

LAW AND THE SPIRIT: *Thoughts on the* CANADIAN CONSTITUTIONAL REVOLUTION

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Introduction

The apostle Paul was the great critic of legalism in the early church. He hated hypocrisy and the notion that adherence to the law gained one his or her salvation. In the eighth chapter of Romans, he writes, "through Jesus Christ the law of the Spirit of life set me free from the law of sin and death." Paul does not oppose law to the spirit here. Paul did not propose the repeal of the law but its fulfillment. The law has goodness. And the Two Great Commandments are both points of the Mosaic Law.

But the Law without the Holy Spirit was a form of bondage to sin and death. Law without the Spirit is a legalism associated with all manner of sin: hypocrisy, envy, jealousy, pettiness, debauchery, sexual immorality, licentiousness, and so on. Paul's teaching has obvious application to believers. But there is also an important sociological truth in this passage: it is the spirit in which law is understood, applied, and obeyed that is most instructive, most telling of a people.

The law, after all, in strict terms is a collection of words on a page, not self-interpreting, not self-applying, and whose meaning rarely attracts universal agreement. If law was all there was, judges would be technicians, and any court of appeal would need only one member. The law is always embedded in a certain spirit or culture of a people. This is important because we are sometimes quick to conclude that the problem with the law is the particular clique of personnel charged with applying it. We sometimes refer to the judges as a class of elites whose views of rights are at odds with those of the great mass of Canadians, the silent majority. There is some evidence for this, but it is not conclusive.

This paper is about changes to the nature of Canadian constitutionalism. Constitutions are, at bottom, statements of political and moral principle. These principles constitute a regime. The text of a constitution is secondary to these more basic principles. Words on a page do not interpret themselves. They are too general and vague. They are interpreted and applied in particular cases and by particular courts staffed by particular personalities. Those personalities in turn are members of particular polities at particular times and they are sensitive in their decision-making to maintain citizens' confidence in the administration of justice. Hence the principles of the regime ultimately drive the text of the entrenched constitution; it is not the other way around. Rights documents should be given no more importance than they deserve.

The Canadian constitutional revolution predated the entrenchment of the Canadian Charter in 1982, and indeed potent cultural and political forces active before then fueled the movement to entrench the Canadian Charter. It is thus inaccurate to blame Pierre Trudeau for the Charter and the changes it apparently produced in Canadian society. It is wrongheaded to assume that the particular members of the Supreme Court of Canada are to blame. Merely changing personnel will probably not alter a great deal. Indeed, it is wrongheaded to think that in the absence of the Charter, Canada would look qualitatively different than it does today. We need to look deeper, to more profound cultural currents to which Charter rights and "suitable" judicial nominees are linked. There is much truth to the view that the "Court Party" of a particular ideological stripe dominates access to the Supreme Court of Canada and crowds out alternative interpretations of Charter rights.¹ But even Morton and Knopff's Court Party thesis is based on an assessment of changing cultural currents in Canadian politics and

society.

It is not the law primarily, but the *spirit* of the law, the spirit in which the law is interpreted, applied, and obeyed, that is most telling of a people. And that spirit has changed in this country, in ways that are complex, sometimes disturbing, and in any case in need of careful attention. This paper will trace the major elements of the constitutional revolution in Canada.

Canada's constitutional revolution

A revolution is a moral overturning of a polity, a re-constitution of its principles. It is re-orientation of the moral compass of a political community. A successful revolution will transform the worldview of the people. It may be led by an elite of confident, all-knowing agents, but a revolution will penetrate the hearts and minds of the population generally. In this respect, a revolution is much more than a *coup d'état*. A revolution is not merely about the occupants of political or legal office; it is about the forces causing us to define words differently and understand relationships differently. A revolution defines what is legitimate, 'politically correct,' to do and say.

The elements of the revolution are the following:

1. Charter values

The Charter is just a collection of words on a page. What are more important are those things that have come to be called "Charter values."

