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Reconsidering the Charter and Election Boundaries

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This article argues for a judicial interpretation of the right to vote under s.3 of the Canadian Charter of Rights and Freedoms that places more emphasis upon the principle of the equal power of every vote—"one person, one vote"—than may be suggested by the Supreme Court of Canada's decision in Reference re: Electoral Boundaries Commission Act. This becomes an issue of particular importance when a government is suspected of engaging in gerrymandering. Gerrymandering involves enhancing expected electoral support by ensuring that fewer votes will be needed to elect representatives in ridings predicted to support the government. Any concessions governments may wish to make to the principle of the equality of every vote should be justified in the context of Charter s. 1 or s. 15(2). These sections represent important exceptions to the particular theory of rights that provides the clearest rationale for many of the provisions in the Charter, including the right to vote.

Cet article propose une interprétation judiciaire du droit de voter sous l'article 3 de la Charte canadienne des droits et libertés qui met l'accent sur le principe du pouvoir égal de chaque vote : "une personne, un vote" plutôt que sur ce qui est suggéré par la décision Reference re; Electoral Boundaries Commission Act rendue par la Cour suprême du Canada. Cette question devient particulièrement importante lorsqu'un gouvernement est soupçonné de charcutage électoral. Le charcutage électoral comprend l'augmentation de l'appui espéré en assurant que moins de votes seront nécessaires pour faire élire des représentants dans les circonscriptions où on attend le retour du candidat gouvernemental. N'importe quelle concession que le gouvernement aimerait apporter au principe du pouvoir égal de chaque vote devrait être justifiée dans le contexte des articles 1 et 15 (2) de la Charte. Ces articles représentent d'importantes exceptions à la théorie particulière des droits qui offre le raisonnement le plus lucide pour plusieurs dispositions de la Charte, y inclus le droit de voter.

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Introduction

1812 was a bad year for salamanders. That is when the good name of this lizard-like amphibian became forever linked to that of Massachusetts' Republican Governor Elbridge Gerry and the practice of manipulating electoral boundaries for partisan political purposes. It was Governor Gerry's achievement not only to sign into law new state senatorial districts that favoured Republican candidates over Federalists,¹ but also to approve of one district that was shaped roughly like a salamander. In

1. The Republicans and the Federalists were the two "classical parties of the early republic" (Arthur M. Schlesinger, Jr. *infra* at xxxiv) that emerged, declined, and were replaced by other parties, notwithstanding initial hopes that a party system would not characterize

response to this observation, a wag commented that it was better to call it a “Gerrymander.”² Thus was born the image of a “grinning mythological monster” manifesting a spirit of base political motivation, and a new verb. Gerrymandering refers to the practice of “reshaping ... a district by the political party in power so as to make its votes count as much as possible and those of the opposition as little as possible.”³

Governor Gerry’s kind of electoral boundary manipulation seems to strike against the important principle that the activities of elected representatives in a democracy should be motivated primarily by a concern for the public good rather than the maintenance of their own power.⁴ That being said, this original example of gerrymandering does not necessarily offend another democratic principle which is arguably more important and certainly easier to articulate. This is the principle of the equality of every citizen in a democracy. The most symbolically and practically significant manifestation of this essential tenet of democratic thought and practice is the equal power of every citizen’s vote.⁵ The concept of gerrymandering has developed to embrace political activity that offends this principle of voting parity. This paper focuses upon situations that generate concern over this kind of gerrymandering, and explores the philosophical basis for objections to the practice.

American politics. Among other general characteristics, Republicans favoured a very limited role for government in the economy, and the Federalists envisioned some relative activism in this regard. See Arthur M. Schlesinger, Jr. ed., *History of U.S. Political Parties: Volume I, 1789-1860, From Factions to Parties*, (New York: Chelsea House, 1973).

2. G.A. Billias, *Elbridge Gerry: Founding Father and Republican Statesman* (New York: McGraw-Hill, 1976) at 316. This anecdote is included primarily so as to allow me to share this interesting point of history, but also to allow me to make amends to salamanders. Like a lot of people, I knew that the word gerrymandering had something to do with this animal. Unfairly on my part, however, I assumed that the allusion was to the physical sliminess of the maligned creature. Such sliminess seems to connote the kind of political corruption that the practice of gerrymandering manifests. As indicated above, I now realize that salamanders’ shape alone is responsible for their association with this kind of conduct. Having said that, a (very) little research revealed that some species of newts—small salamanders—produce toxic secretions. Accordingly, the salamander-politics parallel may be fortuitous after all. Furthermore, the amazing ability of some salamanders to regenerate body parts—return from the near dead as it were—seems metaphorically rich indeed!

3. *Ibid.*

4. The Governor’s response to this would likely have been that the interests of the Republican Party and the public are indistinguishable.

5. Indeed, the most “bizarrely shaped” electoral districts (as the U.S. Supreme Court would have it: *Shaw v. Reno* 509 U.S. 630 (1993)) will probably be a product of attempts to respect this principle of voting parity, while at the same time trying to bring together geographically isolated pockets of support for a particular party or candidate. See J.H. Ely, “Gerrymanders: The Good, the Bad, and the Ugly” (1998) 50 *Stan. L. Rev.* 607 at 608 [hereinafter “Gerrymanders”].

The American experience, again, is instructive. In the 1960s, the United States Supreme Court held that electoral boundaries that establish districts with significantly different numbers of voters infringe the American Constitution's equal protection clause, the fourteenth amendment.⁶ The leading cases dealt with governments' failure to redraw the boundaries of electoral districts in response to the dramatic migration of voters from rural districts to urban centres in the first half of the century.⁷ This government inactivity resulted in rural voters having relatively more electoral power than urban voters. It is not surprising that the conservative administrations in question drew most of their support from the dwindling rural electorate. This willful inactivity created what one American commentator calls a "stranglehold [on government power] that reactionary rural elites enjoyed."⁸

The Supreme Court of the United States responded by articulating the constitutional standard of one person, one vote. This standard is held to ensure that "in a society ostensibly grounded on representative government, . . . a majority of the people . . . could elect a majority of [the] . . . legislators."⁹ This point seems so axiomatic in its relationship to basic democratic practice that its announcement has become something of the paragon example of the legitimate exercise of the otherwise controversial power of judicial review.¹⁰

Governing parties' self-serving failure to redraw electoral boundaries has been called "silent gerrymandering."¹¹ By contrast, the facts that gave

6. The fourteenth amendment to the Constitution of the United States of America reads in part: Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

7. *Baker v. Carr*, 369 U.S. 186 (1962) [hereinafter *Baker*]; *Reynolds v. Sims*, 377 U.S. 533 (1964) [hereinafter *Reynolds*].

8. P.S. Karlan, "The Fire Next Time: Reapportionment After the 2000 Census" (1998) 50 *Stan. L. Rev.* 731 at 735 [hereinafter Karlan].

9. *Reynolds*, *supra* note 7 at 565. Quoted in Karlan, *ibid.* at 735.

10. Thus John Hart Ely speaks of the Supreme Court being in search of "its 'one person, one vote'" principle to settle the issue as to the constitutionality of what has been called "racial gerrymandering." "Gerrymanders", *supra* note 5 at 609-10. Racial gerrymandering involves the laudable attempt to structure electoral boundaries in such a way as to ensure the representation of racial and ethnic minorities and groups in government. Ely's point is that the Court would like to identify for this area of election law a standard that is as intuitively "right," and therefore, as generally accepted, as the one person, one vote standard.

11. B. Grofman, "What Happens After One Person-One Vote? Implications of the United States Experience for Canada" in J. Courtney, P. MacKinnon, & D.E. Smith eds., *Drawing Boundaries: Legislatures, Courts, and Electoral Values* (Saskatoon: Fifth House, 1992) 156 [hereinafter Grofman].

rise to the leading Canadian case on the extent to which voting equality is mandated by the *Canadian Charter of Rights and Freedoms* (hereinafter the *Charter*)¹² were very noisy. *Reference re: Electoral Boundaries Commission Act or, Carter v. Saskatchewan*¹³ involved what some observers saw as an extraordinarily bold example of partisan legislative manoeuvring on the part of the Progressive Conservative administration of Premier Grant Devine in the late 1980s. The concern of some members of the public was that this activity seemed to be aimed at ensuring that votes in rural ridings, where the Conservatives drew most of their support, were generally weighted more heavily than those in urban ridings.¹⁴

12. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

13. *Reference Re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158. Decision of Justice McLachlin for the majority (La Forest, Gonthier, Stevenson and Iacobucci JJ.). Justice Cory delivered a dissenting decision with Lamer C.J.C. and L'Heureux-Dubé J. concurring [hereinafter *Carter*].

14. For example, writing in the immediate wake of the Devine administration's changes to the electoral boundaries legislation that will be discussed more fully below, James Pitsula and Kenneth Rasmussen wrote [*Privatizing a Province: The New Right in Saskatchewan* (Vancouver: New Star Books, 1990), at 254-255]:

A respect for representative democracy was conspicuously absent from the Tories' redrawing of electoral boundaries. After Premier Ross Thatcher's outrageous gerrymander of 1971, the Blakeney government . . . established [a reformed and more independent] Electoral Boundaries Commission The legislation called for constituencies with an average of 10,000 voters, and permitted only a 15 percent variance from that number. It also provided for an automatic review of constituency boundaries every eight years.

When the eight-year period elapsed, Devine refused to allow the already-existing Electoral Boundaries Commission to do its work. Instead, he brought in a new law . . . [replacing t]he clerk of the legislature, a non-partisan officer, [with] the chief electoral officer, a political appointee. Even more significant, the Tories changed the rules to permit the number of voters in a constituency to vary by as much as 25 per cent from the average. This paved the way for a gerrymander whereby rural seats, where the Tories are traditionally strongest had fewer voters than did urban seats. Twenty-one of the 26 NDP seats had their boundaries redrawn . . . while only ten of the 38 seats held by the government saw their boundaries change.

Similarly, Merrilee Rasmussen and Howard Leeson comment upon the "suspicious nature" of the (then) new electoral boundaries regime in Saskatchewan. In "Parliamentary Democracy in Saskatchewan, 1982-1989" [Lesley Hope and Mark Stobbe, eds., *Devine Rule in Saskatchewan: A Decade of Hope and Hardship* (Saskatoon: Fifth House, 1991)] the authors write (at 64):

Thus, even before the commission begins its work, the outcome of a general election is stacked in favour of the party which is primarily based in rural Saskatchewan and the value of a vote in the cities of Saskatchewan is worth less than the value of a vote in the country. The principle of "one person, one vote" is a fundamental underpinning of representative democracies and equality of the vote is a corollary notion. Interfering with the commission's ability to draw boundaries which attempt to adhere as closely as possible to this principle interferes with a basic democratic right.

