Constitutional Reticence

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Introduction

When arguing for constitutional reform, citizens and specialists alike often speak in exalted terms. They speak about constitutional reform as though it were an occasion for national reaffirmation. They suggest that drafting a constitution should be about defining the country and what the country stands for. They see it as an occasion for writing into the country's fundamental document the principles that the country should cherish.

These aspirations are often coupled with language that suggests that constitution drafting should be a matter of great national consensus. Often the existence of a wide measure of agreement is asserted. Advocates of a particular option tell their compatriots that the constitution should express the shared values of all Australians (or Canadians or Americans) and humbly advance their favoured option as the essence of that commonality. When disagreements do surface, the excited and the unwary can find themselves accusing their compatriots of being less than true Australians (or Canadians or Americans) precisely because they do not share what all true Australians should believe.

And of course disagreements do arise, often with more vehemence in constitutional than in ordinary politics. The making of a constitution frequently seems to be subject to the same tug of interests, prejudices and posturing that affects all politics. This is hardly surprising. The burden of debate over constitutional reform is carried by the politicians of the day. They run for office on platforms that have constitutional planks. They debate those questions largely through the institutions of ordinary politics. It is logical that the trade-offs, resentments, and manoeuvring of ordinary politics should also shape the constitutional agenda. But this does jar dramatically with the desire for national affirmation and consensus with which constitutional politics is often invested, at least in the popular arena. The wide gap between the exalted expectations and the political manoeuvring can produce a sense of severe disenchantment.

How then should constitutional politics be conducted in order to produce a better match between expectation and fulfilment? What should our aspirations and

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our conduct be when pursuing constitutional reform?

I believe that aspiration and reality can be bought into better conjunction. The solution lies in a combination of a more realistic sense—or at least a more focussed and more modest sense—of what constitutions should attempt to achieve, together with an ethic that citizens and politicians should observe in pursuing constitutional change, namely an ethic of restraint. Both are important. The first is crucial in order to determine what we should expect from our political structures. Being clear on that will produce better constitutionalism, less prone to illusion and more conducive to what makes for a healthy polity. And the ethic too is important, for we generally do expect something more from our constitutions than we expect from our ordinary politics. That 'more' is what we are grappling with when we invoke consensus or the 'common values that all Australians share'. As I have already made clear, I do not think that the language of consensus and shared values hits the mark, but it does capture the genuine insight that constitutions are different from day to day political life.

This paper is an attempt to identify that difference and to suggest its consequences for constitutional reform. It is, in essence, a reflection on the role of constitutions, attempting to derive from that role prescriptions as to what we should seek to achieve when we create or revise them. Its fundamental argument is applicable to constitutional practice generally, not just reform. Its essential message is that the 'constitutional' should be discerned with some care, and that a clear sense of the institutional role(s) of constitutions within democratic societies should colour the ways in which we draft them, change them, interpret them, and organise the functions of the various organs of governments around them. Moreover, that colouration is not easily definable—indeed is not properly definable—as a set of rules or boundaries. It operates rather as a disposition—an ethic of constitutional reticence.

Dimensions of the Problem

To this point, one might be forgiven for thinking that this paper is simply about the usual gap between aspiration and execution: we would like constitutions to be above politics, but of course they're not. But there is considerably more at issue. This paper speaks to a number of problems that commonly afflict constitutional reform.

One is a frequent tendency for the agendas of constitutional reform to run away with themselves, so that they intrude upon matters that seem manifestly to be the stuff of ordinary politics. Matters of perennial discussion and debate come to be entrenched in constitutional form. Perhaps the most extravagant examples are found in the Brazilian Constitution of 1988. The Brazilian State is, for example, instructed to 'favour organization of cooperatives for prospecting and placer mining activity', and told that 'Prospecting authorization shall always be for a limited period, and the authorizations and concessions provided for in the article may not be assigned or transferred, either in whole or in part, without a prior consent from

the granting authority.'[1] The Brazilian Constitution contains complex provisions that govern the acquisition of various categories of land through prescription.[2] The constitution becomes cluttered with provisions that have little to do with the fundamental organisation of political life. Constitutional politics threatens to absorb all politics, and the coinage of constitutional protection is devalued.

Brazil may be an extreme case, but the general tendency is familiar. The United States had its unhappy experience with the prohibition of alcohol in the 1920s, and more recently with a rash of attempts to require constitutionally that budgets be balanced.[3] In Canada, the round of constitutional negotiations that led to the failed 'Charlottetown Accord' in 1992 suffered from an overcharged agenda, as a wide range of political actors sought to have their interests reflected in the text of the constitution. Many of these items were a matter of legitimate constitutional concern, but others—such as a proposal for a social charter, which ultimately produced a set of 'policy objectives' to which all legislatures and governments were said to be committed—stretched the boundary between ordinary and constitutional politics.[4] The constitutions of various countries, including Ireland and India, contain 'directive principles' of governmental policy.[5] Indeed, the whole movement in international law towards the recognition of 'second' and 'third generation' rights,[6] when translated into state constitutions, raises difficult questions about the role of constitutions both symbolically (are people who disagree with the constitutional policies deficient in their citizenship?) and as legal instruments (what effect, if any, should those policies have on governmental action?[7]). Is there a way of deciding what things are appropriate for inclusion and

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1 Constitution of Brazil, articles 174(3) and 176(3), translation from Albert Blaustein and Gisbert Flanz, (eds) *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana loose-leaf service) vol 3 Release 98-6.

2 Ibid articles 183 and 191.

3 See, eg, David E Kyvig, *Repealing National Prohibition* (Chicago: University of Chicago Press 1979); David E Kyvig, 'Refining or Resisting Modern Government? The Balanced Budget Amendment to the US Constitution' (1995) 28 *Akron Law Review* 97.

4 Proposed sections 36.1 and 36.2 of the Constitution Act, 1982, Charlottetown Accord, Draft Legal Text (9 October 1992) s 31. For the process leading up to the Charlottetown Accord, see: Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd ed (Toronto: University of Toronto Press 1993) 154-218; Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press 1994) 162-175.

5 'Directive Principles of Social Policy', Constitution of the Republic of Ireland, article 45; 'Directive Principles of State Policy', Constitution of India, Part IV. See John Kelly, *The Irish Constitution*, 3rd ed by Gerard Hogan, Gerry Whyte (Dublin: Butterworths 1994) 1117-1123; Durga Das Basu, *Short Constitution of India*, 10th ed (New Delhi: Prentice-Hall of India 1989) 268-278.

6 For a brief account and critical evaluation of the emergence of 'third generation' rights, see Philip Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29 *Netherlands International Law Review* 307.

7 For a valuable exploration of the potential for judicial review of social rights, see Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable

what inappropriate? Or is it a matter of catch as catch can: one constitutionalises whatever musters the necessary majority?

When engaged in constitutional reform, it is seductive to think that one can address the most profound issues of society and resolve them once and for all—that one can vindicate rights, settle issues of political morality, achieve social change, state what a country stands for, and put them beyond legislative back-sliding forever. This is the powerful impetus behind the adoption of charters of rights or the definitions of national identity often found within constitutions. But this desire, if not carefully considered, can end up freezing into constitutional form conclusions that are inevitably provisional, incomplete, and subject to change. Over time, such provisions come to appear anachronistic, enshrining principles or imposing definitions that no longer seem appropriate. Yet the constitutional provision remains, blocking alternatives until the provision is changed through an invariably difficult process of constitutional amendment. This was true, for example, of Ireland's constitutional prohibition of divorce, only recently repealed by referendum.[8]

Moreover, the constitutionalisation of issues tends to force them into a language of absolute right and wrong when toleration of a diversity of approaches, or perhaps even a manifestly imperfect compromise, would be more appropriate, especially in a community of people who disagree. Mary Ann Glendon, for example, has argued powerfully that the United States' controversy over abortion would have been more flexibly and in the end better handled had it not been constitutionalised.[9] Similarly, during debate over the Meech Lake Accord in the late 1980s, many Canadians balked at writing into the constitution forms of accommodation for the country's predominantly French-speaking province, Quebec, that they had long accepted when pursued through administrative compromise.[10] Constitutionalisation carries a high symbolic charge, encouraging citizens to think in moral absolutes. The sense that constitutional change is once and for all, defining the nation, is hostile to compromise and provisional adjustment. Attempting to deal with a difficult and contentious issue through constitutional means can therefore exacerbate political divisions by placing them at the forefront of the national agenda, treating them as issues to be decided once and for all, and making them the measure of national identity.

At its limit, the constitutionalisation of a tendentious position can produce the estrangement of citizens from their country's constitutional order. This is most

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Guarantees? Social Rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1.

8 See Christine James, 'Céad Míle Fáilte? Ireland Welcomes Divorce: the 1995 Irish Divorce Referendum and the Family (Divorce) Act of 1996', (1997) 8 *Duke Journal of Comparative & International Law* 175.

9 Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge MA: Harvard University Press 1987) esp 45ff.

10 Webber, above n 4, 261-262. For the suggestion of a similar dynamic in the Czechoslovakian context, see Jon Elster, Claus Offe, and Ulrich Preuss, *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge: Cambridge University Press 1998) 64.

apparent in the context of religion. The constitutional establishment of one religion clearly poses difficult problems of allegiance for dissenters. The same may be true of lesser constitutional commitments that enshrine one intensely held moral position over another. When addressed through the ordinary legislative process, the question of abortion may be fought hard, but whatever the result, citizens are unlikely to question their sense of belonging to the country because of it. The alienation may be much greater if the outcome—either a right to abortion or its prohibition—is written into the constitution. Constitutionalisation seems to make the outcome, and perhaps the religious or moral commitments from which it derives, an essential element of what it means to be a citizen. It also suggests that the outcome is a permanent part of the national landscape, beyond the reach of ordinary political action.

