" being violated; and, finally, the effects of the measure cannot be too "severe".[149]

This home-grown version of American-style "strict scrutiny" analysis[150] combines elements of both classical and pluralist liberalism. The subjection of even the slightest transgression of individual rights to searching scrutiny can be said to be indicative both of a vision of politics that is deeply unstable and of a felt need to check and contain the potential for tyranny inherent in collective political life by a set of strict and exogenously-imposed limits articulated by the judiciary. And yet there is the pluralist recognition that "courts [are] required to balance the interests of society with those of individuals and groups".[151] The Court seems to accept that these overlap and it appears, by its willingness to inquire into the "severity" of the effects of legislation, to reject the categorical mode of reasoning characteristic of classical liberalism. But

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[145] *Supra*, note 109 at 136, 26 D.L.R. (4th) at 225.

[146] A similar point is made by P.J. Monahan and A.J. Petter, *Developments in Constitutional Law: The 1985-86 Term* (1987) 9 SUPREME COURT L. REV. 69 at 123 ("it is difficult to see why a commitment to these values cuts in favour of a stringent and rigourous interpretation of section 1").

[147] *Supra*, note 109 at 138-39, 26 D.L.R. (4th) at 227.

[148] *Ibid.* at 139, 26 D.L.R. (4th) at 227.

[149] *Ibid.* In relation to this last aspect, the decision states that "[t]he more severe the deleterious effects of a measure, the more important the measure must be".

[150] *See, e.g., Korematsu* v. *United States*, 323 U.S. 214, 65 S.C. 193 (1944).

[151] *Supra*, note 109 at 139, 26 D.L.R. (4th) at 227.

the categorical mode is re-introduced by the requirement that *any* measure violative of a fundamental right or freedom — regardless of its purpose or effect — must "impair as little as possible the right or freedom in question".[152]

Both *Big M* and *Oakes* thus can be understood as a conflictual intermingling of different discursive approaches to the form and content of constitutional law, which in turn can be traced to competing visions of social life.[153] Each vision has a different way of articulating and attempting to reconcile the relationship between the individual and the community. Within the construction of specific constitutional arguments, the radical implications of translating one vision, in all its purity, are mediated by a process of borrowing, at critical argumentative junctures,

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[152] *Ibid.* The Court also stated (at 139, 26 D.L.R. (4th) at 227) that "the nature of the proportionality test will vary depending on the circumstances". This could be read in at least one of two ways: that some (or all) of the three-part inquiry will be inapplicable in certain "circumstances", in which case the Court is deferring to a later day the issue of how to categorize the sorts of "circumstances" which will result in variation; or that only the third branch of the proportionality test will vary, depending upon the effects of the measure sought to be justified. That the latter is to be the case is relatively clear: *see supra*, note 149 and accompanying text. Whether the former was to be the case is less clear from the decision itself.

There are, however, indications that the Court is backing away from the categorical approach contained in the second part of the proportionality test announced in *Oakes*. First, it has upheld legislation despite evidence to the contrary (in the form of legislation in three other jurisdictions in Canada) that there are less drastic means of pursuing a governmental objective, and despite the fact that the government offered no justification for the more drastic means used: *see Jones* v. *The Queen* (1986), [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569 (freedom of religion). Second, it has indicated it is willing to accept "administrative cost" as a (at least partial) justification under s. 1: *see Jones* v. *The Queen*, *ibid.* at 304, 31 D.L.R. (4th) at 597-98; *Edward Books* v. *The Queen* (1986), [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1. Third, also in *Edward Books*, Dickson C.J.C. embraced the American doctrine of "one step at a time": *see Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 75 S.C. 461 (1955). This doctrine enables legislatures to "restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy": *Edward Books*, at 772, 35 D.L.R. (4th) at 44, *per* Dickson C.J.C. This, as Wilson J. points out, permits the Court to uphold legislation which "recognizes the freedom of some members of the group but not of other members of the same group": *Edward Books*, at 808, 35 D.L.R. (4th) at 60.

That these subsequent cases deal with freedom of religion is not unimportant. Freedom of religion, it will be recalled, was the constitutional right at stake in *Big M*, the case from which *Oakes* borrowed the second branch of the proportionality test: *Oakes*, *supra*, note 109 (at 227). The "circumstances" which gave rise to its articulation now appear to facilitate its demise.