Notwithstanding such concerns about the use of government power to pursue partisan goals, the majority in the *Carter* decision held that the constitution was not necessarily offended by a scheme of weighted voting that seemed destined to serve such ends. According to the Court, the right to vote under s. 3 of the *Charter*¹⁵ does not enshrine equality of voting power *per se*. While “relative parity of voting power” is of “prime importance,” the majority held that s. 3 captures the broader concept of “effective representation.”¹⁶ The Court elaborated that this principle is informed by an open-ended list of factors. In addition to equal voting power, these factors include geography, community history, community interests, and minority or group representation.¹⁷

Effective representation is a problematic concept. Its vagueness invites extensive judicial interpretation and it promises little assistance to citizens who are concerned that the right to vote should provide some protection against cynical political activity. The manipulation of electoral boundaries for partisan purposes is a concern in any democratic context. However, the *Carter* decision seems to support the view that a party in power will apparently be given the benefit of the doubt as to its motivation. Following the Court’s logic, any advantage that an administration may receive from the unequal voting districts that it establishes is presumptively incidental to its concern for higher ideals. Such ideals do not, however, have to be established according to any clear standard of proof, civil or otherwise. While the Court refers to “evidence” in its decision, it does not elaborate on its use in a principled manner. Therefore, while the *Carter* decision does not sanction partisan political gerrymandering, it gives it a lot of room in which to hide.

The creation of unequal voting districts to bolster a weak basis of political support is a form of bad faith and an abuse of power. As such, it is an archetypal example of activity that bills of rights like the *Charter* were invented to address: abuses of government power that threaten the equality—among other liberal values—of individuals in a society. Accordingly, to some extent the very mettle of the *Charter* is tested in relation to its success in assisting the citizenry in dealing with this issue. A stronger bulwark against this kind of activity is needed than the Supreme Court provided in *Carter*. In fact, although it was a theme of at least one of the interveners’ submissions to the Court¹⁸ the decision is

15. Section 3 of the *Charter* reads: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” *Supra* note 12.

16. *Carter*, *supra* note 13 at 183.

17. *Ibid.* at 184.

18. Professor John F. Conway, of the University of Regina.

silent as to the gerrymandering issue and to the need for a *Charter* jurisprudence that is capable of addressing it. Accordingly, if 1812 was a bad year for salamanders, then 1991—the year that the *Carter* decision was handed down—was a good year for gerrymandering in Canada.

Notwithstanding this critique, the potential remains post-*Carter* for the *Charter* to be interpreted to strengthen recognition of the principle of voting parity. A clear constitutional mandate for the relative equality of every citizen's vote is the best safeguard against gerrymandering being misrepresented or justified as concern for the greater good of particular electoral constituencies. Like many aspects of life, law is not so much a search for perfect solutions as it is a choice among imperfect alternatives. For a number of reasons, it will be argued that a clearer constitutional mandate for the principle of voting parity is "less imperfect" than the kinds of concessions that the *Carter* decision would seem to allow. As important as factors like geography, community history, community interests, and minority or group representation may be, they would be better understood as potential concessions to the *Charter* protected right to vote, rather than characteristics of the right itself. As concessions, *Charter* s. 1 analysis is designed to allow us to debate their reasonableness.¹⁹

This article will use voting rights as a focus for an introductory discussion of issues relating to critical legal theory and rights. I am interested in addressing what I see as a tension in this body of thought as it relates to rights talk.²⁰ I characterize this tension as a "critics' dilemma." This part of the paper argues that there are times when progressive legalists cannot afford to ignore rights-based legal strategies and *Charter* litigation. Furthermore, voting rights' unique impact upon majoritarian institutions of government should make the interpretation of these rights a matter of particular concern for critical legalists and, specifically, those critical legal theorists who identify themselves as critics of rights.

Next I develop a theme of criticism to be applied to the Supreme Court's decision in *Carter*. I argue in this section that the democratic nature of judicial *Charter* review would be enhanced by the judiciary's clearer embrace of a more consistent vision of rights theory. With some misgivings I recommend as the best candidate for that theory, the current of rationalist liberal individualism that generated bills of rights initially. In *Carter*, the Supreme Court engaged in a method of rights analysis that

19. Section 1 of the *Charter* reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as can be demonstrably justified in a free and democratic society." *Supra* note 12.

20. I adopt this term from M. Tushnet, "An Essay on Rights" (1984), 62 Tex. L. Rev. 1363. For the purposes of this discussion, rights talk implies the use of rights as tools of analysis or to assist in realizing political objectives through litigation.

is inductive and empirical in nature, and which is characteristic of the British legal tradition. This analytical approach, when undertaken in the context of the application of a constitutionally entrenched bill of rights, increases the undemocratic potential of judicial review.

The last part of this discussion returns to gerrymandering. If Canadians are willing to acquiesce in a considerable degree of voting inequality, then it is argued that they at least deserve a constitutional jurisprudence that more clearly restricts the potential for the partisan political manoeuvring that may underlie the creation of unequal electoral districts. It will be argued that the *Carter* decision's relative silence with respect to this issue leaves room for future judicial decisions to develop our understanding of *Charter* s. 3 in a manner that is consistent with this project of silencing noisy gerrymandering in Canada.

I. *The Critics' Dilemma*

A central current of critical legal thought argues that engaging in rights talk necessarily involves some degree of acceptance of, or acquiescence in, what may be called "dominant rights theory ideology."²¹ This ideological perspective is instrumental in presenting as natural and, therefore, beyond criticism, the economic social stratification that is a necessary condition of capitalism. The most important aspect of the critique of rights for present purposes is that which argues that engaging in rights litigation, or demanding the legal recognition of rights, amounts to consorting with the enemy. This is presented as, alternatively, dangerous, degrading, and futile. To generalize rather crudely about a sophisticated argument, a legal system in a capitalist society will only generate decisions that enhance judicial power and maintain unequal economic and social relations.²² These unequal relations are what compel socially and economically dispossessed people to frame their demands in terms of rights in the first place.

21. Joel Bakan and Michael Smith define dominant rights theory ideology as follows: "the set of rights discourses that constitutes the prevailing and generally unquestioned 'common sense' about what rights are; helps sustain the dominant order of social relations by allowing that order to be presented as natural and legitimate, masking social facts that reveal its nastier sides and universalizing the interests of dominant groups; and that embodies elements sufficiently attractive and plausible to command popular support." J. Bakan & M. Smith, "Rights, Nationalism, and Social Movements in Canadian Constitutional Politics" in D. Schneiderman & K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 218 at 240, n. 14 [hereinafter Bakan and Smith].

22. For a succinct example, see J. Fudge & H. Glasbeek, "The Politics of Rights: A Politics with Little Class" (1992) 1 Soc. & L. Studies 45.

People who are interested in law's potential to operate as a vehicle for achieving progressive social and political objectives have been and continue to be warned against falling into the rights trap.²³ This is an understandable and, I think, desirable state of affairs. While the critique of rights may have lost some of its radical impact, the *Charter*-inspired "rights revolution" continues apace. Therefore, someone needs to keep sounding a note of caution—alarm even—in relation to the retrogressive potential of rights talk.

If, then, this is not the time to abandon the critical legal contribution to the debate about the value of rights talk, many progressive legalists believe that it is time reconsider the extent to which that contribution mandates the wholesale abandonment of rights.²⁴ Although the recent work of some prominent rights critics continues to raise serious and disturbing questions about the politics of rights in Canada and the United States,²⁵ it is not clear that people who share their concern for a more equitable society can afford to stay out of the rights interpretation debate.²⁶ Of particular concern is the fact that, regardless of what may be the limited ability of rights talk to advance substantive equality,²⁷ rights litigation can clearly undermine that kind of equality in certain important respects.²⁸ Therefore, it would seem important to maintain a presence in

23. See for example D. Kennedy, *A Critique of Adjudication: fin de siècle* (Cambridge: Harvard University Press, 1997) [hereinafter *A Critique of Adjudication*]; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 2d ed. (Toronto: Thompson, 1994) [hereinafter Mandel]; A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Politics*, (Toronto: University of Toronto Press, 1995) [hereinafter Hutchinson].

24. See for example A. Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17 J. L. & Society 309; W. Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989); G. Binion, "Human Rights: A Feminist Perspective" (1995), 17 Hum. Rts. Q. 509; M. Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L.J. 1860.

25. *Supra* note 23.

26. See M. Carter, Book Review of *Waiting for Coraf: A Critique of Laws and Rights* by A.C. Hutchinson (1996) 11 Can. J. L. & Society 292; M. Carter, Book Review of *A Critique of Adjudication: fin de siècle* by D. Kennedy (1997) 35 Osgoode Hall L.J. 399.

27. Substantive equality essentially refers to equality of actual living conditions. It is distinguished from formal equality—linked to the notion of juridical equality—which is captured by the notion of "same treatment." These different standards of equality present an important tension in human rights thought. Ensuring substantive equality often requires treating people differently, which offends formal equality. To the extent that respect for the dignity of every individual is central to the human rights project, the question arises as to which kind of equality is most essential to human dignity in a situation when the two standards seem to conflict.

28. See M. Carter, "Criminal Law, Women's Equality, the *Charter*: An Analysis of the *Criminal Code*'s Self-Induced Intoxication Provisions" in M. Jackson & K.S. Banks, eds., *Ten Years Later: The Charter and Equality for Women* (Vancouver: Canada Publishing, 1996) 122. In this paper I discuss why the *Charter* "victories" seem so regularly to compromise the equality and security interests of women.

such litigation whenever that is possible. If that makes sense then, like it or not, rights talk is the *lingua franca* of the courts.

Quite apart from being forced to join the rights fray in order to defend substantive equality from libertarian attack, going on the offensive often recommends itself as a strategy. Struggles for formal equality²⁹—for the removal of arbitrary barriers to full participation in society based upon such factors as gender or ethnic identity—have almost defined the “good fight” from a socially progressive point of view in this century.³⁰ In keeping with the concerns of this article, voting rights are a good example of this. Women, First Nations people, and people of non-Western European background struggled for the franchise well into this century.³¹

This is where the critics’ dilemma becomes most acute. Is it hypocritical or unacceptably cynical for one to invoke rights for strategic political purposes if one accepts the critique of rights?³² As suggested, a theme of the critique holds that the legal system operates so as to maintain unequal and oppressive social relations. People serve the ends of this system by showing faith in *Charter* rights and freedoms and the legal process through which their enforcement is pursued. In fact, the argument continues, the *Charter* offers only false hope of achieving anything more than token gains in equality. Therefore, the question arises as to whether the token gains that may be achieved are ever worth the price of hypocrisy. From the rights-critical perspective that is being briefly sketched here, political victories are always tainted if courts deliver them. In the context of a *Charter* challenge, this involves the patronizing spectacle of trying to convince judges to second-guess our representative institutions of government.³³ Although these representative institutions

29. *Supra* note 27.

30. W. Tarnopolsky, “Discrimination and the Law in Canada” (1992) 41 U.N.B.L.J. 215 [hereinafter “Discrimination”].

31. “Discrimination”, *ibid.* provides an overview of Canada’s history of exclusionary voting practices. This is one reason why the *Carter* decision’s deference to Canada’s traditions in this regard is most disconcerting.

32. In fact ambivalence abounds in this regard. For example, in *A Critique of Adjudication*, *supra*, note 23, Duncan Kennedy chastizes those who invoke rights discourse to formulate political demands, for taking advantage of true rights believers (at 310-311). Later, however, he indicates his favour for invoking rights talk for strategic purposes “as long as the deployer has in mind the element of bad faith in his or her performance” (at 358). Similarly, if less dramatically, Alan Hutchinson’s sustained critique of rights talk contains such concessions as: “[T]he liberal campaign for free speech ought not to be undervalued; its solicitude for the interests of individual speakers against unwarranted state interference is of great significance.” Hutchinson, *supra*, note 23 at 204.