My first encounter with Charter values was in 1986 *Dolphin Delivery*² case. The constitutional issue there was the application of the Charter to private conduct via the common law. The Court had a hard time with the matter because it approached the issue in terms of an older conception of constitutionalism in which charters of rights are designed to bind or limit governments. The older view was that government, while necessary guarantors of order and peace, are nonetheless dangerous because of the panoply of power at their disposal. The potential for excessive and arbitrary state action necessitated an institutional check – judicially-enforced limits on governmental power. In this understanding of the purpose of a constitution, the Charter should not apply to the common law as it regulates private relations among non-governmental actors. Constitutional rights, in this view, limit government, not private actors. The Charter should govern only state action taking the form of legislation or administrative conduct by state agents.

The Court decided in *Dolphin* that the Charter shall not apply to the common law but it shall interpret common law principles in light of "Charter values." Specifically, wrote Justice McIntyre for the Court, "Where...private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative."³

Since then, the court has taken the concept of Charter values to places formerly barred to constitutional review. Now the common law is essentially subject to Charter standards.

What are Charter values? *R. v. Oakes* (1986) sets out one of the few full statements. In setting out the section 1 test the Court said:

*The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.*⁴

Two points are in order here. The first is that this list is neither comprehensive nor determinate. As presented, we are given a list of incommensurables, general values whose relation to one another, whose relative importance, is undefined and perhaps unknown. How each value operates in particular

cases is left to be determined. The principles' very vagueness resists consistent judicial application from case to case. So while Charter values such as these are the standards increasingly guiding judicial application of the Charter, we do not know how they apply and what particular meaning and importance they assume in particular cases. It is hard to resist the conclusion that Charter values require the courts to incline away from black-letter legal standards and toward decision-making based on moral and social and political ideas.

The second major point is that the Court is concerned that Charter values increasingly prevail throughout Canadian society, in all manner of human activities. An older view of constitutionalism, mentioned above, was that a written Charter binds government. According to a new understanding of constitutions, Charter values should permeate society. The Charter, in this view, is a canonical statement of the principles of the regime; it is not a documents whose provisions limit governments. When the Supreme Court decides, as I think it will, that same-sex marriage is what the Charter requires for Canada, the real issue will be whether churches and other religious institutions will be able to retain their freedom to refuse to marry those whom the courts have declared have a right to marry. Under the new constitutionalism, court-elaborated values shall prevail throughout Canadian society, including its myriad civil associations.⁵

2. Equality

Some statement of human equality inheres in the very idea of liberal democracy. Political philosophers phrase it as the absence of any particular person's or group's natural right to rule. In the law, a basic civil liberty has always been before the law, that is, the right to the equal administration of laws. Equality in this sense is the right against arbitrary state administration of laws. Equality before the law does not guarantee equal substance of laws. All laws create distinctions, applying to some and not others. We select particular punishment for murderers. We provide employment insurance benefits only for those meeting certain criteria. But the courts have come to understand that equality before the law would be consistent with a law that singled out a racial or ethnic group for internment, indefinite detention, expropriation, or any other maltreatment. Equal administration of laws did not reach the substance of laws, and this became a matter of post-war reform.

Equality in the post-World War II period acquired a more substantive meaning, according to which legal equality increasingly meant that the state shall not draw irrelevant distinctions between people for purposes public policy. Now, equal benefit of the law and equal protection of the law exist alongside equality before the law as constitutional standards. Section 15 of the Charter is concerned with the monitoring of the state's distribution of benefits, and the courts are constantly faced with challenges to laws that are alleged to be underinclusive of the goods the states metes out to particular beneficiaries. When government acts, it must act in conformity with Charter. When it distributes a benefit, it must do so in a manner consistent with equality. Withholding a benefit can be unconstitutional.⁶

Further, equal distribution of benefits is just not about money. It is about dignity and recognition – equal subjective affirmation of different identities and lifestyles. In *Egan* (1995)⁷ underinclusivity of spousal benefits under the Old-Age Security Act was at issue. Common law heterosexual couples were entitled to it but common law same-sex couples were not. A narrow majority denied Egan's claim. Justice Peter Cory's dissent soon became the Court's position on these matters, and his view of s. 15 equality analysis has since become judicial orthodoxy. He wrote at one point in the case:

*The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them even though no economic loss is occasioned.*⁸

It was not only about the money. It was a about a moral principle of recognition, a court-mediated social validation of the morality of people's choices.