There is a strong argument that the current heightened level of alienation of French-speaking Quebecers from the Canadian federation is the result of this phenomenon. That alienation became pronounced following the patriation of the Canadian constitution in 1982 and especially after the failure of the Meech Lake Accord in 1990. I imagine that few Quebecers believe that those events represented any fundamental change in Canadians' conception of their country; they had always known that Canadians held a range of views, and that many English-speaking Canadians rejected the views held by many French-speaking Quebecers. Rather, the events were significant because they appeared to bring those debates to an abrupt conclusion by, in the case of patriation, writing into the constitution a conception that many Quebecers resisted and, in the case of Meech Lake, demonstrating that any modification would be very difficult to achieve. As a result, many Quebecers believed that their vision of the country had been read out of the constitutional order. Support for Quebec's secession increased dramatically.[11]

There may be times when one is content with this kind of estrangement—when one wants to make a clean break with what went before and one deliberately places certain attitudes beyond the pale. The constitutional transformation of South Africa furnishes one example, in which apartheid had to be conclusively rejected. But one should be slow in coming to such a conclusion if one cherishes the vision of a country in which citizens are free to disagree, even over matters of fundamental principle. One should recognise and attempt to limit the potential cost of irrevocable alienation. And in any case, such exclusion should be the product of conscious decision, not the inadvertent consequence of an exaggerated claim of commonality.

Moreover, constitutionalisation is not just about the affirmation of a principle or the establishment of a rule; in operative provisions it also determines the institutional structures through which issues are addressed—who has the last word. All legal provisions, especially constitutional principles, require

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11 Webber, above n 4, 3ff, 161-162; Stéphane Dion, 'Explaining Quebec Nationalism' in R Kent Weaver, (ed) *The Collapse of Canada?* (Washington: Brookings Institute 1992) 77; Maurice Pinard, 'The Dramatic Reemergence of the Quebec Independence Movement: Rethinking Nationalism and Sovereignty' (1992) 45 *Journal of International Affairs* 471.

interpretation. It is often at the level of interpretation that the critical decisions are made. Few democrats would disagree, for example, that freedom of expression is an important principle. The contentious issues arise when determining its precise scope and content: Does it protect commercial advertising from government regulation? Does it protect pornography and, if so, what forms of pornography? Can media of communication be rationed in order to provide more equal access (in election coverage, for example)? Constitutionalisation means that the primary agent for interpreting these principles is the judiciary, not the legislature. Difficult issues of social judgement are taken out of the hands of the legislators, over whom the citizenry has the most control, and placed in the hands of judges, who inevitably are less representative and who make their decisions within a procedural framework that is poorly adapted to weighing relative impact and balancing diverse social interests. This displacement is necessary when it comes to the rules that define the operation of the legislature itself (such as those that specify the division of powers within a federal system). It may also be appropriate for certain minority rights. But the extent to which one indulges in such displacement should at least take account of the fact that constitutional entrenchment is as much about this institutional effect as about the protection of substantive principles.

For all these reasons, it is worth thinking carefully about what constitutions should be attempting to achieve and tailoring one's constitutional politics accordingly. An over-inclusive constitutionalism places excessive strain on the agenda for constitutional reform, sets tentative and eminently contestable propositions in constitutional cement, constructs issues in a way that prefers all-or-nothing solutions to adjustment and compromise, creates a national symbolism that may alienate a portion of its citizenry, and imposes tasks on the courts that may be best dealt with elsewhere. In fact, by being indiscriminate in what it enshrines, it can undermine the usefulness of constitutional entrenchment, weakening the protection afforded those principles that truly are fundamental. As the range of matters that are constitutionalised extends, constitutional provisions command less respect, both generally within society and as requirements that must prevail over competing considerations in adjudication. Courts, instead of treating constitutional principles as peremptory, are drawn into complex calculations of social utility that are not all that different from that conducted by the legislature.[12] And to the extent that such a constitution confers functions upon courts for which they are poorly suited, it can sap their legitimacy.[13] It is well worth distinguishing between the respective roles of ordinary and constitutional politics, so that they do not run together to the ultimate detriment of both.

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12 See Jeremy Webber, 'Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms' (1993) 5 *Canterbury Law Review* 207, esp 213-215, 232. See also the criticisms of indiscriminate expansion in international human rights: Alston, above n 6, 315.

13 See: Elster, Offe, and Preuss, above n 10, 82 (drawing attention to the danger posed to the legitimacy of the Hungarian Constitutional Court as it embarks upon second generation rights); Cass Sunstein, 'Against Positive Rights' (1993) 2(1) *East European Constitutional Review* 35 (identifying the danger to incipient constitutionalism in the post-Communist states generally).

The Role of Constitutions in Diverse Societies

Many of these defects of constitutional practice are the result of loose conceptions of what a constitution should attempt to achieve. This is true, for example, of the aspirations noted at the beginning of this paper—that constitutions should enshrine the fundamental principles of a country, the fundamental values of the nation. Constitutions inevitably play a crucial role in the national symbolism, especially in those countries that have passed through a major transformation. It is unreal to think that the symbolic can be banished from the constitutional. But this leaves open the question of the kind of symbolism that should be enshrined in constitutional form, the extent to which it should be enshrined, and the spirit in which that enterprise should be conducted.[14]

Public and indeed professional debate often goes astray by adopting too indistinct a notion of importance or fundamentality when determining what is appropriate for constitutional entrenchment. One sometimes gets the impression that a simple syllogism is assumed:

> To have a real country—one which is genuinely and not just speciously unified—all citizens have to agree on a set of fundamental values. (This term may be omitted, the syllogism commencing instead with a simple statement of the priority of particular values—although the nationalistic gloss is common even where claims of philosophical truth are made.)
>
> These fundamental values should be settled once and for all, should be affirmed so that all citizens and especially potential citizens know what they are, and should be rigorously protected against governmental intrusion or neglect.
>
> The best way to do this is to write those values into the constitution and, ideally, have them enforced by the courts.

There are several problems with this syllogism, notably its conception of what it takes to have a country, its hubris (and naivety) in attempting to settle profound controversies through a simple drafting exercise, and its lack of attention to institutional strengths and weaknesses. In the paragraphs that follow, I elaborate on those problems. That will prepare the ground for us to address in positive terms what constitutions should seek to achieve. Constitutions should not seek to enshrine 'shared values'. They should not aim to settle fundamental controversies. Those ways of expressing the aspiration are unhelpful and inherently unsafe. Any adequate conception must take into account the central fact that constitutions are not primarily a mode of expressing the will of a unified people today. Rather, they establish a framework for the construction and reconstruction of the people's will long into the future.

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14 I explore these issues in Jeremy Webber, 'Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform', (1999) 21 *Sydney Law Review* 260.

National Identity

The suggestion that countries are typified by a wide measure of substantive agreement is both false and pernicious. First, it is simply not true that all citizens share the same fundamental values, at least in any interesting sense. There are elements of commonality—and I will suggest how we might conceive of that commonality in a moment—but there are also, always, profound differences of opinion, even on the most fundamental questions. To suggest that all citizens must believe the same things—to require a common content of belief—is to establish an unrealistic standard of citizenship. Attempts to define such canonical values inevitably proceed at such a level of abstraction that they gloss over real differences with respect to the values' interpretation and application and generally produce a canon that would be true of virtually any western democratic society.

Second, this view introduces elements into the discussion of fundamental issues that are profoundly illiberal. Arguments over fundamental political questions are distorted by claims of loyalty and disloyalty. The language of Americanism and unAmericanism (for example) makes its ugly presence felt. And in this drawing of boundaries between nationally appropriate and inappropriate belief, citizens who are members of minority groups run a disproportionate risk of finding themselves on the wrong side of the line.

But how, then, should we understand the feeling of commonality that is genuinely a part of one's sense of belonging to a country? I have elsewhere used the metaphor of conversation to capture this feeling.[15] Countries are marked by the participation of their members in public debates—in the discussion of issues affecting the community, in the consideration of how the community is ordered, how it should respond to the challenges it faces. This participation need not be the consuming passion that is sometimes associated with citizens' participation in the idealised Athenian polis. Participation in this context can be considerably less demanding: simply that members use those terms to conceive of their community's affairs, that they see the terms of the public discussion as their own (although more extensive participation is of course desirable). Such conversations have distinctive features: the ways in which issues are posed; the rhetorical resources—concepts, forms of argument, styles of expression—on which members draw; the distinctive historical reference points that are marshalled. These are genuinely common elements—the product of interlocking memories and shared experience—which can serve as the focus of powerful allegiance. Indeed, I believe that they capture much better than the language of shared values the substance of people's attachments when they claim an identity as Australians, Americans, Poles or Canadians, Eoras, Pintupis, Crees, or Kwakiutls. We do not in fact believe the same substantive things, even on fundamental matters. Rather, we claim a place within a particular tradition (or variant of a tradition), one that we share and employ to address issues of community concern.