33. At the end of his preface to *The Charter and the Legalization of Politics* Michael Mandel writes: “Then there is the authoritarian nature of the courts, which makes the whole thing not only dishonest but also demeaning. *Pleading* is not a democratic form of discourse. It dates from a time when democracy was a dirty word.” Mandel, *supra* note 23 at xii.

are far from perfect, the critical argument sees them as vehicles for policy creation that are more democratic, in an important sense, than judicial decisions.³⁴ The truest victories, then, are won “in the streets” by political activism and by the reasoned persuasion of the public and elected representatives.

The particular focus of this discussion—voting rights—provide a limited route beyond this dilemma. If the price of some rights struggles is too high, then voting rights must always be a special case. As indicated above, an important theme of the critical response to the rights revolution is that, as imperfect as our representative institutions of government may be, they are a better place for dealing with political issues than the courts are. Inasmuch as constitutionally entrenched rights in general operate to undermine Canadian democracy, voting rights can be interpreted in such a way as to undermine the representative nature of the very institutions that continue to be the least imperfect alternative to *Charter*-inspired judicial policy making. Therefore, if it is important to maintain the integrity of representative institutions as alternatives to the legalization of politics that the *Charter* encourages then, ironically, it is important to maintain the integrity of voting rights as enshrined in the *Charter*.

But the irony for rights critics does not end with the fact that they have a special interest in the interpretation of voting rights. The next part of this discussion will suggest that rights critics should be interested in having the courts pay closer attention to a particular body of theory when they interpret many of the *Charter*'s provisions. That theory is a variant of

34. At issue in all of this is the complex question as to the nature of democracy. The majoritarianism that is associated with broadly representative institutions can be at odds with the pursuit of standards of substantive equality to the extent that the majority, through its representatives, may not be persuaded to adopt policies aimed at realizing these goals. This is the case notwithstanding the fact that both of these concepts inform important notions of democracy. For his part, Michael Mandel argues the legalization of politics brought on by the *Charter* has compromised both the principle of majoritarianism and the pursuit of the goal of substantive equality. In Chapter 1 of his book, Mandel argues that dissatisfaction with Canada's representative institutions of government made the Canadian public susceptible to assurances that the *Charter* would enhance democracy in this country. He argues, however, that this was wrong and that our political system was at least “more” democratic, in a majoritarian sense, before the *Charter*. Mandel, *supra* note 23. Entrenched bills of rights historically emerge to ensure that the interests of political and economic elites are not threatened by demands for redistribution of opportunity and capital. In the American context, a constructive aspect of Kennedy's *A Critique of Adjudication* that also evinces a pragmatic preference for majoritarian institutions is his proposal for “counterfactual legislative supremacy.” According to this proposal “in every case where appellate judges at the highest level decided a question of law, there [would be] an appeal to the legislature, with a strong practice of the legislature considering and deciding the question [...]” *Supra* note 23 at 215. Accordingly, this suggests some degree of satisfaction with existing representative institutions.

liberal individualism, the *bête noire* of the contemporary critical legal perspective.³⁵ “Better the devil you know”

II. *The Search for Rational Limits to Charter Interpretation*

1. *Taking Rights Reluctantly*

This paper is written from a position of sympathy with many aspects of the critical legal perspective briefly described above, including the critique of rights. The concern is well founded that the *Charter* may represent a liberal individualist threat to areas of the law where the pursuit of social justice and substantive equality are better served by political sensibilities that are more collectivist in nature. However, as suggested in the footnotes and accompanying text of the preceding section, pessimism about the progressive potential of rights talk is not shared by all leftist legal scholars. It may be the case that the indeterminacy of rights talk can be exploited in such a way as to assist in exposing the contingent nature of the hierarchical and oppressive social relations that, heretofore, it has served to conceal.³⁶

A related interpretative project would involve giving *Charter* protections meanings that reflect uniquely Canadian values. These values include, for example, a public willingness to accept government initiatives that would be characterized as more communitarian in nature than individualistic. Universal medicare is the great domestic example of such a program. *Charter* provisions that reflect these communitarian values would often be inconsistent with the way that identical or similarly worded provisions have been interpreted in more individualistic or libertarian political contexts, and in the American context in particular.

I want to develop a position that is distinguishable from the leftist pessimism and optimism about rights talk, at least insofar as it relates to the potential of the *Charter* in particular, but which I hope is reconcilable with important aspects of both perspectives.³⁷ This position emphasizes the *strangeness* of the kind of constitutional instrument that the *Charter* represents, as it presumes to frame moral absolutes and demands the judiciary to interpret them, compare regular government activity to those interpretations, and—possibly—to strike down such activity when it offends those interpretations. Whatever may be said about the progressive

35. For example, see Hutchinson, *supra* note 23, Chapter 1, “Liberalism and the *Charter*.”

36. See *supra* note 24.

37. Having said that, I am sure that this position will be unsatisfactory to strong advocates on either side of this leftist debate.

potential of rights talk as a general matter, or its inherent dangers, constitutionally entrenched bills of rights like the Canadian *Charter* represent a special case.

The Critical Legal concern about the heightened ideological content of judicial review under a constitutionally entrenched bill of rights needs to be taken seriously. Accordingly, since the *Charter* is not going to disappear, the alternative for those who are concerned about judicial review is to identify and advocate recognition of theoretical perspectives and legal arguments that may represent compelling constraints upon this kind of judicial activity.³⁸ As will be suggested, the best candidate for this perspective is one that draws upon Lockean social contract theory. The liabilities that attend this perspective include the threat that it represents to attempts by governments to pursue policies that are consistent with more collectivist or communitarian social principles. These liabilities can be minimized by greater recognition of precisely how much a product of historical and political contingency this perspective and its artifacts—bills of classical civil libertarian rights—actually are.

This contingent nature exists notwithstanding the way that we are compelled to assume the character of natural law/ natural rights “believers” as a necessary condition of engagement with this body of theory. Like any other social or political perspective, Lockean liberal individualism offers a rhetorical pose that may be invoked strategically to support specific political goals.³⁹ Concomitantly, a sophisticated recognition of the rhetorical nature of this theory will allow us to consider as important but unremarkable, the extent to which *Charter* provisions that reflect this theory may be limited or over-ridden by the legislative branch of government.

38. See D. Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology” (1986) 36 J. Legal Educ. 518.

39. See J. Frug, “Argument as Character” (1988) 40 Stan. L. Rev. 869. Henry Staten’s assessment of the deconstructive project is consistent with this theme. In H. Staten, *Wittgenstein and Derrida* (Lincoln: University of Nebraska Press, 1984), Staten writes (at 19): “The value and necessity of pure concepts and categories are not denied, but they are no longer the last word.” Staten continues (at 24): “The question that arises is, then, What does one do once one has given up the idealizing project of knowledge, the effort to unify ever more particulars under ever more powerful subsumptive formulas? Part of the answer is that we *cannot* give up—at least, not entirely—the project of idealization.” It is my argument that the *Charter* compels us to maintain the attitude of idealists in relation to arguments about how its provisions should be interpreted. In arguing that we should feel comfortable engaging in rights talk for strategic purposes and/or because it provides the dominant terms of legal debate, and allows participation in that debate, I am taking issue with Duncan Kennedy’s argument that this amounts to taking advantage of “true believers”. See *supra* note 32.

It may be possible to separate rights talk from rights theory ideology and to use it to pursue substantive equality and to protect Canadian values. It is not clear, however, that the *Charter*, in many of its provisions at least, is an appropriate vehicle for this project. The stakes involved in the constitutionalization of *Charter* standards are too high. It is unreasonable, for example, and perhaps silly and patronizing as well, to assume that the judiciary can tap into a generally progressive or uniquely Canadian vision of political morality that is shared in some way by the population at large. The *Carter* decision itself demonstrates the disconcerting potential for the meaning of *Charter* provisions to be tied to some of the most unfortunate episodes in Canada's legal history.

2. *Uniquely Canadian Charter Rights*

Entrenched bills of rights make little sense if the meaning of their provisions is tied in some necessary way to the legal *status quo*. They serve a purpose only as standards or principles that stand apart from and in a superior relationship to regular positive law and government activity. Furthermore, it is impossible to separate many of the guarantees in the *Charter* from principles that assert the fairly radical sovereignty of individuals in the social world and which presume a fairly sharp distinction between the interests of individuals and those of the state. As Joel Bakan and Michael Smith suggest:

[R]ights discourse is not some free-floating set of signifiers: it is connected at the root to historical and social forces and the existing social structures and institutions they have produced. Though rights discourse may not be conceptually fixed, it is historically and geographically anchored.⁴⁰

Some scholars have argued that, notwithstanding the classical civil libertarian tenor of many of our *Charter's* provisions, the judiciary should be encouraged to give these signifiers content that is uniquely Canadian. The result would be a *Charter* that is a template for our own non-liberal vision of political morality. In this enterprise, the work of historian Gad Horowitz has been an inspiration.⁴¹ Horowitz sought to understand why socialism in Canada has been strong enough to play a role in national politics, whereas it has never been as serious a political force, in relative terms, in the United States. Horowitz contended that the difference is largely accounted for by the "Tory touch" that is characteristic

40. Bakan & Smith, *supra* note 21 at 236.

41. G. Horowitz, "Conservatism, Liberalism, and Socialism in Canada: An Interpretation" (1966) 32 Can. J. Ec. & Pol. Sci. 143.

of the Canadian political conscience. Horowitz argued that Canada evinced this sympathy for an holistic conservative political perspective as an incident of this country's close relationship with Britain and as a result of its receipt of United Empire Loyalist refugees from the American Revolution. Horowitz wrote:

In this new setting, where there is no pre-established over-powering liberalism to force them into insignificance, they play a large part in shaping a new political culture, significantly different from the American.... [In Canada] the sway of liberalism has proved to be not total, but considerably mitigated by a Tory presence initially and a socialist presence subsequently.⁴²

According to Horowitz, the Tory touch in the English-Canadian tradition has been responsible for the greater presence in this country of an understanding of society as a community rather than an aggregation of individuals. Toryism accepts a stratified organic social vision—a community of classes—whereas socialism envisions a classless community. These are not consistent visions. Nonetheless, Horowitz argued that Toryism's class-centred view operated as a precondition for the acceptance of socialism in Canada. This precondition was missing in the United States, where liberal individualism dominated. The demand for a classless society "cannot be made by people who can hardly see class and community: the individual fills their eyes."⁴³

One might be suspicious of Horowitz's thesis for the kind of gloss that it offers on Canada's Tory heritage.⁴⁴ An implication of the argument is that there is a uniquely Central Canadian basis for Canada's socialist tradition whereas this tradition is most clearly and strongly rooted in the Western Canadian experience.⁴⁵ Furthermore, the Tory touch concept places in a very awkward progressive light the legacy of the United Empire Loyalists, whose class consciousness, anti-republicanism, and slave-owning practices are more easily characterized as reactionary.⁴⁶ Notwithstanding this, Patrick Monahan relies upon Horowitz's Tory touch thesis to support an argument against the adoption into Canadian

42. G. Horowitz, *Canadian Labour in Politics* (Toronto: University of Toronto Press, 1968) at 12-13.

43. *Ibid.* at 6.

