Out of Place: Comment on *Committee for the Commonwealth of Canada* v. *Canada*

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In *Committee for the Commonwealth of Canada* v. *Canada*, which concerns the restriction of political leafleting in Dorval Airport, the Supreme Court of Canada takes the opportunity to set out a general approach to the issue of public communication on state-owned property. Three different approaches to the right of access to state property are put forward. The judgments of Chief Justice Lamer and Justices L'Heureux-Dubé and McLachlin offer different approaches to the problem of fitting an issue involving the distribution of communicative power into the established model of freedom of expression adjudication. The members of the Court try to fit the access issue into the established framework and to contain its distributive character by giving general or partial priority to the state's use of its property. However, the general rules and categories that the members of the Court rely on to limit judicial review of the state's property use and the adequacy of the opportunities for public communication, are unclear and unstable.

Chief Justice Lamer gives general priority to the state's use of its property by limiting the protection of subsection 2(b) of the *Charter* to expression that is consistent with the state's property use; yet the consistency standard is vague and flexible and its application is easily influenced by a desire to accommodate important access claims. The distinction between public and private forums, relied on by L'Heureux-Dubé and McLachlin JJ., rests on a general finding about the compatibility of public communication with the state's use of the particular property. But the location of the line separating public forums (the balancing of competing interests) and private forums (the giving of priority to the state's property use) will depend on the decision-maker's views and assumptions about the need for space for public discourse in general and in specific circumstances.

Dans *Comité pour la République du Canada* c. *Canada*, qui porte sur la restriction de la distribution de dépliants à caractère politique à l'aéroport Dorval, la Cour suprême du Canada prend l'occasion d'établir des principes généraux sur la question des communications publiques dans un lieu dont le gouvernement est propriétaire. Les opinions du juge en chef Lamer et des juges L'Heureux-Dubé et McLachlin diffèrent dans leur façon d'insérer la question de la distribution du pouvoir de communication dans la jurisprudence déjà établie sur la liberté d'expression. Les juges tentent de contenir son caractère distributif en accordant une priorité générale ou partielle à l'utilisation par le gouvernement de sa propriété. Cependant, les règles et catégories que les membres de la Cour utilisent dans leur analyse du droit de propriété gouvernemental sont vagues et instables.

Le juge en chef Lamer donne généralement priorité au droit de propriété du gouvernement en limitant l'étendue du paragraphe 2b) de la *Charte* à l'expression qui est compatible avec la fonction ou destination principale du lieu. Cependant, le critère de compatibilité est vague et flexible; sa mise en application est facilement influencée par le désir de permettre certaines formes d'expression jugées importantes. La distinction entre « tribune publique » et « tribune privée », avancée par les juges L'Heureux-Dubé et McLachlin, dépend d'une déeision sur la compatibilité de la communication publique avec l'usage gouvernemental d'une propriété en particulier. La démarcation entre tribunes publiques (peser les intérêts rivaux) et tribunes privées (donner priorité à l'usage par l'État de sa propriété) dépendra des présomptions et opinions du législateur sur le besoin de tribunes pour le discours public dans des circonstances générales et particulières.

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Synopsis

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Introduction

In 1984, officials at Dorval airport in Montreal prevented three members of the Committee for the Commonwealth of Canada from communicating their political views to passers-by in the public areas of the airport. The Committee members were told that their activities (of distributing leaflets and approaching passers-by) violated a federal airport regulation, which provided that

> no person shall
> (a) conduct any business or undertaking, commercial or otherwise, at an airport;
> (b) advertise or solicit at an airport on his own behalf or on behalf of any person; or
> (c) fix, install or place anything at an airport for the purpose of any business or undertaking.[1]

The Committee members brought a motion in Federal Court seeking a declaration that under the *Canadian Charter of Rights and Freedoms*[2] they had a right to express themselves in the public areas of the airport and that this right had been violated by the airport authorities. Justice Dubé of the Trial Division of the Federal Court granted the declaration.[3] He considered that the open areas

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[1]*Government Airport Concession Operations Regulations*, SOR/79-373, s. 7. Under the regulation a person could engage in these activities if "authorized in writing by the Minister."