In *Vriend*,⁹ the Court's majority noted that the Alberta Human Rights legislation, in failing to include sexual orientation in the list of prohibited grounds of discrimination, amounted to Alberta public policy signaling to Albertans that it was acceptable to discriminate against gays and lesbians. Further:

Perhaps [the] most important [harm of the exclusion] is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.¹⁰

My point here is not that human rights legislation should not include sexual orientation in lists of prohibited grounds of discrimination regarding employment or tenancy. It is rather that the constitutional idea of equality has moved into a political economy of recognition, affirmation, self-esteem, and dignity defined as self-worth. The courts now are the guardians of the politics of the self and the self's estimation of its worth. One author calls this the politics of the "therapeutic constitution."¹¹ Of highest importance in the therapeutic state is that the self is affirmed in its acts of self-definition. What the self intrinsically is does not matter; others' affirmation does.

Liberal societies have policed the borders between state and society, between the public and private realms, generally by reference to John Stuart Mill's "harm principle."¹² In his famous formulation, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." The law can restrain my liberty only to the extent that the exercise of my liberty may bring others to harm, against their will. This seems like a reliable, manageable standard of but its chief failing is the very elasticity of the concept of harm. When one's sense of esteem can be harmed by the action or inaction of the state, then the principle loses all cogency. In cases where state inaction can bruise one's sense of self, then the remedy can only be more state intervention. And when so many things can plausibly be said to affect one's subjective sense of self, then the reach of the state is well-nigh limitless. It means that the state acquires the responsibility to repair our fragile egos when so many slights, insults, rebuffs, and failures to affirm can occur. The care of the self grants the state a political blank cheque.

There is irreducible conflict of moral principle here. Some Canadians believe one's dignity is founded in one's status as a creature of God. God's affirmation is what imparts dignity. The now-institutionalized alternative view is that this dignity is a more free-floating matter emanating from within, found in one's creative capacity to define oneself. In this second conception what is needed is the affirmation of others. So the courts become our moral teachers, telling us whom to approve and disapprove.

3. Tolerance

Liberal societies are founded on tolerance of diversity. In liberal democracy's beginnings in the period following the Reformation, it was the freedom to worship God according to the dictates of one's faith that was the core of liberal toleration.

But a crucial distinction is suggested by William Galston.¹³ One concept of diversity is to *put up with* another, despite basic, fundamental disagreement. Tolerance here presupposes basic difference in moral principles and views of the world. The liberal philosophical achievement historically has been to foster a sense of toleration precisely in the face of deep philosophical, theological, and moral differences among members of society.

A newer conception of toleration, however, as William Galston argues, calls for the acceptance, celebration, and approval of others' diverse views. On the one hand it is more demanding because it requires us to affirm others despite deep differences. But on the other hand, as a matter of practice, toleration as celebration propels us toward a flattening of moral differences. For the way to assure the popularity of tolerance-as-celebration is to produce the conditions making it easy to approve of others. That means the offensive things in others' ways of life must be dulled or extinguished altogether. As a political matter, this concept of toleration has developed alongside a movement to diminish the moral distance between disparate communities.

4. Diversity

Toleration is related to diversity. Our society now prizes diversity and we think our diversity positions us for globalized economic competition. In a diverse society, one is led to think there is room for the eccentric, the odd, the aberrant.

Canadian “multiculturalism” is big on openness to ethno-linguistic diversity but less enamoured of ethical diversity. Much recent scholarship devotes itself to an argument for the conditions under which liberal democracies thrive and one answer is that a common morality - cloaked if necessary in the garb of “neutral” rights – must be fostered among citizens. Consider the following remark in a recent American study: “Politics cannot ... leave religion to one side: it cannot leave the soul alone and care only for the body, for our deepest moral and spiritual commitments need to be shaped in accordance with political imperatives.”¹⁴

What are those political imperatives? Among them is certainly the cultivation of habits of tolerance and moderation. Otherwise, religious, ethnic, and ethical diversity may lead to disorder and violence. But political imperatives usually aim higher than this. Here Charter values enter. Charter values are concerned not simply with habits of moderation and tolerance in the traditional sense described above, but with the application of a set of norms in all areas of one’s life.