[153] Monahan, *supra*, note 107 at 251 argues that "*Oakes* is founded on a deep suspicion of the state, assuming that the state power is necessarily intrusive into the private realm of individual liberty." Yet he can only make this claim by marginalizing the judgment's reference to "social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in our society". My point is that *Oakes*, indeed all of constitutional discourse, is simultaneously founded on "a deep suspicion", *and* and deep acceptance, of the state.

certain contradictory aspects of competing ideological visions. The interpretive process involved in the construction of opinion — the movement from the general to the particular, from the abstract to the specific — is constituted by a series of rhetorical switchbacks which gain their meaning from contradictory political visions.

This is not to say that the two cases studied in this Part are wrongly decided or logically unsound, or that the meanings given in the interpretive enterprises are implausible. It is to say, though, that the generated meanings, to the extent that they are constituted by interpretive commitments to conflictual political ideologies, reproduce the type of conflict thought to be resolved. And any coherence each vision may possess in attempting to reconcile individuality and community is lost in the act of combination. The conclusion of this essay, albeit in a preliminary and abstract way, addresses the question whether these attempts at reconciliation can be said to be coherent standing alone.

IV. Conclusion

This essay has attempted to show that Canadian constitutional law can be seen as involving a structure of disagreement among competing visions of social life. Each political vision attempts, through discourse, to mediate the relationship between the individual and the community and each purports to do so in its own unique way. Each gives rise to competing approaches to the form and content of constitutional law — approaches which animate judicial decisions, as well as our interpretations of those decisions, involving both federalism disputes and conflicts at the level of constitutionalized individual rights against the state.

Yet while there are profound differences among the dominant Canadian visions of social life, certain similarities can be said to exist. For example, classical and pluralist liberalism share in an elevation of the individual over the community. Both see the community as nothing more than the sum of its individual parts. Both treat the individual as a free and autonomous agent and society as little more than an arena in which individuals strive to realize their conception of the good, sometimes in concert, other times in conflict. Both see the mission of constitutional law in terms of protecting the individual from the spectre of group tyranny — although they differ on how such tyranny is said to arise.

Toryism and socialism, on the other hand, elevate the community over individual considerations. In contrast to their liberal counterparts, these social visions see the individual as an arena in which *social* structure and *social* forces are reflected and played out. Due to the fact that toryism envisions society in nonconflictual, organicist terms, its portrayal of the mission of constitutional law is a deeply conservative one; constitutional law ought to heed and rely on the legal forms which constitute and reproduce the traditions and shared values of a hierarchical society. Socialist discourse, on the other hand, sees society as an outgrowth of capitalistic relations of production, deeply exploitative of the working

class and riven with contradiction; its vision of constitutional law, at least in what I have termed its optimistic tendency, is as a potential, but unreliable, ally in its quest for social and economic justice and a communitarian and egalitarian society.

Thus the Canadian universe of social and constitutional discourse (or discourse of the Canadian social and constitutional universe) can be approached in terms of two umbrella paradigms. The first, individualism, stresses the individual over the community; the second, collectivism, stresses the community over the individual.[154] Each paradigm can be seen as containing a series of attempts to mediate or resolve the tension which exists between the two poles of individuality and community by emphasizing one aspect of that polarity and systematically suppressing the other. But attempts within each paradigm to engage in such an enterprise inevitably run afoul. Our constitutional imagination is "a prison-house of paradox",[155] built by well-intentioned but ultimately unsuccessful discursive attempts to reconcile the demands of the individual with the demands of the community.

The failure lies in the refusal to acknowledge, despite the fact that each attempt is evidence of it, that individuality and community constitute each other.[156] Classical liberalism, for example, envisions the individual as the fundamental unit of social life. The common good is no more than the sum of the interests of its individual constituents. Classical liberalism thus elevates individuality over the community and seeks to contain and limit aspects of the latter by subjecting collective activity to strict and bright-line rules insofar as such activity represents a real threat to the freedom and integrity of the individual. But in defining the sphere of individuality which is then said to be in need of protection against the threat of collective tyranny, communitarian elements invariably are present. It may make sense to imagine the individual in legal terms as absolute within his or her sphere of authority as against other individuals and the state, but only after a line is drawn. Until that occurs, the boundary is contestable. The exercise of one person's freedom can always be imagined as the transgression of another's rights. And this contestability indicates that the process of line-drawing is a creative act, which draws upon competing ways of imagining the relationship in need of definition. Classical liberalism assumes that all a judge has to do is discover where one individual's sphere of authority ends and another's begins. It does not seem to realize that this act of discovery is an *act* — an act of creation and therefore that there is no "sphere" until the law "discovers" it. The

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[154] *See* Unger, *supra*, note 15 at 81-83, for a discussion of these two paradigms.