[2]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[3]*Committee for the Commonwealth of Canada* v. *Canada*, [1985] 2 F.C. 3, 25 D.L.R. (4th) 460 (T.D.). This American approach to the access issue seeks to isolate a special category of property

of the airport were a "public forum" so that the government's ban on soliciting and advertising in these areas was a restriction on freedom of expression. He found that this restriction did not represent a substantial and compelling purpose and so could not be justified under section 1 of the *Charter*. The case was appealed to the Appeal Division of the Federal Court.[4] Hugessen and MacGuigan JJ. (Pratte J. dissenting) agreed with the trial judge that the airport regulation was an unjustified restriction on freedom of expression. They did not agree, however, with the trial judge's adoption of the American public forum doctrine.[5] Instead they considered that any restriction on communicative access to a state-owned property would violate subsection 2(b) of the *Charter* and would be unconstitutional unless justified under the terms of section 1.

The case was further appealed to the Supreme Court of Canada.[6] In a judgment released in January 1991, the seven members of the Court who heard the appeal disagree about whether the regulation restricting advertising and soliciting covers the respondents' activities. Four of the judges, L'Heureux-Dubé, McLachlin, Cory and Gonthier JJ., think that the restriction covers political communication of the sort engaged in by the respondents. The other three judges, Lamer C.J.C., LaForest and Sopinka JJ., think that the regulation restricts only commercial activities and not political communication. However, all the members of the Court agree that the airport authorities' interference with the respondents' communication of political views, whether or not supported by the regulation, was a restriction on the respondents' freedom of expression that could not be justified under section 1.

In the course of deciding the immediate issue of whether the restriction on communication in the airport violates the *Charter*, the members of the Court try to set out a general approach for dealing with future disputes concerning communication on state-owned property. Three different approaches to the issue of communicative access are put forward.

Chief Justice Lamer (Sopinka and Cory JJ. concurring on the access issue) considers that the question of whether an individual has a right to communicate on state-owned property should be resolved under subsection 2(b) and should depend simply on whether the particular communication is consistent or com-

— "public forums" — which by tradition or designation have been open to the public for communication. The government may restrict communication on a public forum only for substantial and compelling reasons. On all other properties (non-public forums) the government may restrict communication provided the restriction is content-neutral. For a discussion and criticism of the American public forum doctrine, see R. Moon, "Access to Public and Private Property under Freedom of Expression" (1988) 20 Ottawa L. Rev. 339.

[4] *Committee for the Commonwealth of Canada* v. *Canada*, [1987] 2 F.C. 68, 36 D.L.R. (4th) 502 (C.A.) [cited to F.C.].

[5] *Ibid.* at 78, Hugessen J. He says:

> The concept of a "public forum" is borrowed from American decisions. The Constitution of the United States differs appreciably from our own, notably in that it contains no equivalent to our sections 1 and 33. It is neither necessary nor advisable for us in Canada to adopt the categories developed by the U.S. courts to limit the overly absolute formulation of certain rights in their Constitution (*ibid.*).

[6] *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385 [hereinafter *Committee for Commonwealth* cited to S.C.R.].

patible with the state's use of the property. Expression that is incompatible with the state's property use falls outside the protection of subsection 2(b) and can be restricted by the state without special justification. General restrictions on expression that are not based on the incompatibility of the expression with the state's property use must still be justified by the state under section 1 of the *Charter*.

Justice McLachlin (LaForest[7] and Gonthier JJ. concurring on the access issue) holds that a restriction on communicative access to state-owned property that is based on the state's use of its property, and not on the content of the communication, will violate subsection 2(b) only if the restricted communication (including its location) can be shown to advance the values underlying the constitutional protection of freedom of expression. In her view, communicative access to certain state-owned properties, "private" state properties such as prisons, will not advance the values of democracy, truth and autonomy and so the restriction of access to these properties will not violate subsection 2(b). On the other hand, access to state properties that historically have been open to public expression will advance the freedom's values and so the restriction of access to these properties will violate subsection 2(b). If subsection 2(b) is violated, the Court must then consider whether the violation is justified under section 1.