The conversational metaphor also succeeds in capturing more of the subtlety, openness and dynamism of identity. It acknowledges that national

15 Webber, above n 4, 185-193.

conversations can change over time, without any loss of identity. It acknowledges that communities can adopt elements from outside, without loss of purity. What matters is continuity, not the stasis implicitly required by conceptions that insist upon a common core of beliefs.

Moreover, it permits us to make sense of our multiple allegiances, our sense of belonging simultaneously to concentric or overlapping political communities. One can simultaneously participate in and feel deeply attached to more than one conversation, each carrying its own particular meaning and set of historical references. One can be, at one and the same time, a proud Scottish patriot, an engaged and committed British citizen, a European and an internationalist, without there necessarily being contradiction or even tension between them.

Most importantly, the conversational metaphor is tolerant of disagreement and contestation. Conversations require that participants talk to each other, not that they agree. In fact, countries are often, like conversations, defined more by the structure of their disagreements than by their agreements. The language of equality has long been part of the American political culture. The country's founding document affirms that Americans hold equality to be self-evident.[16] Yet Americans have also disagreed violently over what equality should mean. Does it apply to blacks as well as whites? Does it include women as well as men? Does it require that all people be treated the same, or can it tolerate—does it require? —separate spheres in which people are treated differently? Is it equality of opportunity or equality of result? Is equality served by mechanisms of group advancement (trade unions; affirmative action programs) or does it operate exclusively at the level of the individual? Despite vigorous dispute, the debate has had a uniquely American cast. The questions are posed in ways that are specific to the United States, the debate draws heavily upon the distinctive history of that country, and it is pursued through means that are often uniquely American. It has produced a family of answers that is recognisably American. That family resemblance is what it means to be American. It is what makes people as different as Martin Luther King or George Wallace, Hillary Clinton or Rudolph Giuliani, American.

The political scientist Louis Hartz sought to explain the ideological structure of settler societies by suggesting that each was formed by a fragment of the colonising society that was thrown off at a particular time in the mother country's history. In Hartz's theory, the fragment comprised only a portion of the class structure and the ideological spectrum of the country of origin, as a result both of the time of colonisation and of the social profile of the settlers. Because of this different constellation, the ideological landscape had a different character in each new society, the balance of forces was different, and this balance had a substantial impact on the country's future ideological evolution. Hartz's thesis has been controversial, especially in its suggestion that future ideological debate is determined by the inherited ideological fragment. But I believe he was right in emphasising how national character is often a structure of oppositions, where it is

16 The Declaration of Independence (4 July 1776).

the terms of disagreement, not of agreement, that are significant.[17]

Of course, in any real society, it is not sufficient simply to enter into conversation with one another. Things also have to be done. There therefore have to be ways—such as the proceedings of legislatures or the decisions of courts—of coming to provisional conclusions. By conversation, then, I do not mean an endless flow of words with no punctuation. But we should never lose sight of the fact that the punctuations are artificial and constructed statements of the people's will (although by all means necessary and desirable ones), not expressions of its actual will. The disagreement continues and may well generate different conclusions in the future. The debate is primary, the outcomes provisional and necessarily simplified.

Constitutions therefore should provide a structure for community in a situation of irredeemable difference of opinion, not a statement of a society's shared values (as though that were possible). They provide the means by which a diverse citizenry can come together to debate public issues and make decisions through time. All communities are diverse in the sense described here; all call for reticence in the entrenchment of ostensibly common values or beliefs. The insight is not confined to societies that harbour significant cultural or linguistic minorities (although it has special force there). Diversity in this sense is simply a function of human disagreement and interaction.

Why would we want to suppress this diversity in our constitutions? It is perverse to wish to see democratic contention defined out of one's country. Disagreement and vigorous debate are not defects in our national lives. They are signs of vigour. It is good that people care to argue with one another.[18]

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17 Louis Hartz, *The Founding of New Societies: Studies in the History of the United States, Latin America, South Africa, Canada, and Australia* (New York: Harcourt, Brace & World 1964).

18 This paper therefore sees disagreement as fundamental to an understanding of democracy and of legal institutions within a democracy. Disagreement is not an aberration to be wished away. For illuminating discussions of this theme and its implications, see: Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge MA: Harvard University Press 1996); Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon 1999). See also the arguments of Cass Sunstein in favour of 'judicial minimalism' in constitutional interpretation: Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press 1996); Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge MA: Harvard University Press 1999). Sunstein's work has two defects, however. First, it takes the present scope of judicial review in the United States too much for granted. It is, in effect, an argument for how the Court's decisions, given their present scope, can attract the broadest possible support by relying upon 'incompletely theorised agreements'. A more developed analysis as to the merits and role of judicial review is required to found the argument for reticence in constitutional interpretation. Before the expedient of incompletely theorised agreements is persuasive, there has to be a convincing account of the place and role of judicial review itself. Second, there is reason to doubt the possibility of achieving—or of needing to achieve—even the extent of agreement postulated in incompletely theorised agreements. Sunstein's approach is open to the charge that it

Hubris and Humility

The desire to write common values into the constitution is also a mark of considerable hubris, presuming as it does that we have the moral capacity to decide questions of fundamental value once and for all, achieving in one moment what is properly the work of public reflection through time.

The fact that we care deeply about questions of fundamental value—that we form strong opinions and feel driven to act upon them—should not deceive us into thinking that they are straightforward or that achieving satisfactory outcomes is simply a matter of will. They are often profoundly complex, in which reasonable people who accept many similar commitments can disagree on how principles should be expressed, how competing principles should be reconciled, and how those principles should apply to the complexity of daily life. Moreover, our own individual grasp of those issues often changes with time, as we encounter unexpected circumstances or come face to face with people whose perspective on the issues we had not fully considered. Assertions of value, then, have the character of hypotheses. They provide our best judgement, at a given time, of what is valuable, what makes for a sound polity, or what conduces to human betterment, but always subject to the proviso that more remains to be encountered and understood. Today's expressions are perpetually liable to be superseded by more complete understandings or by more adequate conceptions.[19]

This need not lead to inactivity. We always act, as individuals or as societies, on the basis of imperfect information and provisional conclusions. Indeed, if we value justice at all, we must be willing to act upon what are, for the moment, our best understandings of that quality. But our actions should be

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diminishes, once again, the pervasiveness of normative disagreement in order to escape the full force of the challenge to judicial review. It may be a useful guide in some situations in which a measure of agreement is possible, but it is not a complete answer.

19 This argument owes much to the work of Karl Popper. For a useful introduction, see Struan Jacobs, *Science and British Liberalism* (Aldershot: Avebury 1991) 202-212. See also MacIntyre's description of the process of reasoning within a tradition (an approach that I hope is not too paradoxical next to Popper's): Alasdair MacIntyre, *Whose Justice? Whose Rationality?* (Notre Dame: University of Notre Dame Press 1988) 354ff. For approaches similar to that in the text see: Waldron, ibid 164-187; Sunstein, *One Case*, ibid 49-53; and the republican argument against precommitment summarised in Stephen Holmes, 'Precommitment and the paradox of democracy' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press 1988) 195, 205-207. Holmes rejects that republican argument in its pure form, accepting the need for—indeed arguing for—certain types of constitutional restraint. But he argues that these constraints should preserve the capacity for reconsideration and public learning; indeed he justifies them on the grounds that they are necessary to continual reconsideration. These types of precommitment are entirely compatible with the argument in this paper. Most of the measures for which Holmes argues are procedural, stipulating how public decisions are to be made. If there is any divergence (and it is not clear that there is), it may lie in the extent to which, for measures that do not themselves stipulate procedures but rather offer supporting guarantees (eg, freedom of political speech), explicit constitutional provision, as opposed to ingrained traditions of respect, is required.

tempered by an awareness of the endemic fallibility of our moral and factual judgements, and should retain a healthy capacity for reconsideration. In the social realm this should lead, among other things, to a high level of tolerance for differing views. First, our own fallibility should lead us to recognise that someone else's view may potentially be better than our own; we simply have insufficient warrant to suppress the views of others. Secondly, those different views provide an important prod to the bettering of our own; individuals with whom we disagree challenge our preconceptions, probe tensions or inconsistencies in our arguments, and marshal alternative factual situations which we then have to explain or distinguish.

We cannot count on our disagreements being resolved. As some positions fall away, new interpretations will be advanced, new arguments claim our attention. For that reason, constitutional design generally focuses on process, not content. If conclusions are always constructed and provisional—if better or more precise conclusions, or (in a democracy) simply conclusions predicated on a different constellation of political forces, lie always in the future—how our provisional conclusions are determined and how they might be revised become all-important. Procedure therefore lies at the heart of constitutional order. The entrenchment of particular values or specific outcomes is exceptional and subject to special justification for it short-circuits the normal course of debate, emphasises conformity over diversity, and inhibits reconsideration and revision.

Legislative processes provide mechanisms that can produce the necessary provisional closure, allowing societies to act on some definite view even while the underlying debates continue. Those mechanisms are often conceived in terms of the aggregation of wills. To a certain extent the description is apt: the mechanisms do provide ways of addressing continued disagreement, and they do so through the use of mechanisms (like voting and majority rule) that provide a summation of preferences. But it would be a mistake to reduce political decision-making to voting, as though it were nothing more than the summation of wills, the latter being independently determined. The provisional resolutions achieved through voting are necessary expedients in a society in which people inevitably disagree, but they do not displace the backdrop of argument and justification against which voting occurs. Political life is made up both of the challenge, response and reformulation of political debate, and of the periodic decisions brought about by ballot. The opinions that we express when voting are not independently given, but are the product of probing, challenge and reconsideration.