A recent American case illustrates the point. In *Catholic Charities of Sacramento v. Superior Court et al.*,¹⁵ the California Supreme Court decided that a Catholic social service agency should be required to make available to its employees an insurance plan that includes access to prescription contraceptives, a public policy conflicting with a social teaching of the Catholic Church. The law requiring the provision of contraceptive coverage in plans providing prescription drugs created an exception for “religious employers” but these were defined as entities involved in proselytism, and excluded entities involved in religiously-motivated good works (a proposition some justices of the Court were unwilling to embrace). The majority of the Court acknowledged that the incidental effect of the requirement is to abridge the religious freedom of the Catholic Church but that the law is neutral requirement of general application and burdens every employer. Neutrality here as elsewhere is very much a matter of perspective. The decision leads one to wonder what other public, “neutral” obligations religious entities will be required to discharge in future.

Roots of the Revolution Go Deep

The political imperatives informing the remaking of the soul are related to value change among Canadians. This is complex issue, the aspects of which many people disagree, but one brief insight into the matter is provided by pollster Michael Adams, whose recent book¹⁶ attempts to describe the contours of Canada’s new cultural landscape.

It was once thought that Canadians and Americans were different in important respects; Canadians were more conservative, deferential to traditional authority, risk-averse, even fatalistic, than Americans. Canadians did not pit themselves in an opposing relation to the state. The Canadian dominion, in important respects, preceded the Canadian “people” and was often regarded more as a protector, and underwriter of our various projects, than an antagonist. The Americans, inheritors of a revolutionary break from British rule, committed to the conquest of nature for the sake of creating growth and opportunity, are less deferential, hierarchical, and fatalistic. This was the theory of Canadian-American divergence.¹⁷

Then came the theory that the advent of the Charter would propel Canada onto a path of convergence with the United States, both countries becoming increasingly “rights-conscious” and individualistic.¹⁸

Adams offers a post-modern recasting of the divergence thesis. He suggests that Canada-US differences are widening and that *Canadians* have become the social revolutionaries, increasingly committed as they are to individualistic self-fulfillment, autonomy, and distrust of institutional authority. Canadians are interested in “post-materialist” values like equality, environmentalism, diversity of lifestyles, flexible approaches to social and family relations, and general improvement of the self. In these respects Canadians are increasingly homogeneous, notwithstanding official rhetoric about

diversity and multiculturalism. This is a generational phenomenon, not a life-cycle phenomenon. And it is also not a national phenomenon, transcending otherwise tenacious regional differences in Canada.

Meanwhile, Americans are increasingly polarized between a large group of traditional types deferential to authority and received institutions on the one hand, and on the other a growing, demographically young group that is socially disconnected, anomic, and increasingly interested in attaining individual goals by competitive means with less and less regard to existing social rules and conventions.

Canadians, in Adams's portrait, are increasingly European in their sensibilities, and homogeneous in their social attitudes. It is perhaps not surprising that a recent survey indicates that 11% of Canadians regard religion as the most important part of their identity, third behind language and ethno-cultural characteristics.¹⁹ In their waning religious attachments, Canadians resemble Europeans to an increasing degree, while the levels or reported religiosity in the U.S. continue to mark it as exceptional among advanced democratic societies.

In light of these trends, it is not surprising that the country is on the verge of official affirmation of same-sex marriage, making Canada one of the very few jurisdictions in the world, behind, at time of writing, the Netherlands, Belgium, and the American state of Massachusetts.²⁰ Four years ago, in 1999, the House of Commons considered a motion to affirm the heterosexual definition of marriage; that motion passed 216-55. In September, 2004, a similar motion failed 137-132, even after the motion's sponsor disavowed use of the notwithstanding clause of the Charter to uphold the definition in the face of a contrary judicial holding.

Public opinion is split on same-sex marriage with younger Canadians more in favour of it, meaning time is on the side of proponents of change to an age-old institution. Opinion leaders in the media and government are highly in favour, as well. The matter is before the Supreme Court of Canada in a reference submission by the federal government and it is hard to imagine that body *not* endorsing the same-sex option. Consistent with the post-materialist flexibility for which Canadians are increasingly known, a justice of the B.C. Court of Appeal expressed in the language of constitutional law what is becoming a cultural mainstay. Madam Justice Prowse declared that for constitutional purposes marriage as a head of power granted to the federal government under the Constitution Act, 1867 has no fixed meaning and must be updated in step with the evolution of Canadian society.²¹ What George Weigel says of the US law applies here too: "If the supreme liberty right of the constitution is the unfettered expression of sexual autonomy, then on what constitutional grounds are we to 'limit' marriage to the stable union of one man and one woman? Why not two men? Indeed, why not any reasonably stable configuration of consenting adults, of whatever sex and number?"²²