44. Well I'm suspicious, anyway.

45. See H. Gutkin & M. Gutkin, *Profiles in Dissent: The Shaping of Radical Thought in the Canadian West* (Edmonton: NeWest, 1997); George Melnyk, ed., *Riel to Reform: A History of Protest in Western Canada*, (Saskatoon: Fifth House, 1992).

46. For a balanced consideration of Loyalist ideology that identifies within it some progressive tendencies, see Janice Potter, *The Liberty We Seek: Loyalist Ideology in Colonial New York and Massachusetts* (Cambridge Mass: Harvard University Press, 1983).

law of American-style libertarian constitutional standards. Drawing upon Horowitz's "discovery" of this essential dimension of Canada's political identity, Monahan writes:

Although Canada is broadly liberal, there are important features of the Canadian political tradition which cannot be placed within a purely individualist framework The presence of . . . socialist ideas is an indication of the ideological diversity of the Canadian political tradition, particularly the legitimacy accorded collectivist or organic conceptions of society.⁴⁷

Accordingly, Monahan goes on to argue:

To rely, in some wholesale and uncritical fashion, on the answers that American courts and commentators have given to problems of individual rights would be to deny the distinctiveness of the Canadian tradition Thus the whole premise and justification of constitutional adjudication under the *Charter* is that it gives expression to fundamental Canadian values as opposed to fundamental American, British or European ones.⁴⁸

Monahan, therefore, characterizes a liberal individualist strategy of rights interpretation as one that is distinctively "American." It is certainly fair to say that such individualism is an important theme of America's *Bill of Rights* jurisprudence. What is not clear, however, is the extent to which this strategy can be or should be avoided by a judiciary that is faced with the particular kind of statutory instruments that the American *Bill of Rights* and Canadian *Charter* represent.

The intellectual context for Horowitz's discovery of the Tory touch and, therefore, Monahan's evidence for the basis of a uniquely Canadian complement of fundamental rights, is significant for this discussion. Horowitz's work expressly challenges Kenneth McRae's application to the Canadian context of Louis Hartz's "fragmentation thesis." In *The Founding of New Societies*,⁴⁹ Hartz argued that "when a part of a European nation is detached from the whole of it, and hurled outward onto new soil, it loses the stimulus toward change that the whole provides. It lapses into a kind of immobility."⁵⁰ Hartz contended that these new societies become islands of the parent culture's ideology as of the time of separation. In this way Hartz emphasized the "Lockean liberalism" of American political culture, central to which are notions of the natural rights of each individual.

47. P. Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 92.

48. *Ibid.* at 95.

49. L. Hartz, ed., *The Founding of New Societies* (New York: Harcourt, Brace & World, 1964).

50. *Ibid.* at 1.

McRae's adaptation of Hartz's thesis posits a figure that competes for comic potential with Horowitz's tory-touching proto-Canadians. This figure is "the" American liberal. McRae described this figure as follows:

To be sure, he is not quite on his home ground, and this accounts for our initial difficulties in recognition [you can say that again]. He appears first as an exile, a political refugee from his own land, a fragment torn once again from the original American fragment. He settles in a land where his religious feelings are once again hypersensitized by an attempt, ultimately unsuccessful, at church establishment, and by the presence of a large Catholic majority. He lives through a period of government by . . . aristocracies. Yet through all this he retains, no matter how far obscured or submerged, much of the original liberal heritage of the American colonies.⁵¹

It will come as no surprise that this startlingly simplistic—not to mention arbitrary and ethnocentric—method of historical analysis does not enjoy much serious application today. However, significance continues to be found in relation to Hartz's observation concerning the extent to which basic institutions of liberal government are taken for granted in England, America and, by extension, Canada. In comparing the Anglo-North American embrace of liberalism with the strong Continental traditions that run in opposition to it, Mark Lilla observes:

For those of us living in these liberal nations their histories [do not look] harmonious: we think . . . of our radical dissenters and our conservatives. Nonetheless, it is certainly true that even our most radical and conservative thinkers have seldom strayed far from . . . principles of liberal politics: limited government, the rule of law, multiparty elections, an independent judiciary and civil service, civilian control of the military, individual rights to free association and worship, private property, and so forth.⁵²

Lilla's comments are part of his introduction to a collection of essays by a number of young French scholars whose work reflects important themes in contemporary political thought in that country. This scholarship supports the suggestion being made here that, to a significant extent, reference to liberal individualist standards and liberal social contract theory more particularly, is a necessary condition of rights talk and civil libertarian bill of rights talk in particular. Thus, Stephane Rials concludes that the increased clarity of the conversation in relation to fundamental rights in France today is connected to a "return to Locke" and the idea—

51. K.D. McRae, "The Structure of Canadian History" in L. Hartz, ed., *The Founding of New Societies* (New York: Harcourt, Brace & World, 1964) 219 at 234.

52. M. Lilla, "The Legitimacy of the Liberal Age" in M. Lilla, ed., *New French Thought: Political Philosophy* (Princeton: Princeton University Press, 1994) at 3-4 [hereinafter *New French Thought*].

however outdated it may be⁵³—that there exist natural rights that stand apart from positive law and its apparatuses.⁵⁴ Similarly Blandine Kriegel asserts that “[i]t is essential for those who believe in human rights that they be rooted in the idea of natural law. We must, quite simply, return to natural law and further enlarge the clearing it has already carved out for itself in the texts of our tradition.”⁵⁵

The next part of this discussion develops points that have been introduced here. These points include the idea that although there may be a range of techniques for rights analysis and, accordingly, a number of alternative definitions for the substance of any given right, the *Charter* pushes us across a threshold. The comprehensibility of the project of judicial review under the *Charter* demands that many of its provisions be interpreted with reference to the liberal social contract tradition. Concomitantly, the comprehensibility and, therefore, greater predictability of judicial review promises to minimize the threat that this project represents for democratic practice.

The strategy or theme of interpretation of the *Charter* that is being suggested here can be distinguished from some form of originalism or interpretivism. These strategies of interpretation hold that the meaning of the Constitution should be tied to some “original understanding” of its meaning.⁵⁶ As compared to this, I am suggesting that the *Charter*’s meaning should be closely related to the necessary conditions or rhetorical attitudes for rights analysis and conversation that are most comprehensible and predictable. It may well be the case that the drafters of the *Charter* did not have these conditions in mind. Furthermore, the *Carter* decision itself demonstrates that a rejection of this approach will not save us from originalism. In rejecting the argument that the principle of one person one vote should characterize *Charter* s. 3, Justice McLachlin relies upon a sad historical fact. McLachlin J. states: “[T]here is little in the history or philosophy of Canadian democracy that suggests that the framers of the *Charter* in enacting s. 3 had as their ultimate goal the attainment of voter parity.”⁵⁷

53. My caveat, not Rials’.

54. S. Rials, “Rights and Modern Law” in *New French Thought*, *supra* note 52 at 172.

55. B. Kriegel, “Rights and Natural Law” in *New French Thought*, *ibid.* at 162.

56. Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1995) at 621 [hereinafter Hogg].

57. *Carter*, *supra* note 13 at 185. In his accompanying decision, Justice Sopinka makes the same point (at 197).

3. *Bills of Rights as Artifacts of Liberal Social Contract Theory*

In her decision for the majority in *Carter*, McLachlin J. states: "What must be sought is the broader philosophy underlying the historical development of the right to vote – a philosophy which is capable of explaining the past and animating the future."⁵⁸ With respect, her Ladyship is clearly right about the need for a philosophical guide. The theme of the following critique of the decision, however, is that the philosophical search that the *Carter* decision reflects is unfortunately tied to Canadian history, rather than the history of the kinds of rights that bills of rights like the *Charter* enshrine. There is an important difference.

The majority decision in the *Carter* case, it will be argued, does not provide an interpretation of s. 3 of the *Charter* that is linked to any clear vision of rights. Rather, in its decision the Court grafts together opposing traditions of rights analysis. As it relates to critical legal concerns, the development of a consistent vision is an important way for the Court to address the undemocratic potential of judicial review.⁵⁹ A clearer, more consistent vision of rights promises to structure and place limits upon the scope of interpretive discretion. If nothing else, this would serve the democratic purpose of making the *Charter*'s meaning mildly more predictable for those who are supposed to enjoy its protections.⁶⁰ Therefore, rather than the metaphor of sculptors that Justice McLachlin has used to describe judges who are engaged in *Charter* interpretation,⁶¹ this suggests that a more appropriate metaphor would be that of model kit builders.

58. *Ibid.* at 181.

59. Having been in the constitutionally entrenched bill of rights game a lot longer than Canadians, Americans have developed a rich debate in relation to the seeming "moral incoherence" that is represented by the institution of judicial review of the morality, political or otherwise, of government activity. For a valuable overview of this debate with particular reference to the situation of Ronald Dworkin's work within it, see D. Richards, "Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication" (1977) 11 Ga. L. Rev. 1069.

60. In discussing the characteristics of the rule of law in a democracy, Justice McLachlin cites with approval Professor G. Walker's twelve basic requirements for that concept. Professor Walker's third requirement is that "[o]rdinary (substantive) law should possess *certainty, generality and equality*" (emphasis added). From *The Rule of Law: Foundations of a Constitutional Democracy* (Carlton, Australia: Melbourne University Press, 1988) at 23-24. Cited in B. McLachlin, "Rules and Discretion in the Governance of Canada" (1992) 56 Sask. L. Rev. 167 at 169.

61. Justice McLachlin writes (*ibid.* at 170-171): "The *Charter* has introduced vast and important new areas of judicial discretion. The language in which the rights and freedoms are cast is broad and open-textured. What does free speech mean? Liberty? Equality? The right to vote? Judges faced with this sort of language must shape and carve and sometimes limit it, like a sculptor shapes a stone, finding the ultimate shape within the undefined block."

For better or for worse, the best candidate for such a theory is the one that brought us bills of rights in the first place: the variant of liberal individualism that places certain rights above positive law. This theoretical perspective recommends itself as an interpretive guide at least for those rights in the *Charter* that trace their pedigree to the modern flowering of the idea that equal individuals, rather than social, economic, or cultural classes or groups, are the basic unit of society. In this theoretical context, bills of rights are tools to assist individuals in safeguarding the personal sovereignty that is “naturally” theirs, from the threat of a central power to which the individuals have given the authority to govern for specific limited purposes. The concept of individual rights and liberties, and the need for a constitutionalized bill to protect them, “makes sense” in this context, however problematic the logic of individualism may be in application. Furthermore, the concept of rights fits only awkwardly in the context of more communitarian social and political philosophies.⁶²

The right to vote must be recognized as being central to this liberal individualist outlook. As such, one would expect it to be characterized in a manner that is consistent with such principles. The modern human rights conversation began in the crucible of the events of seventeenth century England in particular.⁶³ This conversation is critically tied to what was then a radical notion of the possibility of individual existence outside of civil society—in the state of nature—and the equality of individuals in that state.⁶⁴ The rights-bearing capacity of individuals is a correlate of

62. The debate in this regard is a fascinating one. Aspects of it are canvassed in A.A. An-Naim, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992). Also, see R. Howard, *Human Rights and the Search for Community* (Boulder: Westview Press, 1995) [hereinafter Howard].