This argument accepts, then, the insight of the civic republican literature that deliberation is an important dimension of politics.[20] That literature has sometimes been criticised for presenting an idealised vision of political debate, bearing little

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20 For the application of civic republicanism in constitutional scholarship, see eg, Frank Michelman, 'The Supreme Court, 1985 Term—Forward: Traces of Self-Government', (1986) 100 *Harvard Law Review* 4 and 'Law's Republic' (1988) 97 *Yale Law Journal* 1493; Cass Sunstein, 'Beyond the Republican Revival' (1988) 97 *Yale Law Journal* 1539; Sunstein, *One Case*, above n 18, 24-45; and the many publications cited in those works.

relationship to politics as practised.[21] It may be true that many of the characteristics that civic republicanism ascribes to political deliberation are more useful as a standard of aspiration than as a description of legislative reality. But its essential arguments remain pertinent, even in our understanding of existing polities. It is true that political discussion rarely takes the form of a disinterested search for the common weal. Politics is generally more rough than that, having more than its share of posturing, partisanship, negotiating, bullying and a host of other manoeuvres. But in a democratic polity, the set-piece attacks of political debate do force justifications. Those justifications cannot simply take the form 'I want', but must be phrased in terms of some claim of public interest. And in that process of challenge and justification, the exploration of questions of fundamental public value takes place, albeit in blunt and sometimes aggressive fashion.

Constitutionalisation of substantive values cuts across this process of debate, purporting to settle matters once and for all and writing fundamental principles into a document that is designed to be beyond the political fray. To the extent that it does so, it tends to freeze those values in their provisional state, it prefers one side in the society's on-going arguments, and it largely insulates the result against further political challenge and refinement. It relies upon a generally false claim of unanimity among the populace and of perspicacity among the constitution's framers. It takes the result of one political process at the moment of the constitution's drafting, and enshrines it forever. We have little reason to think that the process in which the framers take part will provide such demonstrably better outcomes that we should put the results of their deliberation beyond the control of their successors.

The essential point is that questions of fundamental value are, in most interesting respects, the subject of endemic discussion and disagreement. There may be reasons for placing some decisions beyond legislative control, but the justification for that expedient has to be more than the simple assertion of fundamentality or of commonality and must satisfy a high burden of justification. Constitutions are auxiliary to political debate—facilitating it and providing structures through which it can result in periodic conclusions. They should not enforce a rigid closure upon it.

Legislatures and Courts

Of course, constitutionalisation normally does not determine the content of disputed values. Rather, it alters the forum in which that content is determined, taking the matter out of the hands of the legislature and placing it in the courts. In practice, constitutional entrenchment is more about this institutional substitution than it is about the stipulation of the values themselves. As a result of the values' constitutional expression, they become subject to adjudication; and because the courts' interpretation of the constitution binds the legislature, the courts' reading of the values sets boundaries on the legislature's actions.

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21 See, eg, Steven Gey, 'The Unfortunate Revival of Civic Republicanism' (1993) 141 *University of Pennsylvania Law Review* 801.

This institutional displacement requires special justification. Not only do we assume that legislatures are more appropriate institutions for making broad social decisions generally, but legislatures possess real advantages in determining precisely the kinds of issues discussed here—issues that raise fundamental questions of social value. For all their defects, legislatures are more participatory, inclusive, and representative than courts. Parliamentarians are more diverse in their origins and possess the singular merit of being chosen by the citizenry. The methods by which they are selected and by which they make their decisions render it more likely that their conclusions will reflect a broad range of opinion within society. In addition, legislative processes are better able to permit direct intervention by a wide range of parties. This is especially true of the proceedings of legislative committees. Legislatures have greater power of initiative and broader evidence-gathering capacity.

Courts, of course, have their strengths. One is their overwhelming commitment to a particular form of rationalism. Their procedures result in the narrowing and focusing of disputes. They provide a structured opportunity for challenge and proof designed to construct utterly dependable factual foundations upon which decisions can be based. Their ultimate conclusions are not founded upon negotiation, compromise and deal-making, but upon a conscientious analysis of the merits of the parties' arguments. These virtues may be exaggerated as descriptions of how courts actually behave, but they are well worth affirming as ideals. They capture a large part of the institutional advantages of courts—why, apart from the personal qualities of judges, we trust them, rather than other institutions, to decide certain kinds of matters, especially those that require a dispassionate unravelling of particular circumstances. But it is important to realise that these advantages also come with costs, costs that are particularly acute when dealing with broad issues of contested social value: the citizenry's lack of direct participation in the ultimate decision (indeed, the limited participation of the parties to the court proceeding themselves); structural impediments to compromise; the constrained ability of judges to secure evidence; and the narrowing of the scope of dispute to that defined by the parties before the court.

The courts' rationalism is commonly thought to favour decision on grounds of principle. This is sometimes contrasted with the actions of legislatures, which are said to depend upon considerations of interest or policy. But this contrast is overdrawn. Principle is often no less evident in the debates of parliaments. Legislative debates over limitations on election spending or racial vilification laws, for example, generally involve as much attention to principle as their judicial equivalents.[22] Courts do tend to pronounce their conclusions in a more categorical,

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22 Compare the process of debate over the New South Wales racial vilification legislation, culminating in Legislative Assembly of New South Wales, *Hansard* (4 May 1989) 7488-7491 and (10 May 1989) 7919ff, to the Supreme Court of Canada's decision in *R v Keegstra* [1990] 3 SCR 697. See also Gutmann and Thompson, above n 18, 45-48; Waldron, above n 18, 14, 230; Sunstein, *One Case*, above n 18, 267-268 fn 5; Janet L Hiebert, 'Wrestling with Rights: Judges, Parliament and the Making of Social Policy' (1999) 5(3) *IRPP [Institute for Research on Public Policy] Choices*.

a more univocal manner and may appear more principled for that reason alone—although one might question whether this is an advantage. The argument of this paper has been that issues of fundamental value frequently do not give rise, in straightforward fashion, to categorical outcomes. As citizens, we may want the abstract values to have categorical priority, but we often find that in daily life, they are enmeshed in circumstances that defy simple analysis. Although courts hold out the hope of affirming one right answer, in a society of diverse opinions justification is needed for why courts should be uniquely entitled to define that answer.[23]

Two such justifications for judicial review are the need to protect minorities against the tyranny of the majority and the need to build into the political order institutional checks against possible abuses of authority. Constitutional entrenchment is appropriate especially when there are insufficient internal incentives to induce respect for the principles in issue. Clear examples include the policing of the separation of powers between the legislature and the courts, in which the very nature of the principle precludes one from leaving the matter entirely to the legislature; and the federal division of powers, where no one legislature can be placed in control of the other's jurisdiction. Similarly in the case of minority rights, there may be a need to guarantee a minority against majority depredations. Even here, one may wish to consider carefully how much of a risk there is before one incurs the costs of rigidity and institutional displacement. Sometimes, the need for these limitations is open to question because of the very fact that the legislators creating them are in no different position than future legislators will be. But often such limitations are imposed from the outside, or at least as a result of outside pressure. In such situations, the limitations may still play a significant role indeed. This was true, for example, of the Fourteenth Amendment to the US Constitution, adopted during the Reconstruction era, which prohibited states from abridging equality before the law; the safeguards (ultimately ineffective) in the South African constitution of 1909 against the use of race to disenfranchise voters in the former Cape colony; the rights provisions written into the constitutions of the new eastern European nations following World War I; and those inserted into the constitutions of the republics of Yugoslavia when those republics sought international recognition.[24]

In addition, drafters of a constitution may seek to attribute certain decisions

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23 I explore a number of these institutional concerns in Webber, aboven 12. See also Waldron, above n 18, 243ff, where he defends voting within legislatures as a way of resolving issues about rights.

24 See, Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (New York: Harper & Row 1988) 251-261; Ian Loveland, *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1855-1960* (Oxford: Hart 1999) 121-125; Inis Claude, *National Minorities: An International Problem* (New York, Greenwood Press 1955) 16ff; European Community Declaration concerning the conditions for recognition of new states (16 December 1991) and Opinion No 5 of the Arbitration Commission of the Peace Conference on Yugoslavia, 'The recognition of the Republic of Croatia by the European Community and its Member States' (11 January 1992), both in Sneζana Trifunovska (ed), *Yugoslavia Through Documents: From its creation to its dissolution* (Dordrecht: Martinus Nijhoff 1994) 431, 489 (my thanks to Peter Radan for this last reference).

to the judiciary in order to benefit from the distinctive institutional characteristics of courts, such as their relative dispassion and their careful attention to the merits of disputes. The framers might worry, for example, that a legislature might lose sight of the broader principles when moved by the passions of the moment or by the drive to achieve an instrumental end. The framers of one age may therefore bind their later counterparts in order to prevent the latter from falling prey to such temptations. This, of course, is the question of precommitment, addressed in a manner that incorporates close attention to the differential institutional characteristics of courts and legislatures.[25] Such an explanation may provide a sufficient reason for constitutionalisation, and indeed is often presumed to do so without argument. But one might ask whether full constitutionalisation is the most appropriate mechanism for achieving the objective. Constitutionalisation still carries with it considerable rigidity, so that all judgements, not merely those that are likely to be distorted by passion or interest, are put beyond legislative control. There may be lesser expedients, involving a blending of legislative and judicial roles, that can achieve the outcomes without falling prey to the problems.[26]

Finally, there may be good reason for establishing a regime that gives rights guarantees an uncompromising priority over all other considerations, even if this does produce a simplistic distortion of outcomes, in circumstances in which individual rights have not historically been protected. The consequences of a systematic disregard for rights are so severe that one should perhaps compensate for the lack of history by instituting a regime that protects rights inflexibly—that, in effect, biases the system in favour of certain interests, even if these end up being overprotected. This might be one implication of Philippe Nonet's and Philip Selznick's argument concerning the 'moral development' of societies, in which societies may have to attend particularly to rights protection until an ethic of respect is firmly established.[27] This may be accomplished by locating rights

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25 For a classic statement of the problem of precommitment in relation to constitution-making, see Jon Elster, *Ulysses and the Sirens: Studies in rationality and irrationality*, revised edition (Cambridge: Cambridge University Press 1984) 87ff.