Similar trends are evident in the abortion issue. In the mid-1980s the Supreme Court of Canada upheld criminal prohibitions of abortion-on-demand. But the Charter's entrenchment gave institutional expression to a rising wave of public opinion in favour of freer access to abortion. And the Court obligingly struck down (admittedly on narrow, procedural grounds) Canada's abortion law in 1988. What was a defense of the law protecting unborn human life has now become a defense of the ability to protest the taking of unborn human life. Canadians are reduced to arguing for Charter rights to be able to demonstrate against the practice and refuse to conduct or participate in abortions on conscientious grounds, and to refuse to pay out of their taxes for abortions at the request of pregnant women. Never mind having a law affirming the humanity of the unborn. Pro-lifers now face concerted action to remove from the public square criticism of the institutionalized abortion movement.

What to do?

Three unattractive options present themselves. One is to allow the logic of a secular culture to work itself out so that those who make decisions consistent with the culture of the autonomous self fully reap their consequences. This is a sort of negative evangelism, drawing attention to the consequences of the law of sin and death. This option, however, ignores the thrust of the Gospel, namely to be agents of mercy, healing and brotherly care. No one would allow his or her brother to suffer, regardless of the folly of the choices causing that suffering.

A second option is to call Canadians to their roots, under the principle that Canada is a Christian

nation. This is the populist assertion of voice of the people against decadent elites. But the premise here is misplaced. Canadian culture is changing. If Canada ever was “Christian” – and it would be important for proponents of this view to spell out exactly what is meant by “Christian” in this context – it no longer is. Reconstructionist missions are politically and morally dubious. You can’t call people “home” when they have changed their address. It is misguided to use political means for what is essentially an ecclesiastical mission.

A third option is to withdraw behind the walls of a fortress of home or church. This is born of an understandable confusion, bewilderment, even despondency about the world. But this option means that believers have no influence over events. And it is contrary to the thrust of the Gospel in any event. Remember the teaching that Jesus’ disciples shall be salt and light.

Four more constructive options present themselves. The first of these is to challenge state-imposed secularism. Ideologies have most of the features of religious beliefs. There is a contest of visions. It is not the case that a neutral state is setting the rules for the marketplace competition of religious and moral ideas. Christians should protect their freedom to preserve integrity of Christian life, devotion, and community in a secular culture. And they should stand beside other faiths in the same task. For example, act for churches, synagogues, mosques, and Sikh temples to be able to refuse to marry homosexuals; act to be able to refuse to perform or assist in performance of abortions based on one’s religious beliefs; act to retain religious schools, and act to uphold the dignity of the poor, disabled, imprisoned, the lonely and unloved.

Second, work to transform Canadian culture. There is ample evidence to show that those who are religiously committed and serious throw themselves into civic engagement and social action and neighbourly service. They give more to charities and good works. They rely less on the state because they are healthier, stay out of jail, avoid addictive behaviour, stay married, have children who do not experiment with illicit drugs, and so on. In many ways the continued health of our society depends on the horizontal social obligations of believers. Imagine the shape and vitality of Canada’s social and charitable infrastructure if religious believers were instantly removed. Part of the secret of believers’ effectiveness in these areas is their refusal – even inability – to observe liberal distinctions between body and spirit when ministering to others.

Third, work for a more pluralistic approach to public policy, not the pseudo-pluralism of a society that praises multicultural diversity but which seeks at the same time to inculcate a uniform set of values in all citizens. A pluralist approach will take ethical pluralism seriously and work out the space for people to practice their beliefs. Go for co-existence, not deep community. This raises very difficult issues requiring the greatest wisdom. For some beliefs are positively harmful to all persons. Does the support of religious freedom for Christian believers require the support of religious freedom for other believers to engage in animal or human sacrifice, the ingestion of hallucinogens, the practice of polygamy? On what principled basis shall religious and ethical diversity yield to laws of general application? Tough questions, but it is necessary that they be addressed straightforwardly.