63. The great “liberal moment” in this period can be dramatically (if not particularly accurately) pin-pointed as occurring when the axe separated Charles I’s head from the rest of his body on January 20, 1649. This culminating event of the English Civil War initiated a search for a theory of political legitimacy to make sense out of such spectacular and brutal exercises of power. T. Hobbes’ *Leviathan*, published in the wake of Charles I’s execution (1651) and during Oliver Cromwell’s protectorate, was indicative of that search. Hobbes famously argued that the journey from the natural state of war toward civil society requires people to submit to the near absolute authority of a mortal God (one person or assembly of people): the “great Leviathan.” [T. Hobbes, *Leviathan* (London: Penguin, 1985), Chapter XVII, “Making of the Commonwealth” at 227.] Also, in Chapter XIII, “Of the Natural Condition of Mankind” Hobbes writes at 185: “Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre.”

64. While Hobbes argued that a perpetual state of war awaits outside civil society, this identification of an “outside” is essential to the liberal nature of his work. It represents a direct challenge to hierarchical, organic social models. Such models supported the theory of the Monarchy’s divine right to rule upon which Charles I relied to justify his arbitrary and absolutist dealings with Parliament, and according to which the existence of individuality outside of a divinely constructed social pyramid with a Monarch on top was unthinkable.

human equality. Furthermore, this liberal individualist outlook identified civil society or the state as a creation of the people who were subject to its authority. The most influential stream of this theory, initiated by John Locke,⁶⁵ made the legitimacy of state authority contingent upon the degree to which it preserved the liberties that people naturally had. Bills of rights developed as markers of these spheres of liberty.⁶⁶

Accordingly, bills of classic liberal rights are artifacts of this particular theoretical context. Such bills are most comprehensible—and their meaning therefore requires the least judicial mediation—in the context of this stream of liberal individualist theory. It promises to provide the most structure for the interpretation of those *Charter* guarantees that represent

Furthermore, if human rights are “rights one has simply because one is a human being,” [J. Donelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989) at 9] then Hobbes identified the first of these to be independent from any divine power’s benevolence: the right to life (Hobbes, *supra* note 63 at 189.) Finally, along with the identification of “natural,” rights-bearing individuality, Hobbes’ authoritarian vision of civil society is premised upon the essential liberal themes of the equality of individuals and their mutual agreement to enter a commonwealth (*ibid.* at 183).

65. John Locke provided the most direct source of inspiration for bills of rights like the *Charter* in his *Second Treatise of Government* (1690). The *First Treatise* having disposed of the theory of the divine right of monarchs, the *Second Treatise* had several purposes. The work was published immediately after the events of the bloodless “Glorious Revolution” when the Whig faction in Parliament was instrumental in replacing James II, a Catholic monarch whom they opposed, with William of Orange and Mary, Protestants who were more sympathetic to their interests. It was Locke’s project to demonstrate how these events represented the working out of natural laws rather than the outcome of raw power and violence. Locke identified the purpose of his *Second Treatise* in the following terms: “[T]o establish the throne of our great restorer, our present King William – to make good his title in the consent of the people . . . ; and to justify to the world the people of England, whose love of their just and natural rights, with their resolution to preserve them, saved the nation when it was on the very brink of slavery and ruin.” Quoted in T. Peardon’s introduction to J. Locke, *The Second Treatise of Government* (Indianapolis: Bobbs-Merrill, 1952) at x.

66. As well as “explaining” the legitimacy of the Glorious Revolution, the *Second Treatise* was aimed at undermining Hobbes’ suggestion that civil society depends upon people’s willingness to suspend their natural liberties and to submit to the absolute power of a sovereign in order to benefit from the security of that arrangement. The state of nature is less fearsome in Locke’s vision and the scope of natural liberty wider (*ibid.* at 4–5). Hobbes’ right to life is expanded to include liberty and property, all of which are maintained under the “law of nature” which holds that “being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.” (*ibid.*, at 5). Significantly, Locke’s rights vision depends upon a Deity. There is, therefore, less need for civil society on the part of the individual who enjoys freedom and equality in the state of nature. Concomitantly, when civil society does arise as a result of people’s agreement to avoid the “inconveniences of the state of nature” (*ibid.* at 9), chief among which is having to punish transgressors of the law of nature, the sovereign body is under a greater obligation to its subjects, upon whose pleasure its authority rests. The outstanding example that this era provided of something like a social contract was the English *Declaration or Bill of Rights*, passed by the Convention Parliament in 1689, and signed by William as a pre-condition of his ascension to the throne.

its correlates. The right to vote is one of those guarantees. While not a classic natural liberty *per se*, it represents an articulation of the understanding that a legitimate ruler's authority is exercised at the pleasure of an equal people, all of whom have retained their sovereignty and are equally possessed of certain natural liberties. The ability to call the government to account, therefore, is critically tied to the protection of these liberties. In this context, damage is done to the whole notion of people as equal rights-bearing individuals which, again, is the assumption that explains why bills of rights are necessary, if some people have a stronger ability to call the government to account than do others.

4. *The Logic(s) of Rights Analysis*

To some significant extent, therefore, instruments like the *Charter* and the American *Bill of Rights* represent a working out and institutionalization of Lockean social contract theory.⁶⁷ Ironically, however, the American and Canadian constitutional bills of rights which are placed above and made immune from regular legislation, mandate a style of reasoning and argument in the legal systems of these countries that was not imposed upon the country out of which the idea arose, England.⁶⁸ In the *Second Treatise* Locke deduces the existence of natural rights from the presumed inability to doubt God's existence and the Deity's imposition of the law of nature.⁶⁹ From this indubitable point Locke steps down, in a process of reasoning, to identify the rights to life, liberty, and property. The deductive or rationalist nature of this exercise is important.⁷⁰ The meaning of these rights and liberties cannot be discerned by induction through the

67. "The lineage is direct: Jefferson copied Locke In political theory and in political practice the American Revolution drew its inspiration from the parliamentary struggle of the seventeenth century." Carl Becker, *The Declaration of Independence* (1922), quoted in T. Peardon's introduction to John Locke's *The Second Treatise of Government*, *ibid.* at xx.

68. In the context of the United Kingdom's unwritten constitutional regime, the *Declaration of Rights*, like the *Magna Carta* (1279), is a regular, if extraordinary, statutory instrument. The *Declaration* has no immunity from the regular legislative process and, therefore, it can be altered by this process.

69. In contemporary terms, this point arises in relation to the challenge that human rights advocates face in trying to establish a non-religious basis for their convictions. Their critics argue that only such a non-religious basis can allow their theory to escape the criticism that human rights standards are morally or culturally relative and, therefore, cannot claim status which is superior to the sorts of social relations or government practices that they are being used to challenge. See Howard, *supra* note 62.

70. Not least because Locke's *An Essay on Human Understanding* represents the fountainhead of modern empiricism which establishes *inductive* reasoning as the route to true knowledge.

observation of existing positive law in a society. These principles draw their authority from a source that is beyond and prior to that society. The entire rights-enshrining exercise only makes sense, in fact, insofar as those rights provide a separate critical perspective upon government activity and indicate the way in which that activity must be resisted or reformed. This, then, is indicative of deontological or non-consequentialist reasoning.⁷¹ The rights in question have an inherent value that does not arise from the regular positive law against which they represent standards of comparison. Neither is the value of these rights relative to the consequences of their application.

In contrast with this, an empirical, inductive tradition of rights analysis has dominated English jurisprudence. This tradition supported the common law's position on liberty that "a person is free to do anything that is not positively prohibited" by the law.⁷² According to this model of analysis, the character and scope of individual liberty that the law recognizes—and, therefore, an understanding of what an individual has a right to do—is not defined by absolute statements of principle. Rather, spheres of individual liberty are defined by the rather incidental absence of legal restraints. Furthermore, no constitutional guarantees exist to prevent the law from infringing upon these spheres of liberty. Thus, in his *Commentaries on the Laws of England*, Blackstone's method of discussing an area of law was "not to trace it back to *a priori* first principles, but rather to locate it within the living body of law and to trace its historical development."⁷³ Rights, according to this perspective, are "coequal with our form of government"⁷⁴ rather than extra-legal entities that define the legitimacy of that government's activity. This position is at odds with the idea of natural, inalienable rights and liberties that became manifest in constitutionalized bills of rights.

Liberal individualist theory, then, provides a rough but important template for understanding the nature and role of bills of rights that enshrine "classic" liberal guarantees in our *Charter*. Furthermore, the *Charter* is a vehicle for a form of rights analysis that is in direct tension

71. In modern jurisprudence Ronald Dworkin provides the most famous metaphor for the idea that "serious" rights analysis does not take account of the consequences of respecting individual rights. Taking rights seriously involves conceding that they "trump" utilitarian arguments as to how the greater good may be served by infringing them. R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

72. Hogg, *supra* note 56 at 580.

73. G. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) at 13.

74. W. Blackstone, *Student's Blackstone*, R. Kerr ed. (London: Reeve and Turner, 1890) at 15.

with the Blackstone tradition that dominated Anglo-Canadian legal thought before the *Charter's* entrenchment. Again, to put it bluntly, we would not have a *Charter* but for the rationalist brand of liberal-rights theory with its themes of individual sovereignty, equality, and the need to curb the potentially abusive power of an "artificial" government that constantly threatens the "natural" liberty of the citizenry. Furthermore, it is submitted that judges' recognition of the importance of this theory and their engagement with it is important. This promises to provide a pattern of more structured and understandable exercises of judicial discretion which would be, therefore, more clearly consistent with the democratic principles that are threatened by the institution of judicial review under the *Charter*.

5. *Summary*

It is suggested that we should be honest about the need for a clearer philosophical map for interpreting *Charter* rights. This is not an indictment of the judiciary's intellectual abilities but, rather, a concern for the law's consistency and predictability. Furthermore, inasmuch as we can accept the need for maps, we can also be sophisticated enough to accept that no maps are perfect reflections of reality. Therefore, we have not failed, and we are not lost, if we decide to stray from the complement of principles and social assumptions we have identified as the best guide for interpretation. This approach is more intellectually mature than relying upon the creative abilities of a well-meaning judiciary to "sculpt" for us a *Charter* reflecting their best ideas as to what uniquely "Canadian" rights may be. Even if they should succeed, the preceding discussion has sought to demonstrate that bills of rights only make sense as instruments that allow critical assessment of existing laws and social practices. Accordingly, a search for the "Canadian way" of interpretation threatens to reverse that relationship by allowing existing laws and social practices to define the rights themselves and thereby undermine the very reason for having a *Charter* in the first place.

III. *Carter v. Saskatchewan*

1. *Background*

According to mainstream accounts of law and judicial activity, a defining feature of legal analysis and decision-making is the extent to which it is distinguished from politics. The liberal democratic concept of the Rule of Law depends upon this distinction. Understandably, therefore, a great theme of the legal realist and critical legal assault on the legal order has

related to the lack of a substantive distinction between law and politics.⁷⁵ The *Carter* decision offers fuel for this debate largely because it can lend itself to characterization in support of either side. The facts giving rise to the case certainly involved politics and the suspicion of partisan gerrymandering on the part of the Saskatchewan Progressive Conservative administration of Grant Devine.⁷⁶ What is at issue, therefore, is whether our legal system seems to have succeeded in identifying nonpartisan legal principles within this most political set of facts. This is central to the rights project, and a point of attack for rights critics. Furthermore, we are interested in whether the decision that the Court generated, if undeniably political, is only incidentally so.