26 I cannot here make this argument in full, but note that significant rights protection, even against statutory infringement, may be achievable through ordinary legislation. In Australia, the Racial Discrimination Act 1975 (Cth) plays a significant role in imposing human rights requirements on the states and, arguably, indirectly on the Commonwealth itself. The protection of native title against actions by the states is founded upon this statute: *Mabo v State of Queensland (No 1)* (1988) 83 ALR 14; *Western Australia v Commonwealth* (1995) 183 CLR 373. The possibility of conflict with the Racial Discrimination Act shaped negotiations over the Commonwealth's enactment of the Native Title Act 1993 (Cth) and subsequent amendments: Frank Brennan, *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners* (Sydney: University of New South Wales Press 1998). Canada has used statutes, enacted in ordinary form but imposing 'manner and form' requirements, to protect rights against subsequent legislative interference: Canadian Bill of Rights, SC 1960, c 44; Quebec Charter of Human Rights and Freedoms, SQ 1975, c 6. See Walter S Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed (Toronto: McClelland and Stewart 1975); Peter W Hogg, *Constitutional Law of Canada*, 3rd ed (Toronto: Carswell 1992) 771-772, 779-791.

27 Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward*

protection in institutions—the courts—that are narrowly focused on their protection and that relentlessly simplify disputes. In any case, whether the content of social values is determined in the courts or in the legislature, there is good reason to have the values' application to particular cases defined through the rationalistic processes of the courts, so that the circumstances of the particular case are not ignored in the rush to achieve general ends.

My purpose in this paper is not to give a full account of when matters should be entrenched and when not, but simply to raise the institutional dimension of entrenchment and the complicated judgements that it requires. For there are real costs to the decision to remove matters from legislatures and assign them to courts. There is certainly a cost in terms of the extent of direct democratic involvement in the decision. But the cost may, in fact, be broader than that, extending to the more general engagement of citizens in the defence of principle. A common theme of civic republican political theory and of the philosophical traditions on which it draws is the importance of an engaged citizenry to the maintenance of democratic accountability, equality, liberty, and freedom of speech.[28] The habit of defending those values is not simply given, but is cultivated through active participation in a range of institutions in civil society and different branches of the state. Constitutional entrenchment, by taking the issues out of the legislative realm and placing them in the courts, can promote a more passive and less participatory approach to the issues, in which citizens leave the definition and protection of their rights to the courts. That lack of engagement may in the end undermine the very interests one wants to protect.[29]

An example may give this argument some reality. In the immediate aftermath of the adoption of the Canadian Charter of Rights and Freedoms, Canadian trade unions initiated a series of actions designed to affirm collective bargaining rights, especially in response to compulsory arbitration or back-to-work legislation (which nullified or suspended the right to strike).[30] There were no express guarantees of collective bargaining or the right to strike in the Canadian Charter, but the unions argued, relying especially on international authorities, that these rights were included in the protection of 'freedom of association'. Their arguments were utterly unsuccessful. The Supreme Court of Canada held that

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Responsive Law (New York: Octagon Books 1978), especially in their comments on the risks of 'responsive' law, 25, 74ff, 116ff. I am grateful to Martin Krygier for pressing this argument upon me. See Krygier, *Beyond Fear and Hope: Hybrid thoughts on public values* (Sydney: ABC Books 1997) esp 40-43.

28 See, eg, John Stuart Mill, *Considerations on Representative Government*, in Mill, *On Liberty and Considerations on Representative Government* (Oxford: Basil Blackwell 1946) 136-151; Arthur Schlesinger Jr, 'Individualism and Apathy in Tocqueville's *Democracy*', in Abraham Eisenstadt (ed), *Reconsidering Tocqueville's Democracy in America* (New Brunswick NJ: Rutgers 1988) 94.

29 Compare Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill-Queen's University Press 1993) 87-109.

30 *Re Public Service Employees Relations Act* [1987] 1 SCR 313; *PSAC v Canada* [1987] 1 SCR 424; *RWDSU v Saskatchewan* [1987] 1 SCR 460. See also Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, revised edition (Toronto: Thompson Educational Publishing 1994) 280.

collective bargaining involved too complex and too specific a matrix of rights and obligations to be caught within the phrase 'freedom of association'.[31] For our purposes the important element is not the conclusion, however, but the process. Prior to the Charter, unions would have dealt with these issues by calling out the members, holding meetings, demonstrating in the streets or in front of parliament, and generally seeking to bring pressure to bear. Their actions would have involved substantial political engagement by the entire membership. In the Charter actions, the issue was placed in the hands of the lawyers, the membership and union leaders remained passive (indeed could not become involved without risking contempt of court), the grounds of argument were narrowed, an outcome was delayed as the matter wended its way through the courts, and the financial resources of the unions were expended at a great rate. Furthermore, the ultimate power of decision was conferred entirely upon the courts, which have not been distinguished by their sympathy towards unionism. When in the past unions had pursued political action, they had often failed to achieve their full aims. But they had frequently achieved better procedural guarantees for the arbitration process or better terms imposed on both parties through legislation. No such compromises were possible before the courts.

Following the courts' decisions under the Charter, the unions sought, unsuccessfully, to have the right to strike written into the Canadian constitution.[32] They were fortunate that they failed. Had they succeeded, they would have faced the same procedural problems of expense and demobilisation. They would still have left the ultimate decision to the courts. And those judicial decisions, if adverse to the unions, would have placed the unions in a worse condition than they would have been without the Charter. The Canadian Charter permits the subjection of rights to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[33] If courts found legislative restrictions to be justified—and traditionally the courts have not been particularly friendly to unions or to their use of strikes—the unions would have been faced with a situation in which the particular infringement of constitutionally guaranteed rights would have been adjudicated and found to be justified on demanding constitutional criteria. The unions would have actively connived in submitting the decision to the courts. They would have had little choice but to accept it.

This may be an especially dramatic case of the demobilising potential of constitutional guarantees. The same may not be true with respect to other issues or groups within society. Indeed, some have argued that the Canadian Charter has generated a healthy dialogue between the courts and the legislature.[34] To an extent

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31 See the decisions cited *id*; *Professional Institute v NWT* [1990] 2 SCR 367; *Delisle v Canada* [1999] 2 SCR 989.

32 Mandel, above n 30, 272.

33 Constitution Act, 1982, section 1.

34 Peter Hogg and Allison Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)', (1997) 35 *Osgoode Hall Law Journal* 75; Janet L Hiebert, 'Why Must a Bill of Rights be a Contest of Political and Judicial Wills? The Canadian Alternative', (1999) 10 *Public Law Review* 22.

this may be true, but there are reasons for continued scepticism. First, legislative participation in the dialogue occurs in the shadow of the courts' decisions; if 'dialogue' is principally comprised of attempts to second-guess what the courts might do, its value as a mode of participatory decision-making is questionable. Second, the situation is open to an effect like that of the 'chilling effect' of compulsory arbitration on labour negotiations: the possibility of deferring the responsibility for hard decisions to the courts diminishes the seriousness with which the broader political process deals with those matters.[35]

In fact, the principal reason why many support constitutional guarantees is disillusionment with the political process. But this strikes me as problematic. First, the processes of legislatures are often subjected to much more scrutiny than those of courts. All institutions have strengths and weaknesses and these inevitably skew the outcomes. If we are going to scrutinise the legislatures, we should also focus upon the courts, not simply assume that constitutional principles define themselves. When we do that, I suspect that we will find much of value in the legislatures. But second and more importantly, the distrust for democratic institutions has an element of self-fulfilling prophecy about it. We become so jaded with democratic institutions that we turn away from them, attribute their functions to others, and fail to attend to the improvements they require. We become so distrustful of our ability to decide matters through our legislative procedures that we abdicate responsibility for decisions of which we are ultimately the authors, conferring our role on the courts. And in the end, we evade our own need to grapple with the consequences of endemic disagreement in society by pretending that the decisions can be made rationally, dispassionately, by a court. That engenders the debilitation of our democratic process, as we no longer take responsibility for the practice of democratic deliberation.