Finally, take the debate away from “rights talk.” This is the language of demand and insistence. It resists compromise and drives people apart rather than to circumstances of accommodation. It also conflates matters of fundamental rights with much more obvious political claims dressed up in legal language to give them the imprimatur of objectivity and unassailable legitimacy. Rights talk is fundamentally philosophical laziness, a type of assertion rather than argumentation. The sooner we depart from rights talk, the sooner we reach the truly important matters of life in a pluralistic society.

Our Responsibility

This is a sobering analysis. There is no point being flippant or a Polly-Anna in the face of cultural forces that are confusing, alienating, and dispiriting.

Fortunately, our vocation is merely to be obedient. We can leave success and victory to God who works through his flock. To be faithful, obedient, pure in heart, innocent as doves, wise as serpents, loving in demeanor – this is our job. Victory and the extension of the Kingdom – that is God’s job. □

Endnotes

1 F.L. Morton, and Rainer Knopff, *The Charter Revolution and the Court Party*. (Peterborough: Broadview Press, 2000).

2 *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

3 *Ibid.*, 603.

4 *R. v. Oakes*, [1986] 1 S.C.R. 103, 136.

5 See Thomas M.J. Bateman, "Rights Application Doctrine and the Clash of Constitutionalisms in Canada" *Canadian Journal of Political Science*. 31:1 (March, 1998), 3-29.

6 This is what is happening in the definition of marriage. Social reformers argue that the benefits associated with public recognition of marriage – social validation, moral legitimacy, and so on – are meted out to opposite-sex couples but denied same-sex couples. Crucially, the argument is that there are no relevant differences between the two social arrangements justifying the distinction. State sanctioning of marriage as a result is alleged to be underinclusive of same-sex couples.

7 *Egan v. Canada*, [1995] 2 S.C.R. 513.

8 *Ibid.*, 594.

9 *Friend v. Alberta* [1998] 1 S.C.R. 493.

10 *Ibid.*, para. 102.

11 See James Nolan, 1998, *The Therapeutic State: Justifying Government at Century's End*. (New York: New York University Press, 1998), discussed in Anthony Peacock, "Judicial Rationalism and the Therapeutic Constitution: The Supreme Court's Reconstruction of Equality and Democratic Process under the Charter of Rights and Freedoms," in Patrick James, et al, eds., *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada*. (Montreal-Kingston: McGill-Queen's University Press, 2002), 17-66.

12 John Stuart Mill, *On Liberty*. [1859].

13 *Liberal Pluralism: The Implications of Value Pluralism for Liberal Theory and Practice*. (Cambridge University Press, 2002).

14 Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Society*. (Harvard, 2000), 30

15 (2004) Opinion No. SO99822.

16 *Fire and Ice: The United States, Canada, and the Myth of Converging Values*. (Toronto: Penguin, 2003)

17 A seminal essay on this is Gad Horowitz, "Conservatism, Liberalism, and Socialism in Canada: An Interpretation," *Canadian Journal of Economics and Political Science*. 32 (1966), 143-171.

18 Seymour Martin Lipset's *Continental Divide: The Values and Institutions of the United States and Canada*. (New York: Routledge, 1990) insisted in continuing Canada-US cultural differences but noted that they might be declining and that the entrenchment of the Charter is part of the reason. "By enacting the Charter, Canada has gone far toward joining the United States culturally." *Ibid.*, 226. A profounder analysis of continental convergence – indeed the convergence of all societies under the influences of liberalism and technology, is George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism*. (Toronto: McClelland and Stewart, 1965). A more riveting analysis is Grant's *English-Speaking Justice*. [1974] (Toronto: Anansi, 1985).

19 Association for Canadian Studies, "What is Most Important to Our Identity?" Accessed at <http://www.acs_aec.ca/Polls/Poll30.pdf> May 25, 2004.

20 Three Canadian provinces, Ontario, B.C., and Quebec, currently issue marriage licenses to same-sex couples, pursuant to provincial court of appeal judgments.

21 *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 25, paras 59-72.

22 George Weigel, comment in 'Has the Supreme Court Gone Too Far? A Symposium' *Commentary* (October 2003). Available at www.commentarymagazine.com.

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