In 1987, the Devine Government passed *The Electoral Boundaries Commission Act*.⁷⁷ Under this legislation, the Commission that it created was instructed to redraw the province's election map in such a way as to respect several extraordinary conditions that were unknown to the work of electoral boundary commissions in Saskatchewan before that time. In calling for the creation of 66 electoral ridings in Saskatchewan, the legislation mandated the establishment of one blunt division in the province, and myriad of more intricate ones. The blunt division was between northern and southern Saskatchewan. The effect of this division was to ensure that the sparsely populated but spacious northern part of the province would have at least 2 seats out of the 66 in the provincial legislature. Of more concern, however, was the way in which the remaining 64 electoral districts were to be divided in such a way as to respect the integrity of a newly identified fundamental division of interest among the electorate in rural and urban areas. This strategy seemed guaranteed to maximize the governing party's chances of retaining power on the basis of the support of a minority of people in the province.⁷⁸

As the respondent's factum in the *Carter* case argued, the *E.B.C.A.* sought to "quarantine" the large urban centres in Saskatchewan⁷⁹ in an

75. For an overview of this debate as waged during the 1980s, see A. Altman, *Critical Legal Studies: A Liberal Critique* (Princeton: Princeton University Press, 1990), Chapter 3, "The Possibility of the Rule of Law."

76. This sentiment was certainly supported by editorialists at the time. In responding to the Supreme Court of Canada's decision in *Carter*, a Saskatoon *Star Phoenix* article "Power Politics Still in Force" (8 June 1991) C9 marked the loss of hope that "the court would put an end to the Tories' crass political ploy to retain power." Also, see *supra* note 14.

77. S.S. 1986-87-88, c. E-6.1 [hereinafter *E.B.C.A.*].

78. For an overview of the partisan motivations that characterized this era in Saskatchewan's political history, see James M. Pitsula & K. Rasmussen, *Privatizing a Province: The New Right in Saskatchewan*, *supra* note 14.

79. Factum of Roger Carter, paragraph 42.

apparent attempt to prevent the interests of populations in these areas from infecting rural interests. The legislation dictated that in drawing the new electoral boundary map, the Commission had to recognize seven urban centres, each of which contained a specified number of seats totalling 29 in all. The quarantining aspect of this exercise was enhanced by s. 15 of *E.B.C.A.* requiring urban boundaries to be drawn so as to coincide precisely with municipal limits.⁸⁰ The area outside of these seven urban centres was left to be divided among the remaining 35 rural seats.

For the purposes of determining the parity of voting power among electoral districts, an electoral quotient is established by dividing the number of voters by the number of districts that are to be drawn. Accordingly, voting parity is achieved when the number of electors in each riding is roughly the same as the quotient. Since absolute parity is an impossible goal⁸¹ the enabling legislation for boundary commissions usually contains a permissible range of variations from the electoral quotient. With the *E.B.C.A.* the permissible variation for the province of Saskatchewan rose from +/- 15% under the previous legislation, to +/- 25%.⁸²

The new legislation gave rise to a range of legal concerns, including administrative law arguments that the Commission's discretion had been fettered by the restrictions that the *E.B.C.A.* placed upon its work. More to the point for the purposes of this discussion, however, is the product of the Commission's work. This was an electoral map, defined in *The Representation Act, 1989*.⁸³ Given the electoral quotient of +/- 25% and the mandatory rural-urban distinctions, the situation was such that at the extreme, 100 votes in the smallest constituency, Saskatoon Sutherland, were equal to 164 in the largest, Saskatoon Greystone. Furthermore, these districts bordered each other!⁸⁴

80. Section 15 of the *E.C.B.A.* reads: "The boundaries of a proposed urban constituency shall not extend beyond the municipal boundaries of the urban municipality of which it is composed." S.S. 1986-87-88, c. E-6.1, s. 15(2).

81. As McLachlin J. pointed out in her decision in *Carter, supra* note 13 at 184. It is not clear, however, why McLachlin J. seems to suggest that this impossibility is part of an argument for being less generally vigilant about the principle of equal voting.

82. Section 20 of *E.B.C.A.*, reads in part: A Commission, in determining the area to be included in and in fixing the boundaries of all proposed constituencies:

- (a) shall determine a constituency population quotient by dividing the voter population by the number of constituencies, from which:
 - (i) no proposed southern constituency population shall vary . . . by more than 25%;

83. S.S. 1989-90, c. R-20.2

84. Factum of Roger Carter, at 13.

2. *At the Supreme Court of Canada*

The *Carter* case arrived at the Supreme Court of Canada in April, 1991, on Crown appeal from the Saskatchewan Court of Appeal's decision the preceding March.⁸⁵ The Saskatchewan government had been forced to respond to the criticism raised against the new electoral boundaries and the legislative regime responsible for them. This criticism initially manifested itself in a proposed *Charter* challenge by the respondent in *Carter*. At the suggestion of the Attorney General for Saskatchewan, the matter was instead referred to the Appeal Court for a ruling as to the constitutionality of the restrictions placed upon the Boundary Commission's mandate, and the resulting product. In a unanimous decision, the Court held that both the process and the product offended the Constitution's guarantee of the right to vote under s. 3 of the *Charter* and that they represented unreasonable infringements under section 1 of the *Charter*.

An outline of the Supreme Court of Canada's majority decision in *Carter* has already been given in this discussion. It will be recalled that McLachlin J.'s reasons recognized the prime importance of relative parity of voting power for the meaning of s. 3. According to the decision, however, this emphasis upon equality of voting is subject to compromise in the interests of the broader concept of effective representation. Among the "countervailing factors" that compete with parity of voting power in giving substance to the Canadian right to vote are geography, community history, community interests, and minority representation.⁸⁶ Furthermore, we are to understand that these are "but examples of considerations which may justify departure from absolute voter parity in pursuit of more effective representation; the list is not closed."⁸⁷ One is left with the impression that the principle of one person, one vote will become incrementally less important for our understanding of the meaning of s. 3 as countervailing factors are added to the unclosed list.

This significance of the *Carter* decision has been thoughtfully analyzed in a number of articles. David Johnson, for example, expresses concern about the Court's attempt to develop a "pluralistic" notion of the right to vote with the non-egalitarian factors that it identifies as being able to contribute to the concept of effective representation. As laudable as these pluralist sentiments may be in a diverse country like Canada, Johnson

85. *Reference Re Electoral Boundaries Commission Act (Sask.)*, ss. 14, 20 (1991), 78 D.L.R. (4th) 449 (Sask. C.A.).

86. *Carter*, *supra* note 13 at 184.

87. *Ibid.*, at 184.

argues that they provide none of the certainty and direction for judicial interpretation offered by a clear emphasis upon voting parity.⁸⁸ Kent Roach develops an opposing line of argument that is probably the best defence of the Supreme Court's remarkable rejection of the Saskatchewan Court of Appeal's unanimous decision. Roach argues that the *Carter* decision reflects an important sensitivity on the part of the Court to concerns for the kind of substantive justice that *Charter* s. 15 jurisprudence has recognized.⁸⁹ According to this jurisprudence, real equality sometimes demands different treatment. Professor Roach welcomes the extent to which the *Carter* decision may facilitate progressive developments such as enhanced democratic power for groups of people who have suffered from an historic lack of representation.⁹⁰

The suggestion that s. 15 establishes a standard of interpretation for other *Charter* guarantees is problematic. In fact, this position undermines the uniqueness of the anti-discrimination theme represented by s. 15 in the context of the *Charter* as a whole. The provision of "four equalities" under s. 15 (equality before and under the law, and equal protection and benefit from the law) was designed to compel the courts to engage in substantive, socially contextualized equality analysis. This kind of substantive analysis of the effects upon equality of government activity contrasts with the restrictive interpretation that the Supreme Court gave to the *Canadian Bill of Rights'* guarantee of "the right of the individual to equality before the law and the protection of the law."⁹¹ Martha Minow

88. D. Johnson, "Canadian Electoral Boundaries and the Courts: Practices, Principles and Problems" (1994) 39 McGill L. J. 224.

89. *Charter* s. 15 reads: "(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability; (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Supra* note 12.

90. K. Roach, "Chartering the Electoral Map Into the Future" in J. Courtney, P. MacKinnon & D.E. Smith, eds., *Drawing Boundaries: Legislatures, Courts, and Electoral Values*, *supra*, note 11, at 200.

91. S.C. 1960, c. 44, s. 1(b). Justice McIntyre's analysis of the wording of *Charter* s. 15(1) in *Andrews v. Law Society of British Columbia et al.*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*], with which the entire Court concurred (while dividing on the disposition), indicates that s. 15's wording is a direct response to the *Bill of Rights* equality jurisprudence. Thus in *Andrews* the Supreme Court of Canada took advantage of the wording of *Charter* s. 15 to break from the "similarly situated" principle of equality that had been dominant before that time. This concept of equality concerns itself only with the treatment of people in relation to others who are similarly situated. It is not offended by inequalities that may exist among differently situated people. Section 15 is not the only right that represents an exception to the conventional

and Elizabeth Spelman capture the theme of substantive equality analysis. It involves identifying and responding to the way in which the “apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written.”⁹²

The assumption of the “sameness” of individuals which makes legal rules neutral and universally applicable is characteristic of the formal equality perspective which is, in turn, the basis for conventional liberal rights theory. In this way s. 15 promises to operate as an important exception to, and a modifying force against, the other *Charter* guarantees that represent correlates of this theoretical perspective. The open-ended language of the section, with its allusion to the existence of non-enumerated grounds of invidious discrimination that judges are invited to identify, compels the sort of pluralist inquiry that is essential when assessing equality rights in a culturally and ethnically diverse country.⁹³ This, however, is clearly an exceptional ambit of discretion that should be understood to arise out of the exceptional wording of that section.

While the wording of s. 15 compels judges to engage in a relatively wide-open interpretive exercise, that is not the case in relation to the right to vote when it is placed in the context of the liberal individualist theory that gives the clearest meaning and rational unity to most of the other *Charter* rights, and explains the existence of bills of rights in general. Furthermore, the factors that give the *Carter* decision its important pluralist spirit—all of which are cited in opposition to the principle of voting equality—could be raised in the context of a consideration as to whether the infringement of s. 3 was reasonable under *Charter* s. 1. Although this should not have saved the statutory regime under consideration in the *Carter* case, it would keep that possibility open for

liberal rights and freedoms contained in the *Charter*. As pointed out by Alan Blakeney in a interview with Murray Dobbin for the C.B.C. *Ideas* program entitled “Democracy and the Politics of Human Rights” there is no “human” right *per se* to the kinds of language, education and mobility rights that the *Charter* contains. Section 15, however, can be distinguished from the rights which reflect Canadian political realities, in that the equality guarantee is consistent with currents of contemporary human rights thought, some of which runs contrary to the spirit of conventional liberal rights.