My argument is simply that a principal theme of recent political theory (rediscovered rather than freshly minted) is that the effective working of institutions depends upon a measure of engagement and support from the citizenry. Without these dispositions, the institutions atrophy. Moreover, the structure of the

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35 See the more nuanced and sceptical interpretation of Charter dialogue in Hiebert, above n 22. See also Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press 1999) 57ff. Tushnet's book is interesting for its exploration of the potential for constitutional interpretation in legislatures. It takes a more extreme line than the advocacy of dialogue, arguing that legislatures should advance their own constitutional interpretations with little or no deference to the decisions of the courts. He favours a contest, with each institution vigorously pursuing its own understanding. His argument suffers from the lack of a strong institutional theory, however. One sees, in his work, no clear sense of the relative roles of courts and legislature, no understanding of the role of constitutions other than as highly symbolic embodiments of the national ethos. The lack of such a theory leaves one with the impression, rightly or wrongly, that Tushnet simply disagrees with many court decisions and would like to continue the argument, always having the last word. Yet at the same time, he wants to leave in place the structure of constitutional government and apparently adjudication by courts. One wonders why. His argument either has to be more thorough going or it has to give some account of the relative roles of courts and legislatures.

institutions themselves can work either to reinforce or to undermine these dispositions. This is, as I have said, an important theme in civic republican writings. It is also one lesson of the theoretical literature on trust, which has emphasised how social structures (democratic institutions; the market) are dependent upon the generation of stable expectations through a myriad of informal interactions, rather than simply through explicit stipulation.[36] Legislative mechanisms, in contrast to proceedings before the courts, are more apt to foster this kind of engagement—more apt to develop, through repeated experience, the civic dispositions on which the long-term health of institutions depends. Over-zealous constitutionalisation can produce passivity. Finally, there is another similarity between at least one branch of the literature on trust and the argument in this paper. That literature identifies civil trust as a relatively 'cool' quality that does not demand a high degree of common belief or passionate commitment. Indeed, it suggests that species of solidarity that are more demanding are also more volatile and, frequently, less liberal.[37] My argument is similar, although translated to the institutional dimension of the state. Too much reliance upon prior stipulation and too little upon the quality of socio-political interaction can be self-defeating.

Constitutionalism versus Consensualism

The argument for reticence in the constitutionalisation of social values therefore follows from the complexity of questions of fundamental value; the inevitable (indeed happy) presence of contestation and disagreement in society; the ineluctably provisional character of our conclusions (provisional both because, at the social level, our conclusions are artificially constructed out of the wills of many and because, at all levels, they are subject to re-evaluation and evolution); and a preference for broad participation of citizens in the discussion and provisional determination of those issues. Constitutions should therefore focus upon process rather than substance. They should seek to foster debate, not pre-empt it.

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36 See: Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press 1993). For stimulating criticism of Putnam for under emphasising the role of legal and political institutions, see Jean Cohen, 'Trust, voluntary association and workable democracy: the contemporary American discourse of civil society', in Mark E Warren (ed), *Democracy and Trust* (Cambridge: Cambridge University Press 1999) 208. Cohen errs in the opposite direction, however, by suggesting that institutional mechanisms of scrutiny and accountability are sufficient (one suspects she may have done so because she is preoccupied with answering what she sees as the traditionalising tendencies of neocommunitarians, especially with respect to the family; her political objection is insufficient to make the theoretical case, however). The very problem that trust seeks to answer is that trust that is fully warranted—trust that is generated by fully effective institutional safeguards—is unattainable; safeguards sufficient to restrain defection fully (assuming they could be designed) would hobble political life, even participatory democratic political life. The concept of trust is interesting precisely as a remedy to the impossibility of universal scrutiny and enforcement. The best explanation is that trust is founded *both* upon institutions that provide a high degree of scrutiny and accountability (but not a complete safeguard), and upon the experience of cooperation in associations, state and non-state.

37 Krygier, above n 27, 57-63.

Note that in my account of the basis of national identity, consent recedes into the background. This contrasts starkly with theories favourable to the constitutional stipulation of rights, which are often based, expressly or implicitly, on a consensualist theory of the state. Constitutional values are conceived—too easily—as the terms of a social contract, which each individual has an absolute right to have respected, a right that is not dependent upon the political concurrence of his or her fellows precisely because it is the quid pro quo of the citizen's original adherence to the state. But if the presumed content of that 'contract' is not in fact a matter of consensus, what happens to the claim of liberality and inclusiveness? Instead of providing the basis for agreement among citizens, the values then serve to distinguish the true citizens—those who subscribe to the canonical set of values—from those whose commitments are suspect. Exclusion is written into the country's basic text. The values that are intended to define the grounds for unity instead serve to stigmatise dissent. There may be situations in which such stigmatisation is justified, but in a liberal polity, surely one would want those to be few. The longer the list of 'fundamental values', the greater the potential for undesirable and often undesired stigmatisation.

The conception of political community for which I have been arguing, in contrast, does not demand an act of consensual acceptance, in which each citizen is held to have subscribed to the canonical values. Rather, it takes citizens as it finds them, already part of a society, already arguing with each other, already participating in the public life of that society as much through opposition as through conformity. Paradoxically, this more organic view of community is more 'liberal' in its acceptance of a range of views, even on fundamental questions. The openness of societies founded upon explicit stipulation is greatly overstated. They can be narrow and intolerant for those who resist the official catalogue of values. Organic communities understood in the manner suggested here can be more tolerant of dissenting views and, for the same reason, more tolerant of local cultures.[38]

But have I overstated the extent of disagreement in the conception of community advanced in this paper? There is, of course, a measure of commonality in the members' implicit acceptance of the public conversation—in their adoption of its terms, of its points of reference, of its modes of argument. This might be seen as a type of 'agreement' in the sense that Jim Tully identifies, following Bolingbroke and others, with custom: '... the 'long use and practice' of a custom reflects and manifests the deliberate judgement of reason, and so the consent, of a free people.'[39] This 'agreement' has real content. The terms of the conversation confine and direct, in the sense that a river channel directs, especially as a tradition becomes denser and more distinctive. Insights that are particular to the tradition emerge, although they tend to be amorphous and multi-layered, rich in subtlety and

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38 Compare Simone Chambers, 'Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis' (1998) 26 *Politics & Society* 143.

39 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press 1995) 59-61, 38ff; Chambers, ibid 144-145, 149-150.

possibility.[40] They are resistant to authoritative stipulation, for their content draws upon an inexhaustible experience that can support a range of possible expressions. Often, the emergent insights are best conceived through the analogy of metaphor—images or concepts that are instructive because of their fruitfulness for further reflection, not because they are definitive. Indeed, constitutional expressions of rights can themselves be understood—perhaps are best understood—in these terms, which is one reason why institutional displacement should be a crucial part of our decision on constitutional entrenchment: the implications of the rights remain to be articulated; the principal question is who should do so.[41]

If this kind of 'agreement' is what is meant, then I am happy to adopt it.[42] This amorphous and richly plural conception does not conform to what social-contract theorists tend to think of constitutions, but perhaps it is more faithful to the true nature of our 'consent'. Perhaps it captures our sense of willing attachment to our communities, a sense that generally exists even when we have not, in any real way, agreed to their terms (whatever those might be). The contract in social-contract theories is, after all, always a fable, a metaphor. Few social-contract theorists pay attention to whether citizens actually know and accept its terms, which are in any case derived from a purely abstract philosophical argument. The language of the social contract may simply thin down and vulgarise what is a much richer and more elusive sense of attachment and belonging—a sense of belonging that has considerably more room for diversity and disagreement than the contractualist imagery would permit.

This paper has emphasised process as the principal element of constitutionalism. Even if substantive values are not a viable focus of agreement in the contractualist sense, might process serve this role? Perhaps we do not agree to a definite set of values, but nevertheless consent to a process for resolving our differences.

This too overstates the matter, if what is meant is the deliberate acceptance, by each citizen, of the processes. Rather than agree, it is more accurate to say that we defer to the processes: they are there when we arrive, we proceed to work

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40 Tully, ibid 36-38, 101ff.

41 MacIntyre is therefore right to speak of liberalism being itself a tradition and not simply being anti-traditional, although his portrait of liberalism is narrow and selective, exaggerating the gulf between liberal and other approaches (although not without insight about certain forms of liberalism): above n 19, 326ff. On the nature of the divide, I prefer Charles Taylor, 'Cross-Purposes: The Liberal-Communitarian Debate', in Nancy L Rosenblum (ed), *Liberalism and the Moral Life* (Cambridge MA: Harvard University Press 1989) 207.

42 See also the discussion of custom and consent in Waldron, above n 19, 63-67, in which this 'consent' is ultimately expressed by Waldron as a state in which objections are 'not so widespread as to make [the practice in question] non-viable' (66) — a form of consent that appears close to the notion of tolerability that I introduce below. This may seem like thin gruel, but note that (as Waldron too makes clear) these practices in some ways represent more substantial 'agreement' precisely because they have worked their way into conduct, not simply explicit affirmation. And of course they have the singular merit of their tolerance for complexity and diversity.

through them, and we naturally hesitate before incurring the high costs of stepping outside them into revolutionary upheaval. This deference towards procedures is, like that to the substantive outcomes achieved through voting, provisional. We work within them, but we may simultaneously criticise and seek to change them, generally through their own mechanisms for change but sometimes by means that are not, or at least not expressly, contemplated in the constitutional order. Even when they are changed by deliberate political action, it would be artificial to treat them as a contract among all citizens. Invariably there are dissenters. Even among those who support the measure, there are those who would have preferred something else, yet have decided, for a range of reasons, to acquiesce. The community's will on matters of process, like its will on matters of substance, is artificial, constructed, and provisional, always harbouring diversity of opinion and potential for change.

