

A COMMON LAW  
THEORY OF  
JUDICIAL REVIEW

THE LIVING TREE

W. J. WALUCHOW

CAMBRIDGE STUDIES IN  
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# *A Common Law Theory of Judicial Review*

*The Living Tree*

W. J. Waluchow

*McMaster University*



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# A Common Law Theory of Judicial Review

## *The Living Tree*

In this study, W. J. Waluchow argues that debates between defenders and critics of constitutional bills of rights presuppose that constitutions are more or less rigid entities. Within such a conception, constitutions aspire to establish stable, fixed points of agreement and pre-commitment, which defenders consider to be possible and desirable and critics deem impossible and undesirable. Drawing on reflections about the nature of law, constitutions, the common law, and what it is to be a democratic representative, Waluchow urges a different theory of bills of rights according to which they are flexible and adaptable. Adopting such a theory enables one not only to answer critics' most serious challenges but also to appreciate the role that a bill of rights, interpreted and enforced by unelected judges, can sensibly play in the constitutional democracy.

W. J. Waluchow is a professor of philosophy at McMaster University in Canada. He is the author of *Inclusive Legal Positivism*, *Free Expressions: Essays in Law and Philosophy*, and *The Dimensions of Ethics: An Introduction to Ethical Theory*, among other titles.

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*For my mother and father*

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# A Charter Revolution

## A. A Charter of Rights

In the early 1980s Canada experienced a fundamental change in its political and legal structures. A new *Constitution Act (1982)* came into effect, declaring itself to be “the supreme law of Canada.” This new *Constitution Act* further decreed that “any law that is inconsistent with [its] provisions . . . is, to the extent of the inconsistency, of no force or effect.”<sup>1</sup> In themselves, these statements seem innocuous enough. By its very nature a constitution contains a society’s basic law; it is reasonable, therefore, to think that it trumps any subordinate law with which it conflicts. What made the *Constitution Act*’s declarations so momentous and deeply controversial, however, was the inclusion of a new *Charter of Rights and Freedoms*. This specified a number of abstract rights of political morality that federal, provincial, and municipal governments were legally barred from infringing.<sup>2</sup> Among these rights were the right to equality before and under the law; the right to life, liberty, and security of the person, coupled with the companion right not to be deprived of the former except in accordance with the principles of fundamental justice; and the right to freedom of thought, belief, opinion, expression, and association.<sup>3</sup> The adoption of a constitutional Charter incorporating these and other rights of political morality was widely applauded as an important step in enhancing the liberty and self-respect

1 Constitution Act, 1982, Schedule B, Part 1, Canadian Charter of Rights and Freedoms, sec. 52 (1).

2 We will assume, for the time being, that many Charter rights – for example, the rights to free expression and equality before and under the law – are a species of moral rights against government. Specifically they are a species of moral rights that governments, in the exercise of their authoritative powers (e.g., to introduce binding legislation), may not validly infringe. In effect, they serve as moral limits to these powers and, consequently, the authority of government. In Chapters 2 and 3 an attempt will be made to ground this assumption in argument. We will also address the question of what kind of moral rights these Charter rights are, together with the question of whose views about their requirements ought to prevail in Charter disputes.

3 Canadian Charter of Rights and Freedoms, sections 15, 7, and 2, respectively.

of Canadian citizens. In adopting the Charter, Canada had clearly heeded the advice of former Prime Minister Lester Pearson, who once commented that “Canadians could take no more meaningful step than to entrench firmly in our Constitution those fundamental rights and liberties which we possess and cherish.”<sup>4</sup> Pearson’s vision was shared by the principal force behind the Charter’s adoption, Prime Minister Pierre Elliott Trudeau: “We must now establish the basic principles, the basic values and beliefs which hold us together as Canadians, so that beyond our regional loyalties there is a way of life and a system of values which make us proud of the country that has given us such freedom and such immeasurable joy.”<sup>5</sup> Eventually, and after a sustained series of political debates and a momentous Supreme Court reference,<sup>6</sup> the Charter came into being. Upon its enactment, then–Justice Minister Jean Chrétien assessed the Charter’s impact and importance in his introduction to a widely distributed booklet sponsored by the federal government:

In a free and democratic society, it is important that citizens know exactly what their rights and freedoms are, and where to turn to for help and advice in the event that those freedoms are denied or rights infringed upon. In a country like Canada – vast and diverse, with 11 governments, two official languages and a variety of ethnic origins – the only way to provide equal protection to everyone is to enshrine those basic rights and freedoms in the Constitution.

