Charter Creep: Creeping Precommitment and the Threat to Liberal Republicanism

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At the heart of constitutionalism lies a fundamental flaw, what Holmes (1988) calls the paradox of democracy. On the one hand, the constitutional entrenchment of certain fundamental rules and values represents a restriction upon the ability of otherwise self-governing citizens to govern themselves. As Hume (1994 [1741–42]) noted in criticism of the Lockean social contract, and as Jefferson argued in his *Notes on the State of Virginia* (1853[1781] 130–35), constitutionalism imposes the values of long-gone generations onto those currently living—embodying that which Locke (1974 [1689], ch. 6: 65) proclaimed to be illegitimate: the father alienating the liberty of the son. Indeed, the very logic of constitutionalism represents the triumph of the dead in governance of the living (Holmes, 1988: 199–205).

On the other hand, absent the entrenchment of fundamental rules and values, self-governance becomes a precarious proposition. There are two fundamental problems with unfettered self-governance. First, without constitutional constraints, citizens are vulnerable to the despotic impulses of those whom they choose to govern them. The citizenry must variously choose between relying upon the ability of leaders to be sufficiently enlightened to recognize what Cicero (1913, bk 3) saw as the harmony of their private interests with the greater good or remaining sensitive to the encroachments of would-be despots to the point of risking periodic bloody conflict (Machiavelli, 1975 [1499], bk. 1:6) or to capitulating to despots in the name of preserving the social peace (Hobbes, 1976 [1661], ch. 17–20).

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Second, a self-governing citizenry is vulnerable to inability to act consistently in its own best interests. Self-governing citizens are susceptible, in other words, to socially akratic preferences.[1] Akrasia, what Aristotle (1999, bk 7. 10: 1152a) conceived as weakness of the will, represents the gratification of short-term objectives (typically governed by passions) over more cherished longer-term objectives—which we might think of as appropriate values such as natural rights—governed by reason. Overcoming despotic impulses and socially akratic preferences is the justification for constitutionalism, or what Schelling (1984: 83–112) calls precommitment, the removal of "certain subjects from the vicissitudes of political controversy, [in order] to place them beyond the reach of majorities and officials" (Justice Robert Jackson, quoted in Holmes, 1988: 196).

As such, the constitutionalist response to Hume and Jefferson, implicit for example in *Federalist* 49 (Publius, 1961), is that precommitment represents the means by which the freedom of future generations to govern themselves may be *preserved* (Elster, 1979; Holmes, 1988; Waldron, 1999a: 266–70). It preserves society's capacity to govern itself by immunizing rules fundamental to self-governance from transitory, socially akratic, preferences, while protecting them against intrusions by those who would extinguish liberty in their quest for power. Rather than the father alienating the liberty of the son, precommitment represents the safeguarding of that liberty against akratic and despotic encroachment.

While precommitment constitutes an important mechanism for resolving the paradox of democracy, problems still present themselves. One is that effective precommitment entails precommitting to an appropriate set of rules. Another is that precommitment is not a static proposition. Through constitutional interpretation, the scope of rules to which a society has precommitted can expand: call this creeping precommitment. In some instances, creeping precommitment undermines the very logic of precommitment, that is, not only is it intrusive to liberty, but creeping precommitment has the potential to bind citizens' ability to govern themselves to the possibly akratic preferences of judges (see Monahan 1987: 124–25).

In this article I examine these problems by exploring the relationship between the Charter of Rights and Freedoms and creeping precommitment in Canada. I argue that while the charter precommits to important values, it represents a double-edged sword in that it opens new avenues for creeping precommitment. Liberal democratic societies can precommit to two sorts of rules: process-enabling and outcome-substituting (Ely, 1980: 74–75; Monahan, 1987: 136–38). Process-enabling rules facilitate the operation of liberal republics, whereas outcome-substituting and rules precommit to values that otherwise would be decided through the normal, legislative political process. Precommitting to process-enabling rules

Abstract. At the heart of constitutionalism lies a fundamental flaw, what Stephen Holmes calls the paradox of democracy. On one hand precommitment—the constitutional entrenchment of certain fundamental rules and values—represents a restriction upon the ability of otherwise self-governing citizens to govern themselves. On the other, absent precommitment, self-governance becomes a precarious proposition. In this article I distinguish between "good" precommitment, whereby values to be protected are generally considered to be more prized than the short-term values that threaten them, and "bad," precommitment to values in the absence of general and ordinal preferences. Specifically, I examine judicially mandated, *creeping* precommitment in the context of abortion and free speech rights in Canada.

Résumé. Il y a au cœur du constitutionnalisme un défaut fondamental, ce que Stephen Holmes appelle le paradoxe de la démocratie. D'une part, le préengagement (precommitment) – la constitutionnalisation de certaines règles et valeurs morales fondamentales – représente une contrainte limitant la capacité des citoyens autrement autonomes à se gouverner eux-mêmes. D'autre part, sans cet engagement préalable, l'autonomie devient une proposition précaire. Dans cet article, je fais la distinction entre le «bon» préengagement, portant sur des valeurs morales à protéger qui sont généralement considérées comme étant plus précieuses que les valeurs à court terme qui les menacent, et le «mauvais» préengagement, portant sur des valeurs morales non tranchées par des préférences générales et ordinales. J'examinerai spécifiquement le préengagement *rampant*, judiciairement autorisé, dans le contexte des droits à l'avortement et à la liberté d'expression au Canada.

is not especially controversial. It represents a critical solution to the paradox of democracy. More controversial is precommitting to outcome-substituting rules. There are issues for which precommitting to outcome-substituting rules is consistent with liberal democratic values. However, the criteria for such precommitment need be clearly understood.