But how can a society hold together with such minimal and shifting commitments? How can state action be legitimate if there is no substantial agreement on the ground rules? This, after all, is the conundrum that led to the myth of the social contract in the first place; the social contract was invented to explain citizens' accession to state power.

I believe that this is another instance, closely analogous to the idea that national identity must be founded on shared values, where the basis of attachment is grossly overdetermined. Living in society is not an exceptional condition, requiring a definite act of consent in order to be explained. It is the norm. Through living in society, individuals gain very substantial advantages that alone are sufficient to justify the maintenance of community—benefits such as access, through trade and the division of labour, to a very much larger range of goods than would otherwise be conceivable; the benefits of peace and order, in an environment in which potentially violent competition is constrained; or the less tangible but no less real benefits of sociability. If we are to live in community, we have to accept that there will be decisions made without our affirmative individual consent—perhaps even decisions about the fundamental processes of our constitutional order. Nevertheless, the benefits of living in community are sufficient to justify continued adherence.[43]

It may therefore be best to think of the constitutional order as essentially a *modus vivendi*. This does not mean that it is unprincipled. There is something profoundly wrong with our political theory if it cannot conceive of principled structures of governance in a context of continued disagreement and debate, even about those very structures. That, after all, is our common condition. Constitution-making is as much a matter of contest as ordinary politics. Moreover, the very fact that the political order is a *modus vivendi*, rather than the pure expression of a single view, may be an important stimulus to further reflection about good

43 See Jeremy Webber, 'Relations of Force and Relations of Justice: the Emergence of Normative Community between Colonists and Aboriginal Peoples' (1995) 33 *Osgoode Hall Law Journal* 623. For an argument that justifies constitutions on grounds like these—as settling some matters, despite lack of consent, so that we can get on with other things—see: Holmes, above n 19.

government—reflection that takes better account of the full reality of society's diversity, that is not one-dimensional in its premises. The heterodox nature of our institutions, expressing as they do an interplay of groups, perspectives, interests and perhaps cultures, may suit that diversity better than any single philosophy would do. At any rate they furnish models and practices that are worthy of deeper consideration for the simple reason that at least they take some empirical account of society's disagreements.[44]

It is, of course, desirable that in a society of democratic equals, one works for the involvement of citizens in decision-making and for a level of acceptance that approaches consent. All other things being equal, the greater the agreement, the better. One wants, then, political institutions that provide for extensive participation, the testing of public opinion, and its aggregation. But full-blooded, individually-based consent cannot be the gravamen for procedural, no less than for substantive, constitutional legitimacy. Indeed, the best way to express the minimal requirement may be 'tolerability'—and of course tolerability is more likely to be achieved if one is reticent about what one constitutionalises.

Constitutional Reticence

Constitutions, then, should be written with restraint, because of the inevitably provisional character of our knowledge and the consequent existence—and indeed value—of disagreement and debate. They should eschew the temptation to resolve substantive controversies. They should be cautious in their entrenchment of supposedly common values. They should aim, above all, to establish processes for future debate and decision. Constitutions are about providing the structures in which citizens can, through time, debate and come to provisional conclusions on matters of public concern. They are not about foreclosing those debates through premature pronouncement.

This kind of constitution will also be more faithful to the nature of our political communities and the very real ties that bind us to them. Those communities exist in movement, in traditions of discussion and justification through time. Our attachments are to those traditions, not to any single set of answers. Institutions that support political processes are therefore much more likely to retain their connection with the society's traditions than those that seek to cast one set of conclusions in constitutional cement.

But there is another objection lurking here, namely that the emphasis on reticence and on process rather than result is disingenuous or at least incompletely reasoned, for it pretends to be agnostic as to fundamental questions of social value when it is not. This paper's argument draws on very real values. Why not recognise that fact, render the values explicit, and found a fully theorised set of constitutional prescriptions upon them?[45] If one does that, surely one may reason through to more

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44 Webber, ibid.

45 This is the approach taken famously, for example, by John Hart Ely, *Democracy and Distrust* (Cambridge MA: Harvard University Press 1981). See also Sunstein, *One*

specific provisions that are indeed worthy of constitutional entrenchment. One would no longer have to depend upon a vague and quaint-sounding invocation of an ethic of reticence. One would also avoid the error of suggesting that process can be determined without simultaneously shaping matters of substance.

Of course, it is absolutely right that values have been present throughout this argument. To take a few examples,

> The argument has assumed the importance of debate and deliberation to a healthy polity, drawing heavily on the insights of civic republicanism.
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> It has aimed for equality of participation in that debate, or at least has been founded upon an assumption that each citizen's views should have equal weight
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> It has been sceptical of truth claims in moral argument and as a result has emphasised humility, an awareness of human fallibility, and the toleration for diversity.
>
> It has nevertheless taken the position that politics must be, in part, about moral argument, and political institutions must therefore take moral pluralism into account in the ways in which they address controversy.
>
> Finally, it has assumed that community is of crucial importance to individuals. We have good reasons for grouping together in communities. We have a strong sense of identification with those communities. Our political arrangements should be sensitive to that identification, hence the need to probe carefully its nature.

So why call for reticence rather than for renewed analytical vigour in building upon these principles? And why shouldn't our conclusions be applied as much to substantive as to procedural guarantees? If the values form an acceptable foundation for the basic processes of decision-making in a state, why can't they be unearthed, articulated, and used as the foundation for direct constitutional stipulation?

In fact, I have no objection to this mode of reasoning, until one gets to the point of constitutional stipulation. One can identify such values, one can reflect on their true character, and one can propose more elaborate conclusions as extensions of those values. Far from this being objectionable, it is an integral part of our political practices—and indeed of public action generally, including judicial decision-making both in constitutional and in ordinary matters. We cannot work with either rules or principles in an uncritical fashion. If we take them seriously, we have to probe the burden of their meaning, struggle for more adequate expressions of them, and inquire into their significance for our present action. The simple attempt to follow a rule or principle forces us to think about what it means for us in the circumstances in which we find ourselves, and in so doing we extend its

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Case, above n 18, esp x-xi, 30, 61ff (although note at 25-26 his concession that even the canons of deliberative democracy can be contested, leaving one to wonder whether it is appropriate to base an extensive core of constitutional protections upon them).

meaning.[46] Moral reflection and extrapolation is, then, a central element of public deliberation, which this paper has placed at the heart of both national identity and political organisation.

The injunction towards reticence is not therefore an objection to the pursuit of principled reflection in public affairs, but an argument about *how* and *where* that pursuit should be conducted—the concessions one should make, when engaging in precisely that form of argumentation, to our fallibility and the existence of divergent views in society. It is for this reason that this paper's prescriptions are best conceived of as an ethic, the precise burden of which is a matter of judgement. We must engage in the pursuit of principle. We must draw upon principle in public reasoning. There are no viable means of escaping the challenge of normative disagreement.[47] We are faced, then, at one and the same time, with the need to engage in principled argument, and with the need to do so in a manner that is respectful of divergent views and open to future revision.

That is the reason for the specific concern with the constitutionalisation of substantive values. Constitutionalisation tends to entrench one set of answers, erects barriers to future revision, and removes (in large measure) the further elaboration of those values from the legislature to the courts. Moreover, it does so with great symbolic effect, running the risk of suggesting that those who dissent are less than true citizens. It is the ostensible settling of the issues and the encasement of that settlement within the national definition that is problematic, not the fact that the issues are brought within the sphere of public action.

But even when it comes to constitutionalisation, the best outcome is highly context-dependent, a matter of judgement rather than of fixed rule. There may be situations in which constitutionalisation is appropriate, especially where it is essential that one harness the symbolic impact of a constitution. This is especially the case when founding or refounding a society. In such instances, it may be necessary to define the new society against the old, marking a clear break with the past. In the post-Communist states in eastern Europe, for example, constitutional reform was important not just as a way of instituting fully democratic processes but as a method of affirming an unambiguous respect for rights and liberties long denied. This kind of gesture is especially important when the very membership of the new polity has to be reconstituted, bringing into the citizenry individuals previously excluded. An example would be South Africa following the collapse of apartheid. Indeed, the effort to constitute a people, rather than simply define the

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46 Hans-Georg Gadamer, *Truth and Method* (New York: Crossroad 1988) 263ff and, applied to law, 275.

47 Rawls attempts to deal with this problem by stipulating a subset of reasons that alone can be invoked in fundamental arguments about justice and by presuming that these are subject to agreement, at least in their essentials: John Rawls, *Political Liberalism* (New York: Columbia University Press 1993). The attempt fails both in its postulation of independence between public reason and comprehensive doctrines (Michael Sandel, Book Review of *Political Liberalism*, by John Rawls (1994) 107 *Harvard Law Review* 1765) and in its failure to take seriously the implications for political design of continuing disagreement about the content of justice itself (Waldron, above n 18, 149-161).

structures of the state, may provide the clearest example where rich constitutional stipulation is appropriate. But definition by constitution is nevertheless second best, an expedient that may be necessary when the political community does not hang together on its own. Even then, the constitutional definition is susceptible to overstatement and, as time passes, anachronism. The dynamic character of communities is such that constitutional expressions of common values eventually have to be treated as iconic, subject to a wide and relatively open array of interpretations (so that they provide the language but not the content of national identity) or they become increasingly stultified, as the society leaves them behind. Even if the claim that a political community is based upon explicit agreement has some plausibility at the moment of its founding (and that is generally a distortion), communities cannot remain so based. They develop a richer and more varied fabric of allegiance, or they begin to pull apart.