Now, for the first time, we will have a Canadian Charter of Rights and Freedoms that recognizes certain rights for all of us, wherever we may live in Canada.

To be sure, there has been a host of federal and provincial laws guaranteeing some of our fundamental rights and freedoms. However, these laws have varied from province to province, with the result that basic rights have been unevenly protected throughout our country. Now that our rights will be written into the Constitution, it will be a constant reminder to our political leaders that they must wield their authority with caution and wisdom.<sup>7</sup>

As Chrétien states in his introduction, most of the rights included in the Charter enjoyed, in some form or other, recognition in Canadian law before the introduction of the Charter. For example, something *like* the right to equality before and under the law was recognized as far back as *Edwards* (the “Persons Case”), which was decided in 1930 by the Privy Council of the United Kingdom.<sup>8</sup> And many Acts of Parliament and provincial legislatures – for example,

4 The Right Honourable Lester B. Pearson, *Federalism for the Future* (Ottawa: Publications Canada, 1968), Introduction cited in *The Charter of Rights and Freedoms: A Guide for Canadians* (Ottawa: Publications Canada, 1982), 1.

5 The Right Honourable Pierre Elliott Trudeau, 1982 (cited in *The Charter of Rights and Freedoms*), 1.

6 *Reference Re Resolution to Amend the Constitution of Canada* [1981] 1 S.C.R. 753, commonly referred to as “The Patriation Case.”

7 *The Charter of Rights and Freedoms: A Guide for Canadians* (supra n. 3), Preface, v.

8 *Edwards v. Attorney General of Canada* [1930] A.C. 124. We will return to *Edwards* later on. It is in this case that the “living tree” metaphor, from which this book takes its subtitle, was introduced into Canadian law.

provincial Human Rights Codes – made reference in some way or another to the notion of equality. Nevertheless, many of the rights to which the Charter makes reference did not, prior to its enactment, enjoy the *kind* of status it accorded them, the status of entrenched, fundamental constitutional rights that no government action is to violate – unless, that is, certain specific conditions are met. For example, an infringement can be justified under Section 1, which specifies that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Alternatively, a constitutional impediment can be overcome by way of a Section 33 override, which allows that “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 20 or sections 7 to 15 of [the] Charter.” Despite these novel features of the Canadian Charter, its impact was profound. Anyone doubting the significance of Charter recognition rights need only review the sorry history of its predecessor, the *Canadian Bill of Rights*, which had very little impact on the state of Canadian law.<sup>9</sup>

Although adoption of the Charter was applauded by many Canadians, not everyone shared the optimistic views of Pearson, Trudeau, and Chrétien. Many critics pointed to the fact that the Charter’s abstract rights were left largely undefined by the political actors whose efforts gave them constitutional status. Canadians were told that they were now guaranteed, in Section 15, an entrenched constitutional right to equality before and under the law. But what exactly that meant in concrete terms was a question that the Charter left completely unanswered. This, together with the fact that the task of answering that question – that is, of determining the concrete meaning and implications of the entrenched rights in specific cases – would invariably fall mainly to the judges, was the source of considerable unease. It was also the source of much vitriolic complaint.<sup>10</sup> This unease found expression in a number of objections, many of which had already been voiced during the long political processes leading up to the Charter’s eventual adoption. Perhaps the most powerful objection came in the form of what might be called the “Argument from Democracy.” Roughly, the argument is this: Democratic principle is seriously compromised if unelected and politically unaccountable judges are left with the task of fleshing out the

9 For an example of a feeble, pre-Charter attempt to use the Bill of Rights to develop a robust jurisprudence of equality, see, for example, *Attorney General of Canada v. Lavell* [1974] S.C.R. 1349. This case is sometimes cited as evidence that a purely statutory, nonconstitutional Bill of Rights is an ineffective tool for the protection of rights.