This paper unfolds as follows. First, I discuss the relationship between liberty and obligation that is inherent in any self-governing polity, that is, I conceive of liberal democracies in terms of the amalgamation of liberal and republican principles. Second, I expand the discussion of precommitment as it pertains to process-enabling and outcome-substituting rules, specifying the criteria under which precommitment to outcome-substituting rules is consistent with liberal and republican values. Finally, I introduce creeping precommitment in the context of the Charter of Rights and Freedoms, examining two issue areas, abortion and political speech, as an illustration of how, respectively, creeping precommitment has the capacity to intrude into areas where outcome-substituting rules are not compatible with liberal republican values, and to undermine precommitment to process-enabling rules.

Liberty and Obligation

Liberal democracies understand liberty in two distinct ways. First, liberty entails the right to be left alone, to choose, in other words, not to engage in civic life. This conception of liberty imposes a thin theory of obligation, to respect the laws that protect the rights of others to live

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their lives as they see fit (Mill, 1869, ch.4). This first type of liberty, born of a contractarian conception of government, privileges citizens' natural rights to life, liberty and security as the basis of civil society (Locke, 1974 [1689], chs. 7–8).

A second understanding of liberty is more purposive. It is the freedom to participate in the civic life of the community. While this liberty is exercised voluntarily, it presupposes a normative expectation that citizens' obligations to one another extend beyond simply respecting one another's natural rights (see Galston, 1991, ch.10: iii). Instead, this obligation, what we might think of as republican virtue in the civic humanist conception of the term, entails two fundamental objectives: the preservation of values universally understood to be appropriate and the articulation of values, manifested as laws, the appropriateness of which are particular to time and place.

This article is premised upon the assumption that modern liberal republics[2] rely upon a stock of both liberty and virtue. Broadly speaking, virtue represents a duty owed by each individual to the self (Plato, 1974, bk. 2: 357–58; Aristotle, 1999, bk. 5: 11), to the community (Cicero, 1913; Machiavelli, 1975 [1489–1520], bk. 1: 17–18), and, for many, the objective rightness embodied by the will of God (Aquinas, 1947 [1265–74], bk. 1: 93). Obligation to self conforms to the Socratic and later Stoic traditions that happiness requires both the knowledge of how to live well and the character to be able to do so. Obligation to the will of God means what I have called universally appropriate values. These have been variously understood as values born of natural law, of a moral code born of shared human experiences (Dershowitz, 2004), or of an innate moral sense (Wilson, 1995). This universal appropriateness imposes a set of transcendent rules that represent moral prohibitions on certain forms of behaviour while imposing affirmative obligations to live up to these standards of appropriateness. Finally, and most pertinent to the task at hand, obligation to community ranges from the Roman/Machiavellian ideal of the citizen-soldier to the far less restrictive mandate embodied by the civic humanist ideal of the *vita activa*, which holds that it is the duty of citizens to participate in, and hence shape the character of, civic life.

Just as appropriateness can be conceived universally, it also derives from particularly derived values, those that conform to the core values with which discrete communities identify and which these communities impose as requisite conditions for the good society. These values, which are neither universal nor transcendent, constitute the aggregation of social preferences. They are mutable values which conform to the humanist ideal of social perfectibility.

Liberty and obligation are manifest in (insofar as they contribute to and are dependent upon) civic participation. Civic participation helps to foster common purpose expressed as an understanding of the (particu-

larly derived) values for which the republic stands. This common purpose does not mandate that citizens come to consensus on all issues; they will not. Rather, common purpose is to be understood in the sense expressed by Thomas Gilby that "civilization is formed by men locked together in argument" (quoted in Murray, 2005: 24; see also Hirschman, 1994; Waldron, 1999b, chs. 4–5). The values that bind us are constructed and perpetuated through refinement born of debate and dialogue. Our understanding of appropriate values is examined, and sometimes re-evaluated, through the process of debate. Value issues are settled through temporary equilibria that we think of as policy, rather than through fiat inherent in the will of Gods, kings, or ruling classes. In Murray's words, "only at the price of ... continued contact with experience will a constitutional tradition continue to be 'held' as real knowledge and not simply a structure of prejudice" (2005: 28). In this sense, then, civic participation represents both means and ends. It keeps alive the values for which the republic was constructed and represents the means to the achievement of these values.

Civic participation also constitutes a bulwark against tyranny. The Aristotelian/Madisonian logic of mixed government whereby ambition checks ambition cannot stand as the sole defense against the encroaching nature of power. Hence Madison's admonition in *Federalist 51* (Publius 1961, 322) of checks and balances as but an auxiliary precaution "against the defect of better motives." One need not look beyond the former Soviet bloc to find well-constructed constitutions in nations that suffer despotic government. A people who wish to be free must act in support of that freedom. Participation broadens the locus of political power. The more citizens who participate in public life, who mobilize in support of causes or beliefs, the broader the distribution of authority, and hence the protection afforded to liberty. If concentration of power is the very definition of despotism, the distribution of it is the best protection against despotism (see Dahl, 1961).