Finally, Justice L'Heureux-Dubé takes the view that any time the state restricts expression on its property it violates subsection 2(b) and must justify the restriction under section 1. However, she considers that the section 1 standard should be lowered for time, place and manner restrictions. As well, she accepts that the "public" or "private" character of the property should be taken into account in the balancing of competing state and individual interests under section 1. Some properties, "public arenas," are better able to accommodate expression. A general restriction on public communication on one of these properties is unlikely to satisfy the requirements of section 1. However, public communication is fundamentally incompatible with the operation of "private" state-owned properties. A restriction on communicative access to a private forum will invariably be justified under section 1.

The judgments of Lamer C.J.C. and L'Heureux-Dubé and McLachlin JJ. recognize that discussion of public issues would be seriously impeded if private citizens did not have some right to communicate on state-owned property. And so all three reject the argument that state-owned property is simply part of the background to judicial review and insulated from all claims of access. Yet at the same time, all three are unwilling to subject a restriction on communicative access to state property to the ordinary section 1 standard, which assumes a right to communicate in the absence of substantial reasons for limitation.[8] They are unwilling to regard the constitutional question as simply whether or not the state's use of its property is important enough to justify a restriction on the basic right of the individual to communicate wherever and whenever he/she

[7]Specifically, La Forest J. says: "in dealing with future cases, I would tend to approach them in the manner suggested by McLachlin J." (*ibid.* at 166).

[8]See *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 139, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.], for the Supreme Court's definition of s. 1 of the *Charter*.

chooses.[9] Instead, the three judgments give either complete or partial priority to the state's use of its property over communicative access.

All three judges are reluctant to second-guess the state's judgment about the compatibility of communication with its property use and to require any significant compromise of the state's property use to accommodate communication. There are a number of reasons that may explain this reluctance. First, the members of the Court may be reluctant to treat property ownership as irrelevant or insignificant in the resolution of a dispute between competing use claims. The system of property rights seems to provide a stable context for individual and collective activity, giving different individuals and groups exclusive control over certain resources and settling the problem of competing use claims.[10] Property is such a fundamental part of the social order that it is difficult for the members of the Court to give no weight whatsoever to the state's ownership of a particular place or facility. Or put another way, property is so fundamental that, although the members of the Court are not prepared to see it as lying entirely outside the realm of judicial review, they are inclined to see a judicially defined right of access as a special exception to the exclusive control of the property owner. A right of access requires the owner to surrender part of his/her established rights, something that should be exceptional.

More particularly the judges are reluctant to examine the state's use of its property. An assessment by the courts of the state's property use would involve second-guessing the state's judgment about the importance of particular public policies and the implementation of those policies — whether certain forms of communication can be reasonably accommodated on a property dedicated to automobile transportation or to the imprisonment of convicted criminals, for instance. A judgment by the court requiring access to a state-owned property, and in particular to a state-owned property that is closed to the public such as a prison or a government office, would affect the property's function or operation in unpredictable ways.

However, the principal reason for the judges' reluctance stems from the systemic or distributive character of the access issue. The access issue is not, as Justice L'Heureux-Dubé describes it, "a 'classic' confrontation between the acknowledged value of political expression and legitimate government interests in imposing certain restrictions on expression generally."[11] It is instead a confrontation or competition between different uses of state-owned property, a distributive issue that will not fit easily within the established model of rights adjudication.

Under the established model, freedom of expression is understood as a liberty which individuals have unless and until interfered with by the state. The two questions for the Court under this model are first, whether the restricted activity is expression protected under subsection 2(b) and second, whether the state act that restricts the freedom represents an interest significant enough to

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[9]*Ibid. Oakes* established rationality, proportionality and minimum impairment standards.

[10]Moon, *supra* note 3 at 343.

[11]*Committee for Commonwealth, supra* note 6 at 166-67.

justify the restriction. However, the issue raised by a restriction on access to state-owned property is not simply whether the value of the restriction is substantial enough to justify interference with expressive activity. It is rather whether the government's use of its property leaves adequate space for public discourse and does not effectively prevent the public expression of particular views.

The established model of adjudication focuses on a particular state act that restricts expression rather than on the larger system of property distribution and use.[12] It structures the access issue as an assessment and balancing of the state's reasons for excluding communication from a particular property and the individual's interest in communicating on that property. While the underlying concern is the adequacy of opportunities for communication in the overall system, the courts' attention is focused on a point in the system, a particular state restriction on access.