[155] *Ibid.* at 3.

[156] *See* White, *supra*, note 1 at 8 ("Culture and the individual self are . . . to be understood not in isolation, as independent systems or structures, but in their reciprocal relations one with the other."). See *also* R.C. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, unpublished manuscript (on file with author), for the view that subjectivity and structure evince a similar relationship.

erection of boundaries between the individual and the community constitutes that relationship, shaped by the dominant ideas of the society in which we live. But even after the lines are drawn, the individual sphere is still contestable, to be shaped again and again by the interplay of competing visions of social life. Individuality is a social process, which calls into question the classical assumption that individuality is independent of, and prior to, communal life.

Pluralist liberalism also elevates the individual over the community. But it does so by appearing to accept the interdependence of individuals while at the same time insisting upon the priority of the individual over the community, and thus upon a radical separation between the two. The mystification increases by the invocation of balancing and interest analysis. This form of judicial reasoning is said to be an effort to "balance" the interests of the individual against those of the community. Yet, as stated previously,[157] this form of reasoning does not tell a judge what to do; it merely restates the problem.[158] Like classical attempts at reconciliation, pluralist liberal balancing analysis is a creative act and its outcomes are shaped by the social interplay of competing visions of social life. The problem of reconciliation is simply displaced onto the level of determining and defining which interests are individual and which are communal and which are worthy of protection and which are not. And the act of defining the individual, whether it is cast in the classical language of individual "spheres", or in the pluralist language of individual "interests", is a social, or communal, process. To then insist on the priority of the individual as if it were something independent of the collectivity conceals the communal elements contained in the meaning given to individuality.

Conversely, toryism and socialism elevate the demands of the collectivity over those of the individual, but this process of giving meaning to those terms suffers from the same problem liberalism can be said to experience — in reverse. That is, by defining the individual in social terms, either through the imagery of organic harmony or class conflict, these collectivist pictures of social life repress precisely what individualist visions celebrate: namely, that society is composed of self-reflective, creative individuals who can and do reflect on their circumstances and imagine and realize a better world. The individual is subsumed under a web of hierarchical social relations in collectivist visions — a web which is viewed positively in tory discourse and negatively in socialist discourse. But what is repressed — individual self-reflection and intentionality — is essential to the meaning of what is established as prior. That is, we can only understand the meaning of social and economic relations, and attempt to transform them, by reflection and intentionality. Society does

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[157] *See* text accompanying notes 72-74, *supra*.
[158] *See* Frug, *supra*, note 16 at 1349-50.

not do this for us, even if only in "the last instance".[159] Collectivist discourse either treats the individual as a social automaton (toryism), thereby eradicating any notion of individuality, or accepts the fact that the individual and the community can only be understood in relational or polar terms (socialism), but then undermines that relational character by seeing one pole (the community) as ultimately determinative of — as something independent of and prior to — the other pole (the individual).

Thus our constitutional imagination is constituted by a series of discursive attempts to reconcile the relationship between the individual and the community. And while we rely on these attempts to attempt to give meaning to ourselves and our surroundings, these "uncertain pointers" not only conflict with each other, but also are internally questionable to the extent they repress the notion that the relationship between the individual and the community is self-defining. Our individual and communal self-definition is constrained by a constitutional conversation which blinds itself to the fact that it is not only speaking about, but creating, the relationship between the individual and the community. This repression tends to legitimate the current ways in which we have imagined and organized our society and limits the possibilities of imagining and constructing a world better suited to the human condition. And in so doing, constitutional discourse far too often devolves the profound responsibility of engaging in the construction and transformation of social life away from its rightful bearers: ourselves.

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[159] *See supra*, note 86. As MacIntyre states in AFTER VIRTUE, *supra*, note 30 at 215:

> Marx's account [is] less than satisfactory partly because he wishes to present the narrative of human social life in a way that will be compatible with a view of the life as law-governed and predictable in a particular way. But it is crucial that at any given point in an enacted dramatic narrative we do not know what will happen next.

See also C. Taylor, *The Agony of Economic Man* in LaPierre, ed., ESSAYS ON THE LEFT: ESSAYS IN HONOUR OF T.C. DOUGLAS (Toronto: McClelland and Stewart, 1971) at 234 ("There is a genus of human activities in which what happens to us, or what we simply observe, is given human meaning for us, not changed for our purposes, but taken in, understood, interpreted.").