Civic participation is also fundamental in that it works against the potential for political alienation by a discrete subset of the population. There is a recursive cycle between low levels of political participation and efficacy among groups and low levels of political influence. This alienation, moreover, represents not just an opportunity cost for civic engagement but serves to encourage faction. An alienated segment of the population cannot be expected to support the common values of the nation and, indeed, may begin to work actively against them.

A fourth benefit of civic participation is legitimacy of law. The values for which a community stands are not static. These values, moreover, must be reflected in laws if those laws are to be seen as legitimate.[3] The federal imperative arose for this very reason. Republicans from Aristotle (1988, bk. 7: 4) to Montesquieu (1989 [1748], bk. 9: 1) recog-

nized the dangers of seeking to impose laws on a people who had no meaningful hand in their construction. Legitimate laws tend to be largely self-enforcing; absent such self-enforcement, the enforcement costs in terms of both resources and liberty increase (see Uslaner, 2002). The failed experimentation with communism in the twentieth century represents a case in point. A philosophy that foresaw the redundancy of the state instead fostered what must count as among the most totalitarian regimes in history.

Precommitment

As noted, to resolve the paradox of democracy, liberal republics must precommit to process-enabling rules. These typically require affirmative steps by the state, such as creating an effective forum for political participation, delineating the powers of respective departments of government and specifying the means by which officials are to be held accountable to the citizenry. Such process-enabling rules protect citizens' ability to participate in the political process.

In general, liberal republicanism demands that precommitment be restricted to such process-enabling rules. However, there are some outcome-substituting rules to which liberal republics must precommit. For example, the constitutionalization of universally appropriate values, such as the rights to life, liberty and security and the right not to be deprived of such except by due process of law, is critical to the liberal republican conception of the good life and hence must be rendered invulnerable to socially akratic preferences if the inherent values of liberal republicanism are to be preserved.[4]

In addition, there are circumstances when liberal and republican values must be preserved through outcome-substituting "gag rules" (Holmes, 1995, ch.7). Gag rules are limitations on the power of the democratic state to govern with respect to discrete issue areas. They are outcome-substituting in the sense that their existence substitutes for outcomes that might otherwise be subject to legislation. Gag rules are an important means to the resolution of what Hirschman (1994: 214) calls live-and-let-live issues.

Live-and-let-live issues conform to two criteria. First, they are intractable, possibly de-stabilizing value issues that are therefore more appropriately deliberated and resolved in the private sphere than in the public square. Second, their resolution is content neutral in that the private resolution of these issues has no direct and substantive impact on others. The best example is the freedom to worship as one pleases. By precommitting to an agreement to banish this issue from resolution in the public square, the political process is relieved of the imperative to resolve the irresolvable.

To suggest that gag rules represent an important means of resolving intractable, live-and-let-live issues, however, is not to suggest that all socially intractable issues are justifiable through precommitting to outcome-substituting rules. Some socially intractable issues do not conform to the live-and-let-live criteria insofar as their resolution is not content neutral. Rather, for these either/or issues, to rely once again on Hirschman's terminology (1994: 213), resolution must favour one position or another.

Abortion is an excellent example of such an either/or issue. Abortion cannot be considered a live-and-let-live issue because its resolution axiomatically violates the criterion of content neutrality. The very debate over abortion turns on whether or not a woman's ability to choose to end her pregnancy does have substantive impact on another (specifically the fetus). As such, to devolve the issue to the private sphere axiomatically represents the privileging of one position over another.

A reasonable objection that might be raised, of course, is that the criteria justifying precommitment to outcome-substituting rules are murky. Abortion, for example, may simply be a manifestation of liberty, a universally appropriate value. On the other hand, it may be a violation of the right to life, another such value. But it is this very ambiguity that constitutes an argument against precommitment (Waldron 1999a: 267–68). Precommitment exists to preserve cherished social values, not to determine them.

Precommitment secures first-order values against weakness of the will; it represents, in other words, a defense against the predicted dominance of less cherished values over more cherished ones. But it is difficult to claim that first-order values are susceptible to weakness of the will if those values have yet to be decided upon. The point can be made through a couple of examples. Call not driving drunk a first-order value. We know there is some chance that a second-order value, the desire to get home in one's own vehicle, might threaten this first-order value, especially when one's reasoning capacity is overcome by a short-term stimulus such as being intoxicated. The obvious and oft-relied upon solution is to give one's keys to a friend with the request that the keys not be returned until their owner is fully sober.

The logic of precommitment breaks down, however, where an individual (or society) is unable to articulate a clear ordinal preference between competing values. Waldron provides an excellent example. He asks us to imagine Bridget, who after much soul searching definitively decides upon a particular theological course for her life. Reinforcing her commitment to this path, she locks up her private library of theological books, which previously had stimulated her self-doubt, and gives the keys to a friend with instructions that the friend is not to return the keys, even if Bridget makes such a demand in the future.

But new issues and old doubts start to creep into Bridget's mind after a while, and a few months later she asks for the keys. Should the friend return them? Clearly this is quite a different case from, say, withholding car keys from the drinker at midnight. Both involve forms of precommitment. But in Bridget's case, for the friend to sustain the precommitment would be for the friend to take sides, as it were, in a dispute between two or more conflicting selves or two or more conflicting aspects of the same self within Bridget, each with a claim to rational authority. It would be to take sides in a way that is simply not determined by any recognizable criteria of pathology or other mental aberration. To uphold the precommitment would be to sustain the temporary ascendancy of one aspect of the self at the time the library keys were given away, and to neglect the fact that the self that demands them back has an equal claim to respect for *its* way of dealing with the vicissitudes of theological uncertainty (1999a: 268–69).