92. M. Minow & E. Spelman, “In Context” (1990) 63 S. Cal. L. Rev. 1597 at 1601.

93. Section 15 protects against discrimination “and in particular” against discrimination on certain enumerated grounds. This structure suggests that there is a larger set of grounds of unconstitutional discrimination of which s. 15 provides a few examples. Accordingly, the Court is compelled to make inquiries as to what these grounds might be on the basis of an understanding of the characteristics that enumerated grounds seem to share. See *Andrews*, *supra* note 91.

future cases. If this suggests the prospect of never-ending litigation of electoral boundaries, the *Carter* decision has not saved us from that. By establishing an open list of factors the Court has suggested that it will entertain ongoing candidates for principles that can outweigh voting parity as a defining factor of the right to vote.

3. *The Carter Decision and the Logic(s) of Rights Analysis*

An earlier part of this discussion argued that democratic concerns about judicial review under the *Charter* would be addressed to some degree by a pattern of analysis more consistently linked to the form of deductive reasoning that attends the theory of natural rights. It was also suggested that this pattern of rationalist legal analysis is in tension with the inductive empirical method of analysis that has dominated English jurisprudence. Deductive, rationalist analysis of rights is also inconsistent with consequentialism. Consequentialist or teleological argument implies that the nature and value of a principle is relative to the consequences it produces.⁹⁴ The *Carter* case evinces an attempt to graft these inconsistent traditions together. This is a matter of concern for several reasons. One is that the inductive, empirical method of analysis undermines the very need for a *Charter*. Such reasoning implies that the *Charter*'s provisions are only a distillation of the law we already have. If that is the case, then it is not at all clear why we need a *Charter* to provide this strange outline of the themes of our existing positive law.

An inductive approach to defining the right to vote would involve a consideration of the way in which that activity has been recognized in Canadian law up until now. If applied generally, this deference to tradition would, of course, prevent *Charter* rights from acting as standards of critical comparison for our law. Such a role is the only clear rationale for constitutionally entrenched bills of rights. Notwithstanding that, and notwithstanding the fact that voting rights in Canada illustrate the most

94. Consequentialist analysis is essentially utilitarian. In utilitarian terms the morality, correctness, or justice of a particular direction of government policy (for example) is dependent upon the amount of good or happiness that it produces in relation to alternative policy choices. This, then, implies that super-legal principles or rights that have self-evident value and restrict legitimate government activity do not restrict the law, itself the reflection of these policy choices. Such rights would prevent the utilitarian calculation of the greatest good. This, then, describes the separation of law and principles of morality (i.e., rights) which is the cornerstone of legal positivism. H.L.A. Hart's work has been the most prominent articulation of this perspective in the post World War II era. See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

discriminatory aspects of our legal history,⁹⁵ the *Carter* decision is remarkable for the extent to which it reflects this kind of deference.

Early in her decision for the majority, McLachlin J. cites John A. Macdonald's non-egalitarian sentiments⁹⁶ in support of her argument as to voting parity's lack of absolute primacy for the meaning of *Charter* s. 3. This is followed shortly by the observation that "there is little in the history or philosophy of Canadian democracy that suggests that the framers of the *Charter* in enacting s. 3 had as their ultimate goal the attainment of voter parity."⁹⁷ It is not clear why the framers' intention should concern the Court in this context when it has not done so elsewhere.⁹⁸

McLachlin J. goes some way toward minimizing the extent to which this approach implies a Blackstone-type of commitment to interpreting *Charter* rights. Her Ladyship states:

This is not to suggest, however, that inequities in our voting system are to be accepted merely because they have historical precedent. History is important in so far as it suggests that the philosophy underlying the development of the right to vote in this country is the broad goal of effective representation.⁹⁹

It is respectfully submitted that the reasoning in this regard seems strikingly circular. This is because the concept of effective representation was, of course, first enunciated in this decision itself. The Court then proceeds to draw upon historical references to assist us in understanding that concept. In the passage quoted above, however, effective representation is being used to limit the significance of that historical source of its own meaning. Clearly, then, we are at the Court's mercy in our attempts to discern within the historical record those aspects consistent with effective representation—and therefore the right to vote—and those aspects inconsistent with effective representation. Many of us, for example, thought that a history of unequal voting power would be inconsistent with a *Charter* of rights that places a premium on equality.

95. See "Discrimination", *supra* note 30.

96. *Carter*, *supra* note 13 at 184.

97. *Ibid.* at 185. In his accompanying decision, Justice Sopinka makes the same point (at 197).

98. The most prominent example is probably *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. Among the issues in the case was whether *Charter* s. 7's reference to "fundamental justice" mandated substantive judicial review. In that case Lamer J. (as he then was) for the majority rejected clear evidence (testimony before the Special Joint Committee examining the text of the *Charter*) that the section was only intended to mandate procedural review. Accordingly, the judiciary has "gone substantive" ever since.

99. *Carter*, *supra* note 13 at 187.

By implicating the judiciary so deeply in our ongoing understanding of s. 3 of the *Charter*, the *Carter* decision succeeds in producing a net gain in the potential power that can be exercised by both the judicial and legislative branches of government. The judiciary will mediate our understanding of the relationship between our history and the nature of our rights, and legislatures can engage in a scope of electoral manipulation at least as broad as that which gave rise to the *Carter* case. To return to the rationale for bills of rights, as outlined in the preceding text and footnotes, they manifest a concern that the exercise of power by all three branches of government—executive, legislative, and judicial—needs to be kept in check. The jurisprudence relating to *Charter* s. 32, outlining the branches of government whose conduct is subject to *Charter*, supports this point.¹⁰⁰

The deference to legal tradition and history in the interpretation of the right to vote is, then, a strategy of analysis that conflicts with the treatment of rights as “first principles” against which the rest of the legal order is to be compared. Reasoning from first principles is essential to the theory of rights that is responsible for, and which explains the existence of, bills of rights like our *Charter*. This theory of rights is also inconsistent with the consequentialism that characterizes aspects of the *Carter* decision.

Consequentialist analysis makes these rights relative to the judiciary’s assessment of the consequences of respecting them. This undermines the tenet of rights theory that suggests that these standards have inherent value. Furthermore, this form of consequentialist analysis is precisely what s. 1 of the *Charter* is capable of providing in a manner that does not damage the logical fabric—and therefore the potential for a general understanding—of the substance of the right itself.

This aspect of the majority decision in *Carter* is subtle but significant. It arises in the context of McLachlin J.’s consideration of the conditions of effective representation and the relationship of equal voting power to that concept. Her Ladyship states:

A system which dilutes one citizen’s vote unduly as compared with another citizen’s vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.¹⁰¹

100. See M. Carter, “Non-Statutory Criminal Law and the *Charter*: The Application of the *Swain* Approach in *R. v. Daviault*” (1995) 59 Sask. L. Rev. 241.

101. *Carter*, *supra* note 13 at 183-4.

This is essentially the extent of the Court's consideration of the significance of the one person, one vote principle for the meaning of *Charter* s. 3. The decision then proceeds to consider the ways that this concern is mitigated by the benefits that the dilution of votes can bring. It should be noted, therefore, that the value of the principle of basic individual equality that voting parity supports is considered entirely in relation to the consequences attending its infringement. The possibility that it has inherent value is not considered. In fact, such a possibility is essential to the project of taking rights seriously. Clear analysis of the substance of the kinds of human rights or principles that liberal individualist bills of rights enshrine, cannot be related entirely to a consideration of their consequences. It must be seriously assumed that they have some value in and of themselves. Consequentialist analysis is only appropriate in the context of a discussion as to when limitation of those rights is reasonable.

4. *The Right to Vote as a "Qualified Right"*

The *Carter* decision suggests that the creation of unequal voting districts, an important if not conclusive indicator of an abuse of political power, is a rather unexceptional characteristic of the right to vote in this country. A clear lack of voting parity is not, as one might have expected, an exceptional side-effect or a kind of necessary evil that may attend the pursuit of some important social objectives that governments should be prepared to justify in the context of *Charter* s. 1 analysis. The fact that voting inequality is embraced by the scope of *Charter* s. 3 rather than being identified as a limitation upon the substance of that right that may or may not be justified in a free and democratic society, is of more than symbolic significance. This state of affairs makes the right to vote essentially a "qualified right," at least insofar as voting parity is concerned.

Qualified rights are those *Charter* guarantees limited by their own terms or, in this example, by the Court's interpretation of their substance.¹⁰² Such a reading of limits into the substance of a right is more common with bills of rights that do not contain express limitation clauses. The outstanding example is, again, the American one. The United States *Bill of Rights*

102. The *Legal Rights* section of the *Charter* contains a number of rights that are qualified by their own terms. Uncontroversial examples are s. 8, which guarantees everyone the right to be secure against *unreasonable* search and seizure (emphasis added). Similarly, s. 9 provides everyone with the right not to be *arbitrarily* detained. Concomitantly, therefore, everyone does **not** have a right to be secure from *reasonable* search or seizure, or non-arbitrary detention or imprisonment. *Supra* note 12.

contains no express limitation clause and, accordingly, American courts have had to identify implied qualifications in order to allow legislative restraints upon rights.¹⁰³

The effect of a *Charter* right's qualified nature is to place upon the party challenging the constitutionality of government activity the obligation to prove that it represents not only an infringement of a *Charter*-protected principle, but an unjustifiable infringement as well. In the context of the right to vote, it will be incumbent upon someone challenging unequal voting districts to anticipate which of the countervailing factors the government might point to as being served by this inequality, and to undermine that argument. As we have seen, this is an open-ended list of factors that includes, but is not restricted to geography and community of interests. The government will, of course, be allowed to defend itself from these allegations during this first stage of *Charter* review. If the challenger is successful at this stage, then the government will have a second chance to defend its actions through *Charter* s. 1 analysis. Here the onus shifts to the party wishing to uphold an infringement to establish its reasonableness on a balance of probabilities.¹⁰⁴

A closer equation of the right to vote with the principle of voting parity would lower the threshold for an infringement of *Charter* s. 3. This would bring the analysis under s. 1 more quickly, relieving the burden upon the parties with the least resources—those challenging government action—and compelling governments to be forthcoming about their rationales for creating unequal voting districts.

5. Summary

The *Carter* decision presents an ironic spectacle. It suggests that the Court is engaging in the apparently democratic practice of deferring to our representative institutions. It does so, however, in relation to conduct that threatens the representative nature of those institutions. We may be glad to see that our courts are prepared to strike this deferential attitude. If it has a place in this situation, however, it is in the context of s. 1 where non-rights-based analysis can be undertaken without jeopardizing the logical structure of the substantive rights and, therefore, the public's ability to understand them.

This suggests, then, that the deference shown to the legislature in the *Carter* case, though commendable in its own way, is misplaced.

103. Hogg, *supra* note 56 at 669.

104. *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927.

Furthermore, the attempt to characterize this position as one that flows logically from the nature of the right compels the Court to abandon the clear principle that would have made s. 3 most consistent with liberal rights theory. The *Carter* case was a rare moment in the history of the *Charter*'s interpretation when the interests of majoritarianism and a determination to "take rights seriously" (as Professor Dworkin would have it) coincided. In the result, both of these interests lost out. This compromised the rational fabric of *Charter*, and failed to facilitate the democratic project of making the meaning of this part of the constitution more obvious to the citizenry and less relative to the judiciary's latest pronouncement.