I signalled earlier that there might be one qualification to my ready acceptance of unconstrained pronouncement in the legislative realm on precisely the issues upon which I am urging reticence in the constitutional realm. When it comes to constitutions, the argument for reticence is founded upon the need to avoid premature resolution of debates in a form that prevents later revision, combined with the potential impact of entrenchment on dissenting individuals' sense of belonging to the society. But this kind of situation can be produced outside the realm of constitutional entrenchment, when a cohesive majority imposes its views upon an equally stable minority through the legislative process. The majority status of the first group can effectively preclude revision. If the matter is sufficiently serious, the impact on the minority may be comparable to the constitutionalisation of highly tendentious conclusions. Dissenters can be estranged from the political order. They can have the sense that the society has been defined in a manner contrary to their fundamental interests, so that their full participation is impaired. The effective constitution of the country—which should provide the groundwork for political community among the diverse elements in the population—is instead perceived to be the product of the unmitigated will of one element. The imposition of Sharia on non-Islamic minorities in the Sudan is one good example of this phenomenon.

In these circumstances, a similar ethic of restraint may apply. There may still be reason to impose the majority view, but that imposition has to be subject to strong justification in a manner that takes into account the value of continued community in a diverse polity.[48] The mere summation of wills, by majority decision, would pay inadequate heed to the consequences of the decision for the community as a whole. As the decision cuts closer to the core beliefs of the minority community, and as its minority status excludes any realistic prospect of revision, the decision becomes more akin to decisions on the entrenchment of contested principles, rather than the pursuit of particular outcomes through the

48 Jeremy Webber, 'Multiculturalism and the Limits to Toleration', in André Lapierre *et al* (eds), *Language, Culture and Values in Canada at the Dawn of the 21st Century* (Ottawa: International Council for Canadian Studies and Carleton University Press 1996) 269.

mechanisms of ordinary politics.

But if that is so, might that not provide the foundation for a richer set of rights guarantees than those contemplated in this paper? The recognition that the enactment of laws on particular subjects would impair the fundamental interests of minorities could provide a way of identifying matters that should be exempt from legislation. Constitutional guarantees might then protect those matters from legislative impairment. Thus, from an argument in favour of reticence, one might work one's way back towards a measure of constitutional entrenchment, albeit modest.

This may indeed provide an argument for constitutional entrenchment consistent with the broad lines presented here. But note that many of the problems of entrenchment remain: the entrenched provisions introduce rigidity in the political order; and substantial political questions are deferred to the courts. Entrenchment provides substantially less satisfactory outcomes than due regard for the ethic of restraint would do. The example of Sharia is instructive. It would be difficult to frame a constitutional prohibition that would effectively deal with this problem without substantial distortion. An outright ban on the influence of religion over the legislative process would be untenable, given the pervasive influence of religion on precisely the kinds of moral decisions that shape the law of any country, yet how else might religious influence over legal principles be countered? Constitutionalisation may be the best solution when the ethic has failed. It may be especially necessary when there are minorities in deep conflict with the majority community and that conflict is stable and dominant, so that there is little possibility of shifting coalitions. But as long as the ethic has some reasonable hold, reticence remains desirable.

There is, then, a connection between the considerations on which this paper's argument has been based and fundamental moral principle. Moreover, to a certain extent the procedural and institutional implications for which I am arguing would result in those principles having constitutional reflection, in the sense that the structure of the constitution would be premised on the principles. Furthermore, one can legitimately take those principles and extrapolate, deriving conclusions from them that are richer in their social prescriptions than the prescriptions I believe we should be constitutionalising. Indeed, we should be engaging in precisely that process in the non-constitutional realm. But granted all of this, there is still very good reason for being reticent to pursue similar extrapolation and entrenchment in our constitutional politics. The problem lies not in a lack of logical connection between the principles and the rich conclusions that one may, by a long chain of reasoning, achieve, but in the vagaries of that chain. The more extensive the implications we draw from our reasoning, the more liable they are to error, and the more reason why they should not be cast in constitutional cement.

In essence, this argument comes down to a valorisation of process and an unwillingness to reduce questions of process to questions of substance. It is certainly true that particular processes are tightly related to substantive principles. It is also true that process can have a very significant impact on substantive outcomes. The two remain in considerable inter-relationship. But declining to collapse them

permits one to keep one's principles open to reflection and re-evaluation and, at the societal level, permits greater scope for debate and disagreement. There is always a gap between our current best understanding of principles and the principles themselves. Our institutions, by focusing upon process, permit us to function within that gap.

Conclusion

We should not fall into the error that constitutions are simply the expression of the public will. They are the framework for elaborating and discerning that will over time. They have to allow for that will to be defined and redefined into the future, without predetermination. To put it another way, they should be founded upon a conception of community that exists prior to the expression of will—that is not itself based on a common will but that furnishes the commonality that justifies the artificial and provisional construction of a common will in the future. Constitutions are best considered as providing the framework for that true, non-will-based community, and should manifest an acceptance of diversity that the articulation of supposedly common values cannot achieve. Communities should be open to their members holding a broad range of beliefs, and to revising those beliefs through discussion over time. The terms of our constitutions should express a similar openness.

This is the essential reason for reticence in constitutional reform. The same arguments play in favour of an ethic of restraint in other dimensions of constitutional practice, including interpretation, although I should be clear about what restraint means in that context. It is not necessarily conservative—although it does eschew a particular form of radicalism—nor is it opposed to the use of principled reflection in constitutional interpretation. Rather, it is concerned with taking the provisional character of decision-making on matters of fundamental principle—and the diversity of views on principle—seriously. It is concerned with taking fully into account the insight that our statements of legal principle are simply our best expressions for the moment, subject always to reconsideration and revision. The ethic of restraint cautions against too rash and too categorical a statement of constitutional principle, one that is closed to the rethinking and re-expression that further experience should produce. When interpreting an existing constitutional text, then, the ethic requires an active struggle continually to refine our understanding of the text, to probe the text's relationship to other dimensions of the law, to consider contrasting interpretations, and to reflect upon how the text might be applied to circumstances not contemplated at the time of drafting. It is the humility with which we pursue this enterprise, our openness to argument and evidence, and our willingness to put our conclusions continually to the test that comprises the ethic. That disposition may result in significant revision or it may result in a more thorough explanation of the previous conclusion, but it is in any case as alien from a close-minded conservatism as it is from an expansive and dogmatic radicalism.

In fact, the ethic may in the end have more in common with practices of

interpretation often labelled 'activist' than with our conventional understanding of conservative theories of interpretation, for it insists upon an inevitable openness in interpretation—upon the need to see one's present interpretations as, at most, the best one can do for the moment, subject always to further consideration.[49] But it would be misleading to collapse the ethic into the stereotyped judicial conservatism/judicial activism dichotomy. That dichotomy tends to be parasitic upon a sterile argument about the controlling power of texts. Judicial conservatives are assumed to believe that a constitutional text can and should speak for itself. 'Judicial activists' are accused of reading rules into the constitution that are not in the document. The ethic for which I am arguing accepts the openness of texts. It accepts, in other words, that interpretations are theories about the text, and like any good theories they have to be continually challenged and refined, in reference to the text. Occasionally those theories will be overturned. But the ethic directs us to engage in that process with humility and with an awareness of the rich diversity of views, which may lead to more caution in decision-making and to more tentative conclusions than we commonly associate with either 'judicial conservatism' or 'judicial activism'.

The ethic may also, paradoxically, help explain why, when dealing with a written constitution, fidelity to the text of the constitution remains a cardinal virtue, even if the terms of a text cannot dictate an outcome in any strict sense but only provide the ground for arguments of consistency. In a society of those who disagree, the text—more than any substantive principles—remains an important point of convergence for citizens' allegiance. Its terms represent one crystallised element of the society's structure, one fundamental point of shared reference, for a community that is not united by common belief in specific substantive principles. I have already argued that constitutions are not well understood as a social contract to which all citizens subscribe, and I do not mean to slip into that language now. The role of a written constitution in citizens' allegiance is rather one of an especially salient element in the cluster of national events, arguments, achievements, and frustrations upon which the national conversation draws. Its salience results from the fact that it sets the framework through which public decisions are taken (and therefore provides the framework for the core of the national conversation itself), and also from the circumstances of its origin, which generally involve a self-conscious attempt to set the framework for the society, even if that attempt is accomplished through less than unanimous agreement and is itself subject to re-interpretation through time.

And so we return again to the observation that constitutions are not and cannot be about expressing common beliefs or shared values once and for all, in canonical form. One central theme in this argument has been a healthy scepticism for our ability to stipulate matters exhaustively, in any meaningful sense, when it comes to the constitution of our political arrangements. Constitutions are not the product of a concurrence of the wills of a country's citizens, at one founding moment in its history. Even if they were, that concurrence of wills would be of limited use in the definition of the country's future. We should therefore stop

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49 Gadamer, above n 46, 265-266.

treating them as though they should be created, or have been created in the past, in this fashion. A country's constitution is inevitably broader, richer and more subject to currents and counter-currents than the terms we use to express it. All constitutions are, in large measure, unwritten. That unwritten character has a great deal to do with what permits a society of people who disagree to live as one political community, and to see themselves as members of that community.