Intractable, either/or value issues are not easily resolved, and civic participation as an alternative to precommitment—what Hirschman (1994: 213) calls "muddling through—hardly guarantees a salutary outcome. But among the advantages of muddling through is that it, to reprise Gilby, "locks men together in argument." It lends itself to bargaining, persuasion and the prospect, however difficult, of arriving at a compromise solution. Madison reasoned that the reason why minorities accede to majority rule is that where the boundaries of political contestation are wide, the logic of overlapping group membership suggests that no one class of citizens enjoys a monopoly on political success, and no one group is destined to suffer perpetual defeat. The rough and tumble of public discourse—of intergroup competition for political influence—renders legislation but a system of semi-stable equilibria, which can be altered by shifting social understandings of what constitutes appropriateness (Riker, 1980). By virtue of overlapping group membership, such shifts do not move systemically in any particular direction, that is, they do not privilege any particular class of citizens; rather than serving to de-stabilize, they re-enforce Gilby's civic ideal. Unlike precommitment, muddling through encourages popular discourse rather than shutting down, or at least rendering much less efficacious, subsequent discussion and the prospect of finding a more palatable equilibrium.

Creeping Precommitment

As with other forms of precommitment, creeping precommitment often proves valuable in terms of enhancing both liberty and obligation. Indeed, to the extent that judicial review keeps other branches of government in check, it protects process-enabling rules fundamental to freedom. In fed-

eral states—Canada is a good example—judicial review has accomplished this by limiting federal encroachment into areas of provincial competence. Indeed, in protecting the federal principle, judicial review can be said to be a virtue-enhancing mechanism.[5] And courts serve an important role as trustee of the nation's most cherished values, serving to ensure that common values to which society has precommitted are not subsequently eroded through the legislative or executive process (Knopff, 2003: 201–02).

But creeping precommitment can be problematic. First, it can gradually expand the scope of gag rules to encompass outcome-substituting rules that do not conform to the live-and-let-live criterion of content neutrality. In this way, it can intrude upon civic participation in a fashion erosive of liberty and obligation. Second, it can undermine process-enabling rules to which society has already precommitted with the same negative consequences. I address these pathologies sequentially.

Creeping expansion of gag rules

Perhaps the most pernicious element of creeping precommitment is that even as boundaries of political contestation are narrowed, there is a general sense that judicial review represents the triumph of justice over politics (Waldron, 1999b: 2, 128). Judicial social policy making is imbued, in other words, with a myth of the sacred (James et al., 2002). Even within academic circles, the narrowing of the boundaries of political contestation has been understood to be conducive to civic participation. Dworkin has argued, for example, that

> when a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted and even reversed by future decisions, a sustained national debate begins, in newspapers and other media, in law schools and in classrooms, in public meetings and around dinner tables. The debate better matches [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process on its own is likely to produce. (1996: 345)

Dworkin cites the abortion debate in the United States stimulated by the decision in *Roe v. Wade* (1973) as an example, although the Canadian equivalent, *R. v. Morgentaler* (1988), is equally applicable.[6] Both brought the issue of abortion to the forefront of public consciousness through their review of the constitutionality of laws criminalizing abortion. On the other hand, the court is hardly unique in its ability to bring important issues into the public consciousness. Indeed, public consciousness is likely to be heightened where debate takes place within a representative legislature rather than in a court room. There is more to civic participation than merely awareness (Waldron, 1998: 340). Virtue is born of propri-

etorship of the public square. It represents the active obligation of the steward and not the passive attendance of the spectator, however piqued the interest might be.

Dworkin is correct to note that constitutionalization of an issue does not wholly remove it from political contestation. But it certainly changes the terms of such contestation. Unlike legislators, judicial decision makers are not responsible to the citizenry. Popular input is wholly at the discretion of the courts. The Supreme Court of Canada, responsible for its own docket, manages the issues that come before it. Citizens wishing to participate must be granted intervenor status in order to be heard on such issues.

More importantly perhaps, for constitutional matters, the judicial process does not lend itself to bargaining. The system is adversarial. Absent is the imperative to construct and maintain alliances, either on the floor as in the United States, or within caucus in systems more reliant upon party discipline. Moreover, for most of those who appear before the courts, the process is not iterative. There is no incentive to be sensitive to the compromise demanded by political alliance; indeed, the process itself precludes such mechanisms as issue linkage as the route to compromise.

Finally, Supreme Court decisions are for all intents and purposes dispositive. Where courts reverse precedent, the intervening period typically stretches to decades, far longer than the electoral cycle that facilitates policy changes in the legislative arena. Rather than stimulating debate, moreover, the dispositive nature of such decisions typically serves notice that the case is closed.

With respect to value issues this is reinforced by the fact that very often judicial decisions are couched in the language of rights. Elevation to the status of right generates the sort of moral entitlement that marks dissent as intolerance and the attempt to deny those who claim such a right the very dignity rightfully theirs by virtue of their humanity. To return to an earlier example, it is one thing to debate public policy with respect to abortion; it is quite another to deny a woman her right to reproductive liberty.