10 Although Charter rights are usually applied in judging the constitutional status of acts of legislation, their application extends to other forms of government action, including executive and administrative decisions of all kinds. In order to facilitate ease of expression, and unless otherwise stated, I will simply refer to Charter conflicts with legislation, with the understanding that this is only one possible form of conflict.

contours of the moral rights the Charter claims to guarantee, and then applying these rights against legislation duly passed by democratically accountable bodies like Parliament and the provincial legislatures. How could allowing the duly considered judgments of the people's representatives to be trumped by the actions of a small group of judges sitting in appeals courts possibly be reconciled with democracy – with the “free and democratic society” to which Section 1 of the Charter itself makes reference? Not only are the judges empowered by the Charter to thwart the democratic will of Canadians, they seem now able to do so by imposing their own possibly idiosyncratic and biased moral beliefs and ideologies upon the legislatures and, ultimately, the citizens these bodies were elected to represent. Nothing in the Charter specifies precisely what Charter rights to free expression, equality, and liberty mean. And yet judges are empowered to invalidate duly enacted legislation because, in *their* judgment, such legislative acts violate these wholly unspecified moral rights. It seems to follow that legality in Canada is now ultimately dependent on the moral opinions of unaccountable judges.

But there are other, no less serious objections as well. Legal practice under the Charter not only seems to pose a threat to democracy, but it is politically dangerous and fundamentally unfair – indeed, it seems to constitute a threat to the very idea of the rule of law. It is dangerous because considerable political power is now vested in a small cadre of unaccountable judges sitting in appeals courts. They, not the people and their parliamentary representatives, ultimately have been assigned the task of deciding controversial moral issues on behalf of Canadians – and on the basis of these decisions determining what shall be deemed lawful in Canada. This is far too much political power for a small group of unelected judges to wield over an entire population, no matter how learned and wise they might be. It is fundamentally unfair because citizens are, in effect, disenfranchised by this arrangement. Each citizen of voting age has the right, in a democratic society, to contribute to the creation of the laws by which she is governed. This she exercises directly via the ballot box and by whatever contributions to public discourse and debate about controversial issues she chooses to make. She also does so indirectly via the legislative votes of her elected representatives, who are supposed to represent the interests and opinions of constituents. All this has been replaced by subjection to the pronouncements of judges. The duly considered views of citizens and their representatives about the laws by which they are to be governed, arrived at through fair processes of democratic decision making, are, in effect, being set aside in favour of the moral opinions of a handful of judges. The unfairness of this is only compounded by the fact that the judges can almost never demonstrate, to the satisfaction of all concerned, that their decisions are any better at honouring the relevant Charter rights than the democratically chosen decisions they replace. The unfairness is further exacerbated by the undeniable fact that judges on appeals courts often disagree vehemently among themselves about Charter rights and must often,

in the end, themselves rely on voting to settle their disagreements. It is not at all uncommon to see split votes when a court deals with contentious issues of moral principle raised by a Charter challenge. And even when the justices are unanimous in their vote, concurring opinions, each in its own distinctive way supportive of the court's decision, reveal deep divisions concerning the precise meaning and import of the relevant Charter rights. Add to this the fact that judges render decisions that all too often appear to conflict not only with views widely shared in the community at large but also with *their own* previous decisions; and what might have appeared like a marvellous idea to Pearson, Chrétien, Trudeau, and many other Canadians – constitutionally guaranteeing moral rights against unwarranted exercise of government power over citizens – is transformed into a living nightmare, a nightmare in which democracy and the rule of law have, in effect, been abandoned and replaced by the rule of a few men and women, by a kind of “judicial oligarchy.” And no matter the high esteem in which we tend to hold our judges, this is not a form of government to be eagerly embraced. This was a point noted in the mid-twentieth century by an influential American jurist, Learned Hand, who offered the following analogous warning in relation to the American Bill of Rights and its potential for use by judges to rationalize what is in effect an unadulterated power grab:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, “My brother, the Sheep.”<sup>11</sup>

These initial misgivings about the Charter and the role it appears to assign judges remain unabated, and they flare up from time to time in public discourse when controversial cases are decided in Canadian courts. The list of relevant cases includes *Butler* (obscenity and pornography), *Keegstra* (hate speech), *Egan* (same-sex unions), *Vriend* (discrimination against gays and lesbians), *Sharpe* (child pornography), and *The Montfort* (the threatened closure of Ottawa's only Francophone teaching hospital).<sup>12</sup> An earlier court decision in *Montfort* led the *Globe and Mail* to declare in an editorial that “our courts are amending the Constitution as they will, when they will, spinning principles