IV. "Noisy" Gerrymandering: Attending to Intention

The introduction to this article identified the partisan-motivated creation of unequal vote districts as a kind of gerrymandering that is of more concern than the incidental production of the same results. The lack of judicial attention to this issue before the late 1980s, and the lack of focus upon it in the *Carter* case itself, has left a lacuna in Canadian legal thought with respect to such distinctions. This lacuna could be filled in such a way as to bolster *Charter* s. 3's ability to operate as a restriction upon the most offensive forms of gerrymandering while at the same time allowing future courts to distinguish, rather than reverse, the *Carter* decision.

As compared with the relative novelty of the subject in Canada, voting rights litigation is well enough established in the American context that clear patterns can be discerned in the case law. Bernard Grofman identifies two major categories of issues in this area. The first relates directly to the exercise of the franchise. The case law in this area concerns such issues as barriers to registration and voter intimidation. Gerrymandering falls within the second major category, identified by Professor Grofman as vote dilution. The American experience has given rise to three streams of case law in this regard: a) racial vote dilution; b) partisan gerrymandering; c) one person, one vote.¹⁰⁵

The first of these categories relates to concerns about electoral boundaries that dilute the voting strength of a concentration of electors who are members of a racial minority group. This is a matter of particular concern when the number of electors is significant enough that they might otherwise succeed in electing a candidate who represents their interests. As applicable as these concerns are to the Canadian context, they do not

105. Grofman, *supra* note 11 at 156-7.

address the issues that were at large in the *Carter* case as directly as the other two categories. Like the racial vote dilution category, partisan gerrymandering can embrace situations where relative voting power is maintained amongst electoral boundaries. However, in the context of partisan gerrymandering, those boundaries are drawn in order to achieve a strategic political goal. In the racial dilution example, the goal—or at least the effect—of electoral boundary drawing is the defeat of candidates who would represent minority interests. The goal of partisan gerrymandering is to capture pockets of support for a political party that would otherwise be “lost” within an electoral map that was drawn without partisan considerations.

Finally, it is the one person, one vote category of vote dilution that is most clearly engaged by the *Carter* case. Within this category the American case law on point is dominated by a concern for a particular variant of this kind of vote dilution, also mentioned in the introduction of this article: silent gerrymandering. Silent gerrymandering arises when states have failed to redraw electoral districts in response to census data suggesting, for example, that migration to cities has effectively bolstered the power of rural votes and that it is time for voting districts to be readjusted accordingly.¹⁰⁶ This demographic pattern is central to the Canadian case law in this area as well. For example, along with the *Carter* case, *Dixon v. British Columbia (Attorney-General)*¹⁰⁷ and *Re Electoral Boundaries Commission Act (Alta.)*¹⁰⁸ both involved conservative governments in British Columbia and Alberta respectively, attempting to shore up their traditional support from a shrinking rural electorate.

Returning to the issue of intention, its importance in the American context relates primarily to the categories of racial vote dilution and partisan gerrymandering. As discussed above, these kinds of electoral boundary manipulations are not necessarily reflected in vote inequality between districts. Accordingly, intention is more of an issue because without it, the negative consequences of such conduct are less tangible and less clearly offensive to democratic principles than the inequalities which attend one person, one vote dilution. To generalize upon Professor Grofman’s analysis, the case law suggests that proof of intent to commit these forms of vote dilution is necessary in order to establish a constitutional violation. Accordingly, the case law on point establishes various tests for satisfying the burden of proving intent.¹⁰⁹

106. *Ibid.*, at 158. For case law on point, see *supra* note 7.

107. (1989), 59 D.L.R. (4th) 247 (B.C.S.C.).

108. (1991), 86 D.L.R. (4th) 447 (Alta.C.A.).

109. Grofman, *supra* note 11 at 164.

In the context of one person, one vote litigation, however, the sole fact that electoral boundaries are established in such a way as to give more weight to some electors' votes establishes a *prima facie* case of constitutional infringement. Furthermore, although somewhat separate standards have developed in relation to state legislative and congressional elections respectively, American law is considerably less tolerant of deviations from the principle of equal voting power than is the case in Canada after *Carter*. Permissible variations from the number of electors in a district that would satisfy absolute vote equality have been generally restricted by the Supreme Court to 10% and never allowed above 16%. Professor Grofman identifies the one person, one vote jurisprudence as a settled area of American election law, "the very model of mechanical jurisprudence."¹¹⁰

In her decision for the majority in *Carter*, McLachlin J. characterized the American emphasis upon equal voting as "radical" as compared to the "pragmatic" Canadian approach to the matter in the pre-*Charter* era.¹¹¹ It is extraordinary that the majority decision expresses surprise at the notion that the *Charter* demands a reconsideration of the law in this area. This relates to points made earlier as to the Court's lack of consistent regard for the fact that bills of rights only make sense if they are assumed to be vehicles for critically analyzing the legal landscape, rather than framing the one that already exists. Furthermore, the idea of the *Charter* as a force for change is one that the Court has not hesitated to embrace in other areas of the law. Judicial *Charter* review in the criminal law area provides many examples.¹¹² It is interesting as well that the majority justifies its rejection of the possibility that the right to vote enshrines the principle of vote equality by saying that this would demonstrate an intention to "adopt an American model." The Court fails to consider the possibility that the

110. *Ibid.* at 159.

111. *Carter*, *supra* note 13 at 185.

112. A few well known examples include: *R. v. Oakes* (1986), 50 C.R. (3d) 1 (S.C.C.), holding that s. 8 of the *Narcotics Control Act*, R.S.C. 1985, c. C-47, represents an unreasonable infringement of *Charter* s. 11(d); *R. v. Swain* (1991), 63 C.C.C. (3d) 481 (S.C.C.), holding that the common law rule that allows the prosecution to adduce evidence of an accused person's insanity, against that person's wishes, is an unreasonable violation of *Charter* s. 7; *R. v. Martineau* (1990), 79 C.R. (3d) 129 (S.C.C.), holding that *Criminal Code* s. 230, the "constructive murder" provision, in particular section 230(a), is an unreasonable infringement of *Charter* sections 7 and 11(d), by removing from the Crown the obligation to prove that an accused person had subjective foresight of death; *R. v. Daviault* (1994), 33 C.R. (4th) 165 (S.C.C.), holding that common law restrictions upon the defence of intoxication is an unreasonable infringement of *Charter* s. 7; *R. v. Heywood* (1994), 34 C.R. (4th) 133 (S.C.C.) holding that *Criminal Code* s. 179, the vagrancy provision, violates *Charter* s. 7 and is not saved by s. 1.

Americans have embraced a principle that makes the most sense in the context of the kind of individual rights analysis that constitutionally entrenched bills of rights impose.

The “silent gerrymandering” that led to the United States Supreme Court’s decision in *Baker v. Carr*¹¹³ was achieved by inactivity on the part of the government. By comparison the legislative agenda initiated by the government of Saskatchewan that was destined to result in a similar advantage for rural electors, was very noisy. Accordingly, we do not risk mimicking the Americans’ “radical” example by trying to ensure that our constitutionally enshrined right to vote is not radically ambivalent to extreme examples of anti-democratic political manoeuvring. Unfortunately, the *Carter* decision provides no guidance in this regard.

It is suggested that evidence of intention—real or constructive—should have a clear place in Canada’s jurisprudence relating to electoral boundaries and the *Charter*. If our courts were receptive to arguments as to governments’ intention to pursue partisan advantage by manipulating electoral boundaries, then the Supreme Court’s desire to establish a less radical approach for Canada, as compared with the United States, in relation to electoral boundary manipulation, would still be satisfied. As compared with the Americans’ sweeping concern for all lack of voting parity, Canadians would focus constitutional attention only upon those examples of this phenomenon most clearly consistent with the realization of partisan political advantage.

As suggested above, in the American context intention to dilute votes does not have to be proven in relation to one person, one vote cases. This means that American constitutional law is capable of addressing all situations where such intention actually *does* exist, and those where it does not but the effect is the same. In Canada we may be more willing to accept some of these unintentional non-egalitarian effects of electoral boundary manipulation. Surely, however, such toleration should not extend to situations where the evidence suggests, on a balance of probabilities, an intention to dilute votes for partisan purposes. This is the case even if that partisan intention should happen to coincide with certain hypothetical “countervailing factors” (which, on the facts of the *Carter* case, were not clearly made out). In this regard, the Canadian approach, with its narrower focus of constitutional concern, emerges as a more modest—less “radical”—approach to gerrymandering, but one that is still clearly opposed to that practice.

113. *Baxter*, *supra* note 7.

It might also be suggested that, even when evidence of intention to gerrymander falls short of a balance of probabilities, the fact that partisan benefit would result from a proposed re-drawing of electoral boundaries should have some effect on the permissible variation issue. For example, if a variation from the electoral quotient of $\pm 25\%$ is reasonable when countervailing factors are well made out, it is less reasonable when the electoral boundaries being proposed would also result in a windfall for the party in power.

It is submitted that this attention to the issue of “intention,” which has a place in American election law, would allow the Canadian constitution’s guarantee of the right to vote to provide a more satisfactory bulwark against gerrymandering than the *Carter* decision seems to allow. Having said that, to the extent that the Court in *Carter* did not address the intention issue, this approach may be seen as a refinement of that decision, rather than a repudiation of it.¹¹⁴

Conclusion

This analysis of the *Carter* decision has emphasized its failure to correspond to the theory of rights most appropriately applied to bills of rights like the *Charter*. It is suggested that closer adherence to this theory by the judiciary would go some way toward addressing concerns about the democratic legitimacy of judicial review and *Charter* interpretation. In the specific context of voting rights, the recommendation of this theory of interpretation serves another purpose as well. It provides a means for addressing the kind of partisan political manoeuvring by governments that led to the *Carter* case. Gerrymandering activity is uniquely threatening to the citizenry’s ability to call the ruler to account. This is the democratic practice that the strand of liberal theory that inspired bills of rights is supposed to protect. Therefore, an ability to establish a meaningful line of defence against this kind of abuse of power by a government is essential to the legitimacy of the *Charter* as a whole.

The *Carter* decision does not address the issue of gerrymandering directly. This omission may in fact work in favour of those who are concerned about this kind of activity. As suggested in the discussion of

114. I am distinguishing my point here from the good one that is made by R.E. Fritz in “The Saskatchewan Electoral Boundaries Case and Its Implications,” where he suggests that a reconsideration of the electoral quotient would require the Supreme Court to readdress the question as a *tabula rasa*. In J. Courtney, P. MacKinnon, & D.E. Smith, eds., *Drawing Boundaries: Legislatures, Courts, and Electoral Values* (Saskatoon: Fifth House, 1992) 70 at 86.

noisy gerrymandering, it might be argued that the Court has not yet ruled on the issue of “intention” to dilute votes. This is particularly the case in situations where evidence of that intention, objective or otherwise, satisfies a civil standard of proof, or where intention can be inferred from an electoral windfall that a governing party would receive as a result of vote dilution.

These lines of argument do not provide an assured route to better constitutional protection for equal voting power and a concomitant defence against gerrymandering. What they do suggest, however, is that given a sympathetic climate of judicial opinion, the legal materials exist for success in this regard.