The translation of value issues into constitutional rights depletes virtue in other ways as well. One of these, notes Glendon is the "missing language of responsibility" (1991, ch.4). When citizens assume stewardship of the public square, they assume responsibility for both the content and the maintenance of the public square. Through the logistics of policy making, the desires and preferences of others must be factored into the demands one makes upon society. The mere fact of compromise, in other words, serves as a constant reminder of our obligation to others and of our own interest in remaining sensitive to that obligation. But when value issues are privatized, citizens' incentives shift. Litigation over rights constitutes a winner-take-all proposition. Citizens compete for the prize of

having value preferences institutionalized as constitutionally protected interests (Graglia, 1992).

Obligation is also depleted through privatization of value issues insofar as it weakens the bonds of community. Where preferences are couched as rights, and the mitigating imperative to compromise is trumped by the unadulterated incentive to compete, community-enhancing values such as trust and efficacy, or social capital (Putnam, 2000), are eroded. Bonds of community are enhanced through the formation and preservation of shared values, of the sense of common purpose that gives meaning to our understanding of civil society.

Absent common purpose, we are left with factionalizaton, or the very sort of corruption that republicans since Aristotle have feared. Factions represent the privileging of the particular good over the universal. The Madisonian solution to the pernicious effects of faction was to temper them through the countervailing forces of rival factions. The wider the boundaries of political contestation—the greater the number of intersecting cleavages—the greater the likelihood that the evils of faction could be neutralized through the legislative process. Re-couching value issues as rights, on the other hand, represents a mitigation of the temperate equilibrium forged through the legislative process insofar as the dispositive, winner-take-all nature of judicial policy making restricts the countervailing pressure that dissenting groups are able to bring to bear.

Indeed, as we have seen in Canada, factionalism appears to have been stimulated through the politicization of rights under the Charter of Rights and Freedoms.[7] Schedule B of the *Constitution Act* (which includes the charter) contains special constitutional protection for enumerated groups such as linguistic minorities (s.23), Aboriginal Canadians (ss.25 and 35), Canadians of non-English or French heritage (s.27) and women (s.28). As Cairns (1995, ch.4) and others have pointed out, the designation of certain groups as deserving of special constitutional protection has created a sense of proprietorship on the part of various groups over provisions dedicated to the protection of their interests. This proprietary sense has led to the natural desire for groups to expand the interpretive scope of their constitutional status through the courts (Brodie, 2002; Knopff and Lusztig, 1994; Manfredi and Lusztig 1998; Knopff and Morton, 1992).

In addition to specific enumeration of constitutional status, the courts have left open the prospect of identifying other discrete and insular minorities in need of constitutional protection (*Andrews v. Law Society of Upper Canada*, 1989), and taking affirmative steps to ensure that protection. In both *Vriend v. Alberta* (1998) and *M. v. H.* (1999), for example, the Supreme Court of Canada "read in" amendments to the *Alberta Individual Rights Protection Act* and the *Ontario Family Law Act*, respectively, in order to expand protection afforded by these laws to groups not identified by the legislative bodies that passed the legislation. The effect is

judicial appropriation of the legislative process absent the deliberative filter which traditionally accompanies the making of laws in liberal republics.

Removing value issues from the scrutiny afforded by public discourse has the effect of raising the stakes on contentious issues. Rather than temper the socially disintegrative effects of faction, it heightens them, building antagonism, resentment and distrust and undermining the sense of common purpose constitutive of a working liberal republic. Marrying factionalism to the winner-take-all process embodied by judicial policy making, in other words, does nothing to militate against what Knopff (1998: 686) perceives as factions' inherent vulnerability to "theocratic temptation."

Creeping erosion of process-enabling rules

Creeping precommitment is also problematic insofar as it can undo or weaken other elements of precommitment. For example, it has the potential to undermine the sorts of process-enabling rules that preserve citizens' ability to participate in the political arena. An excellent example is the right to freedom of political speech and expression. For it to be meaningful (with the exception of speech that incites violence or sedition) political speech and expression must be protected. This was recognized by the framers of the Charter of Rights and Freedoms, as evident in the s. 2(b) guarantees freedom of thought, belief, opinion and expression.

Freedom of political expression represents the freedom to join the public discourse that shapes particularly derived appropriate values. Of course, in order to arrive at appropriate values, logic dictates that inappropriate ones need be voiced, debated and rejected. Men are not locked in argument when all agree, or are forced to agree. Some values are particularly inappropriate. One example is flag-burning. While shameful and deeply offensive, especially given that citizens have given their lives in defense of the values for which their national flag stands, as the US Supreme Court found in *Texas v. Johnson* (1989), prohibiting such expression represents an intolerable intrusion into citizens' ability to participate in the political process.

As offensive as expression that desecrates the iconic symbols of nationhood is speech intended to incite or perpetuate hatred against discrete portions of the population. Such hate speech has been prohibited in Canada since the introduction of s.319 to the Criminal Code of Canada in 1970. Under s.319(2) it is unlawful to publicly or willfully incite hatred against any group identifiable by colour, race, religion, ethnicity or (since 2004) sexual orientation. However, if we are to accept that liberal republics rely upon the sort of obligation inherent in civic political participation, we are left with no choice but to conclude that hate

speech accomplishes the remarkable feat of conforming to both the odious and the virtuous. Its prohibition undermines freedom to participate in the political process. It is out of recognition of the imperative for freedom of political expression, that the framers of the Constitution Act (1982) precommitted to entrenching freedom of expression into the Charter of Rights and Freedoms, subject to (as with all constitutional rights) "such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society" (s.1).