11 Learned Hand, *The Bill of Rights* (Cambridge, Mass.: Harvard University Press, 1958), 73–4.

12 *R. v. Butler* [1982] 1 S.C.R. 452; *R. v. Keegstra* [1990] 3 S.C.R. 697; *Vriend v. Alberta* [1998] 1 S.C.R. 493; *Egan v. The Queen in Right of Canada* [1995] 2 S.C.R. 513; *R. v. Sharpe* [2001] 1 S.C.R. 45; *Lalonde et al., v. Commission de Restructuration des Services de Santé* (“The Montfort”), Ontario C.A., docket no. C33807, December 7, 2001.

into protections with an entrepreneurial fervour with no more than lip service to those who drafted the highest law in the land."<sup>13</sup> Even those who accept the value of the Charter as part of the fundamental law of Canada often object to the way in which it is interpreted and used by Canadian judges. Jeffrey Simpson, in a *Globe and Mail* column, denounced the Supreme Court for opposing legislation restricting the voting rights of prisoners serving two years or more. According to Simpson,

That decision was one of the most aggressive in asserting judicial supremacy over Parliament. It dismissed parliamentary debates on the issue as having offered "more fulmination than illumination." . . . So much for the vaunted but rather tattered notion of the Supreme Court and Parliament engaged in a "dialogue." It's more like diktat from the court.<sup>14</sup>

Often, then, the complaint is that judges substitute their own moral views on the meaning and import of Charter rights for those of the relevant legislature. At other times, the complaint is that the judges, emboldened by their new roles as the nation's guardians of moral rights, have gone so far as to create entirely new rights and read them into the relevant law. In *Vriend*, for example, the Supreme Court was said to have run roughshod over Alberta's *Individual Rights Protection Act* by inventing a completely new legal right against discrimination based on sexual orientation, a right that was nowhere to be found in the Act but that was thought by the judges to be analogous to those that were. Similar complaints were made after the *Montfort* ruling, which recognized an unwritten, general constitutional right to Francophone minority protection based on the more specific minority protections regarding language, religion, and education that are explicitly mentioned in the Charter and elsewhere. In response, the *Globe and Mail* declared:

Think of the Divisional Court of Ontario's Superior Court of Justice not as a body tied to the tedious, written contents of the Constitution, but as a cheerful entrepreneur prepared to expand the document as it deems wise. That is how the court seems to see itself if its astonishing ruling this week on Ottawa's Montfort Hospital is any guide.<sup>15</sup>

Unease over the Charter and the role it seems to assign judges is not, of course, restricted to newspaper commentaries. A parallel academic scholarship has emerged in which the wisdom and legitimacy of the Charter, and of judicial efforts to implement its provisions, have been the subject of scathing critique. Among the principal critics are F. L. Morton and Rainer Knopff, who, in *The Charter Revolution and the Court Party*, offer the following blunt assessment:

13 *Globe and Mail*, December 3, 1999.

14 "The Court of No Resort," *Globe and Mail*, Friday, November 22, 2002, A25.

15 *Globe and Mail*, editorial, December 3, 1999.

The Charter does not so much guarantee rights as give judges the power to make policy by choosing among competing interpretations of broadly worded provisions. . . . In a dazzling exercise of self-empowerment, the Supreme Court has transformed itself from an adjudicator of disputes to a constitutional oracle that is able and willing to pronounce on the validity of a broad range of public policies. Interpretive discretion and an oracular courtroom – these are two of the chief building blocks of Canada's Charter Revolution.<sup>16</sup>

An equally forceful condemnation was proclaimed by Michael Mandel. In summing up his critique of the Charter and its tendency to entrench "legalized politics," Mandel writes:

. . . all I have really tried to do is to reveal the dishonest nature of legalized politics and to show how what has been sold as a democratic movement is actually its opposite. . . . [I]n every realm, and whether on its best or worst behaviour, the Charter's basic claims have been shown to be fraudulent. . . . Despite all the heavenly exaltation, the Charter has merely handed over the custody of our politics to the legal profession. . . . The Charter would be a mute oracle without a legal priesthood to give it life, and the legal profession has shown itself more than willing to play the lead part in the hoax. Canadian lawyers and judges have, for the most part, gleefully and greedily undertaken a job – deciding the important political questions of the day – for which they lack all competence.<sup>17</sup>

Further on the question of the threat posed to democratic ideals, Mandel adds,

. . . we have seen what it means for something to be "constitutionally guaranteed." We have seen that the form makes all the difference in the world. Putting the bare phrase "freedom of association" in a document administered by an unfettered judiciary not responsible to anyone is unimaginable in any society we would call democratic. Nailing down the meaning of freedom of association by specific, concrete, legal (as opposed to constitutional) rights with institutional guarantees that they will be rigorously respected is a different thing altogether. In other words, we do not need "freedom of association" if we have "all it entails." Nor will we have democracy if we are not allowed to make up our own minds about what freedom of association entails, but instead must hand the question over to a few of our betters to decide the matter for us under the pretext of interpretation. . . . Using the Charter offensively legitimates a form of politics we should be doing everything we can to *de*-legitimate.<sup>18</sup>

So what are we to conclude from all this? Despite the fact that the majority of Canadians seem to share the favourable picture of the Charter and its possibilities enunciated by Pearson, Trudeau, and Chrétien, there remains a significant body of public opinion and scholarship that questions their rosy picture. Many share the view recently articulated by the archbishop of the Roman Catholic diocese of Toronto. In an open letter calling for the federal government to use

16 Morton and Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), 13–14.

17 Michael Mandel, *The Charter of Rights and the Legalization of Politics* (Toronto: Thompson Educational Publishing, Inc., 1994), 455.

18 *Ibid.*, 458.



Section 33 of the Charter to override rulings by several Canadian courts that restricting marriage to heterosexual couples is an unjustifiable infringement of Section 15, the archbishop wrote:

Some will argue that the use of the notwithstanding clause in the Charter [Sec. 33] is wrong in principle. I must respectfully disagree. The notwithstanding clause was inserted to recognize parliamentary supremacy and the need for democratic oversight for the courts. No Canadian can say that the courts always get things right. Judges are not elected and are ultimately not accountable for their decisions. Fundamental social change should only occur with the consent of the people through their democratic institutions. This understanding of the role of Parliament led to the inclusion of the notwithstanding clause in the Charter. Its use in the context of same-sex marriage would be most appropriate.<sup>19</sup>

The arguments put forward on behalf of the archbishop's underlying political philosophy are not entirely without substance. It *is* difficult to reconcile the Charter with the view that, ultimately, self-government – arguably, the animating ideal of democracy – demands government by the people and/or their chosen representatives. It rejects government by a small group of unelected judges who are not required to answer to the population over whom they exercise considerable authority and who often represent anything but a cross-section of views on the controversial moral issues arising in Charter challenges. It *is* difficult to think of the Charter as “guaranteeing” our moral rights, when it is largely left to judges to figure out what these so-called guarantees really mean. The problem is only further exacerbated when the judges can seldom, if ever, demonstrate that their answers are the correct ones, or even come to an agreement on their proposed solutions. It *is* difficult to reconcile the Charter's “guarantees” with the suspicion that there really are no “right answers,” in either law or moral theory, to the question of what, in Canada, the rights to equality, free expression, life, liberty, and security of the person really mean in practice. How can Canadians be guaranteed something about which there is so much controversy? How can they be guaranteed something that may not even exist? How valuable is a guarantee when it's only *after* one attempts to act on it that one is told what the guarantee actually amounts to? Would anyone be prepared to buy a car or a dishwasher under these circumstances? Surely not. But then why should they be willing to buy into a Charter that seems, if the critics are correct, to offer nothing more?

So, in the abstract, and without considering the values and ideals it threatens to undermine, a Charter or Bill of Rights sounds like a very good idea. But once one thinks things through a bit more carefully, tough questions emerge that demand serious attention. It is the aim of this book to contribute to efforts

19 Cardinal Aloysius Amrozic, “An Open Letter: Why the rush on same-sex marriage?” *Globe and Mail*, Wednesday, January 19, 2005, A19.