In the first charter challenge to s.319(2) of the Criminal Code, the Supreme Court in *R. v. Keegstra* (1990) ruled 4-3 that the hate speech prohibition contained in s.319(2) trumps the constitutional right to freedom of expression contained in s.2(*b*) of the Charter of Rights and Freedoms. Keegstra, an Eckville, Alberta, social studies teacher, subjected his students to vitriolic and manifestly inaccurate rantings of the evils visited upon the Christian world by Jews, Catholics and blacks. Referring to Jews as "sadistic" and "child-killing," he painted the Holocaust as a hoax perpetuated by an international Jewish conspiracy. Moreover, these were not off-the-cuff remarks. Students were expected to replicate these views in their assignments on pain of losing grades. One would have to search long and hard in the hope of finding any redeeming qualities about James Keegstra as a teacher or as a citizen.

Offensive as they were, it is difficult to justify the prohibition of such sentiments, far less their criminalization. In making the case that s.319(2) constitutes a reasonable limitation on freedom of expression the majority held that:

> The effects of s. 319(2) are not of such a deleterious nature as to outweigh any advantage gleaned from the limitation of s. 2(*b*). The expressive activity at which s. 319(2) is aimed constitutes a special category, a category only tenuously connected with the values underlying the guarantee of freedom of expression. Hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. Moreover, the narrowly drawn terms of s. 319(2) and its defences prevent the prohibition of expression lying outside of this narrow category. Consequently, the suppression of hate propaganda represents an impairment of the individual's freedom of expression which is not of a most serious nature. (*R. v. Keegstra*, 1990)

It is curious to suggest that there are any underlying values, other than freedom, connected tenuously or otherwise with freedom of expression. It is possible to articulate *competing* values, such as public safety, or demonstrable group-based harm, that comes from permitting unfettered free speech. But to imply, as the next sentence in the decision does, that underlying the constitutional right to freedom of expression are val-

ues such as the imperative to seek the truth or promote individual self-development, smacks of the very distinction between good (that is, state-sanctioned) speech and bad political speech that the Charter of Rights and Freedoms seeks to guard against. Indeed, rather than constituting a limitation that can be demonstrably justified in a free and democratic society, the wording suggests a limitation inconsistent with a free society. The idea that limiting citizens' rights to express ideas, even foolish and offensive ones, somehow contributes to the "fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged," is particularly unconvincing.

The point is not that the contribution of Keegstra and his ilk is substantively valuable, although the case can be made that social opprobrium illustrates the inappropriateness of such sentiments in a far more effective manner than does state prohibition. The greater vice is the impact this ruling can have on the actions of others. Even the threat of prosecution under s.319(2) has a deleterious effect on freedom of expression and civic participation. After the inclusion of sexual orientation as the basis for protection against criminal hate speech in 2004, for example, religious groups in Canada have had to consider the prospect of criminal prosecution for promoting religious beliefs that are inconsistent with homosexuality. In the words of one evangelical Christian, "the wording of the [hate speech] legislation is so vague, there is no way of knowing how it will be interpreted" (quoted in Clausen, 2005: 458). Similar fears have been expressed by other religious leaders, academics, and journalists. Given the nebulous definition of what it means to incite hatred, it is hardly inconceivable that a person's stated opposition to public policies, such as homosexual marriage, could subject a citizen seeking to participate in the vibrancy of democracy to prison time, or at the very least the cost of mounting a defense against criminal prosecution (Clausen, 2005: 457–59). The criminalization of hate speech in Sweden, for example, landed Pastor Ake Green a month in prison for publishing a sermon in which he likened homosexuality to a cancerous social tumor (Brammer, 2006).

The impact of *Keegstra* is felt in the increasingly prominent role played by human rights tribunals maintained by the federal government and each of the provinces in Canada, tribunals that would have far more restrictive mandates had the Supreme Court more rigorously upheld the constitutionally mandated gag rules on freedom of expression. Indeed, the precommitment to free speech rights under s.2 of the Charter of Rights and Freedoms is clear. It required judicial activism to mitigate its effect. Responsibility for motive and means may lie elsewhere, but it is the Supreme Court of Canada through its erosion of a clearly articulated gag rule that provided the opportunity for whatever mischief human rights tribunals have done in Canada.

The federal human rights tribunal (provincial tribunals are patterned on the federal model) is a creature of the 1985 Canadian Human Rights Act. Section 13(a) of the act prohibits communication that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination. The penalties for conviction are not inconsiderable. In addition to the issuance of a cease–and-desist order, those convicted face a maximum fine of $10,000 and are liable for special compensation to the victims to a maximum of an additional $20,000. Win, lose or draw, defendants are responsible for their own legal costs; complainants' tabs are picked up by the state.

Somewhat predictably given the expansive capacity of government, the scope and intrusiveness of the federal human rights tribunal has broadened. In the eight cases heard between 1979 and 2002, the tribunal imposed no penalties beyond the order to cease and desist. By contrast, since that time, ten of the 11 cases heard have imposed fines in addition to the order to cease and desist, and of those, four have resulted in special compensation to the complainant.[8]

There has also been a good deal of mischief at the provincial level. In 2001, the Saskatchewan Human Rights Commission ordered an evangelical Christian and the newspaper that published his advertisement to pay compensatory damages totaling $9,000 to three gay men who were offended by the advertisement. Hugh Owens took out an advertisement in the *Saskatoon Star Phoenix* for bumper stickers that he was selling. The stickers featured a figure of two men holding hands. The figure was encircled, with a diagonal line running through the circle, a common means of signifying prohibition. Next to the figure were the words Romans, Leviticus and Corinthians, with verse designations, followed by an equality symbol. The implication is clear. Most graphically, Leviticus 20:13 states, "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death. Their blood shall be upon them." While the case was overturned by the Saskatchewan Court of Appeal in 2006 (nine years after the advertisement was printed), the fact remains that Mr. Owens and the *Phoenix Star* were subjected to nearly a decade of litigation for the offense of citing biblical passages (*Owens v. Saskatchewan*, 2006). It is not unreasonable to conclude as a counterfactual that, despite the ruling in the Saskatchewan Court of Appeal, the incident had a chilling effect on those who might wish to express their religious views in Saskatchewan and elsewhere in Canada.

Indeed, in 2008, the Reverend Stephen Boisson and the Concerned Christian Coalition were convicted before the Alberta Human Rights Panel. Boisson's offense was a 2002 letter that he wrote to the *Red Deer Advocate* in which he remonstrated with citizens to defend traditional

social values against the inroads made by homosexual activists since the 1960s. The tone of the letter, while hardly equivocal, was not mean-spirited. It did not advocate violence towards, or even hatred of, homosexuals. In its decision, the Alberta Human Rights Panel ordered Boisson and the Concerned Christian Coalition to pay $7,000 in compensation. In addition, the defendant was prohibited from any public disparagement of homosexuals and was ordered to write a letter of apology to the complainant. On top of that, the *Red Deer Advocate* was ordered to publish the panel's ruling (Alberta Human Rights Panel, 2008), the point of which, presumably, was to serve as a warning to other would-be contributors to the debate on gay rights. The effect of this ruling is especially significant, given that Boisson is a Christian pastor. In addition to barring Boisson from articulating his political views, the panel's order effectively precludes him from giving a sermon pertaining to his religious views on homosexuality (Levant, 2008).

In *M.J. v. Nichols* (2008), the Saskatchewan Human Rights Tribunal fined a Baptist minister for refusing to officiate over a gay marriage ceremony. Orville Nichols was ordered to pay $2,500 in compensation, in spite of the tribunal's finding that "the Respondent was acting out of his genuine and sincere religious belief in refusing to perform the marriage ceremony." And that this was "not a case where the Respondent was simply acting in a callous and calculated manner" (Saskatchewan Human Rights Tribunal, 2008). The implication of the tribunal's ruling was not only that it was illegitimate to take a particular position on the issue of gay rights, but that citizens have an affirmative obligation to support a particular position on the issue.

Most notorious is the decision by the British Columbia Human Rights Commission to prosecute journalist Mark Steyn and *Maclean's Magazine*. In "The Future Belongs to Islam," which *Maclean's* published in October 2006, Steyn points out that demographic trends in the developed versus Islamic worlds presents the prospects of a radically different global environment by the middle of the twenty-first century. Simply, the Islamic world's population is increasing rapidly; the population of much of the developed world, based upon fertility rates below the replacement threshold, is in steep and perhaps irreparable decline. If one considers the additional fact that welfare spending remains robust in most of the developed world, the scenario that presents itself is a developed world that relies on immigration to sustain itself in the lifestyle to which it has grown accustomed. If much of that immigration comes from the Islamic world, which again seems demographically likely, it is reasonable to question whether the host countries will be able to assimilate this flood of immigrants or whether it is the host countries themselves that will be assimilated.

Among those offended by "The Future Belongs to Islam" were three law students at Osgoode Hall, as well as members of the Canadian Islamic

Congress. The complaint was heard by the BC Human Rights Tribunal, which ultimately found Steyn not guilty. That result, however, hardly undoes the damage. Despite being a prominent journalist and in the face of strong media opposition, Steyn's case was prosecuted and he was subjected to intense public scrutiny and the cost of mounting a defense. For citizens whose visibility is not as high or whose resources are not as great, the prudent move is to refrain from public comment on political issues that might result in someone's feelings getting hurt.

Conclusion

Precommitment represents a double-edged sword, which is to say that there is what we might think of as good precommitment and bad. "Good" precommitment is necessary to overcome the paradox of democracy. It institutionalizes rules that allow a citizenry to be free to govern itself without falling prey to socially akratic preferences that could, in the end, undermine the citizenry's very ability to govern itself. Good precommitment can be defined as the ability to articulate preferences that, upon sober reflection, can be ordinally structured in such a way that the values to be protected (say liberal republicanism) are generally considered to be more prized than the short-term values that threaten them (such as periodic chauvinistic impulses). "Bad" precommitment, by contrast, precommits to a set of values in the absence of clear, *general*, ordinal preferences (see Waldron, 1999a, 268–70).

All precommitment is erosive of political liberty insofar as it axiomatically removes certain value issues from the realm of ordinary democratic politics. This erosion can be justified, then, only where there is general consensus that higher order values are otherwise at risk. If we are willing to accept that there exists a general first-order social preference for liberal republican government and the values that sustain it—and given the lack of a revolutionary impulse in established liberal republics this is a safe assumption—then it is necessary to precommit to three sorts of rules: process-enabling rules, outcome-substituting rules that institutionalize universally appropriate values such as natural rights, and outcome-substituting gag rules that preclude public regulation of intractable, content neutral, live-and-let-live issues. Failure to precommit to such rules constitutes a challenge to the values that sustain liberal republics.

"Good" precommitment is fundamental to liberal republicanism. It lays out the rules of the game, making them invulnerable to shifting social preferences, and specifies outcome-substituting rules that relegate certain issues to the private realm, free from public regulation. Good precommitment is conducive to the self-governance and civic participation

that allows citizens to articulate and shape particularly derived political values, obliges representatives to honour these values, and imbues legislation reflective of these values with legitimacy.

Also important are the means by which precommitment takes place. The most obvious is through formal constitutional amendment. More surreptitious is what I have called creeping precommitment. Neither of these processes is inherently bad, although the former does have the advantage of a greater period of sober reflection by a wider range of sober reflectors. The latter, however, provides greater flexibility and serves to overcome whatever majoritarian bias that might exist in the legislative and constitutional framing processes.

My focus in this article has been "bad" creeping precommitment, that is, judicially mandated precommitment that does not conform to the criteria laid out above. The first case, abortion, represents a case of the court regulating an either/or value issue. In the absence of a general, ordinal preference among competing values, the court's adjudication of this issue imposed the cost of foreclosing civic participation without securing the advantage of protecting a clear first-order social preference. There are costs to such action. Among the less obvious, as I have argued, is to shift interest-group politics out of the inclusive and integrative legislative arena and into the more exclusive and factionalizing judicial one.

The second case, political speech and expression, is a bit more complex. In this case, most of the mischief created through regulation of political speech has been done by the executive branches of government in Canada and not by the courts. However, the case is important insofar as it was judicial interpretation of the charter guarantee of free speech that has permitted the expansion of political speech regulation in Canada. Section 2 of the Charter of Rights and Freedoms is unambiguous in guaranteeing citizens' "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication," When the issue of speech regulation came up in *Keegstra*, it was judicial activism that provided qualifications to the outcome-substituting gag rule contained in section 2(b) of the charter. While it is human rights tribunals in Canada that have been most destructive of freedom of political speech and expression, it was the responsibility of the Supreme Court of Canada to stop the process before it began.

I have argued that precommitment has crept too far in judicial interpretation of the charter. Finding the appropriate balance between legislative capacity and critical restrictions to that capacity is extremely difficult. While I make no pretence to having articulated such a balance with any degree of precision, I have provided a decision rule that provides guidelines for what sort of precommitment is appropriate for societies with a first-order preference for the preservation of values foundational to liberal republican government.

Notes

1 Among examples of governments acting upon socially akratic preferences is the internment of Japanese Canadians during the Second World War.

2 Canada is not technically a republic, of course, but to borrow from Montesquieu's characterization of Britain, Canada is a republic that "hides under the form of monarchy" (quoted in Sullivan, 2004: 4).

3 At the republican extreme, it is not merely the perception of legitimacy that is important, but the fact of it. Indeed, from this perspective what matters is not the benefit that accrues to the individual by virtue of his/her participation but rather the contribution to the greater good (see, for example, Rousseau, 1968 [1762]: II.6).

4 This need not occur through a constitutional bill of rights, of course. There are numerous countries, including Canada prior to 1982, that preserve fundamental rights through parliamentary supremacy bounded by constitutional convention (for competing views on the constitutionalization of bills of rights see Dworkin, 1987; Waldron, 1993).

5 Republicans have long pointed to the relationship between government responsiveness and virtue. For logistical reasons alone, local governments are more responsive and hence more conducive to the promotion of virtue. This is why, for example, republicans tend to favour decentralization of authority in federal states. Of course, as the American Civil War suggests, it is possible to overstate this point.

6 In *R. v. Morgentaler* (1988) the Supreme Court of Canada, while not ruling out the prospect of an *inter vires* law restricting abortion, found that s.251 of the Criminal Code, which mandated that abortions were legal only at accredited hospitals and only after review by the relevant hospital's Therapeutic Abortion Committee violated the freedom of security (s.7) provision of the Charter of Rights and Freedoms. In handing down four decisions, the Court meaningfully divided 7-2. The dissenting decision by Justices McIntyre and La Forest found neither of the conditions that reconcile precommitment to outcome-substituting rules with liberal republican values was extant in this case. "The proposition that women enjoy a constitutional right to have an abortion is devoid of support in either the language, structure or history of the constitutional text, in constitutional tradition, or in the history, traditions or underlying philosophies of our society. Historically, there has always been a clear recognition of a public interest in the protection of the unborn and there is no evidence or indication of general acceptance of the concept of abortion at will in our society. The interpretive approach to the charter adopted by this Court affords no support for the entrenchment of a constitutional right of abortion."

7 The clearest manifestation of this constitutional factionalism occurred in the debates surrounding the failed and socially polarizing Meech Lake and Charlottetown Accords.

8 In each of these cases, the complainant was Richard Warman, a one-man heckler's veto. A former employee of the Human Rights Commission, Warman has made hate speech a crusade and a career. In addition to collecting over $40,000 in special compensation from his former employers, Warman has filed 12 complaints that have been, or currently are being, heard by the tribunal.

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