Under the established model, expression can only be restricted for substantial and compelling reasons.[13] But a minor government function, or a less than compelling purpose, should not be defeated simply because it requires a restriction on access. The state should not be free to restrict access that does not interfere in any way with its property use. But if there are a variety of other forums open to public communication, the state may be justified in restricting access that interferes in either a large or small way with its use of a particular property. It is unnecessary for the state's use of a particular property, even a comparatively minor use, to yield to communicative access claims if there are alternative forums. On the other hand though, if there are not adequate alternatives, the state may have to compromise its property use and permit access. With this said, however, it is unclear how much space should be preserved for public discourse and at what point and to what degree the state should be required to compromise its property use to accommodate communication.

An assessment of the importance of a particular access claim to free and open public communication and to the realization of freedom of expression values would turn, in part at least, on the availability and adequacy of alternative forums for the restricted communication, which in turn would depend on the distribution of communicative power in the community. However, if an individual's constitutional right of access to a particular property, such as an airport, depends, in part, on whether he/she has a right to communicate on other prop-

[12]All three judges claim that their particular approach to the access issue follows the model set out by the Court in *Irwin Toy Ltd.* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 978-79, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy* cited to S.C.R.].

[13]Other freedom of expression issues, such as defamation, hate propaganda, election spending and pornography, have a distributive dimension in the sense that relative communicative power may play a role in justifying the restriction of these forms of "expression." But these issues still seem to fall within the established model. In each case the expression may be restricted because it causes harm to an important individual or collective interest. The distributive dimension is simply that the harm caused by these kinds of expression is greater because of the injured party's relative lack of communicative power. For example, defamation causes harm to the individual's reputation; but our understanding of the seriousness of this harm is affected by our recognition that the individual ordinarily does not have the power to respond effectively to defamatory remarks.

erties, state or private, how is a court to judge the available alternatives? Will not the right of access to these other properties in turn depend, in part, on whether the individual has a right of access to the airport and to other properties?

A judgment about alternatives seems to require a reasonably stable background of communication rights and restrictions, perhaps in the form of recognized public and private forums, which rest either on an established state practice of allowing communication on certain properties (such as parks and streets) or on a judgment that communication is reasonably or generally compatible with the ordinary state use of certain properties so that access should be permitted regardless of the alternatives. Any approach that tries to be open and flexible and to judge the importance of each access claim on the basis of available alternative forums seems inevitably to rely on assumptions about the background of communicative alternatives and ultimately to evolve into a version of the public forum doctrine.

The differences in the way the three judgments structure the access issue reflect different approaches to the problem of fitting the issue into the established model of freedom of expression adjudication. The established model's focus on the restriction of access to a particular property makes it difficult for the courts to assess the adequacy of the space available for public communication and to make the systemic adjustments necessary to achieve a fair compromise between the requirements of public communication and the demands of government policy.

The members of the Court try to fit the access issue into the established framework and to contain its distributive character by giving general or partial priority to the state's use of the property. Under the approach of Lamer C.J.C. the state will only be required to give access to communication that is compatible with its property use. This approach seems to avoid judicial second-guessing of the state's property use and judicial assessment of the background of opportunities for public communication. Lamer C.J.C.'s approach either ignores the issue of alternative opportunities for communication or assumes that in the background there are always significant alternatives.

Both McLachlin and L'Heureux-Dubé JJ. purport to follow the established two-step model for analysing freedom of expression issues. However, they want to avoid a close assessment of the state's property use and to limit the *ad hoc* balancing of competing state and expression interests. They do this by smuggling into the standard analysis a version of the public forum doctrine. McLachlin J. relies on the distinction between public and private forums in defining the freedom's scope under subsection 2(b). L'Heureux-Dubé J. relies on the distinction in balancing competing state and expression interests under section 1. The test for determining whether a particular property is a public or private forum (arena) is the property's importance as a forum for communication and the general compatibility of public communication with the state's use of the property. If a property is classified as a public forum, the state will have to make some efforts to accommodate expression. But if a property is classified as a private forum, it will be insulated from all claims of access.

The division of state-owned property into public and private forums shifts attention away from the question of alternative forums and reduces the need to second-guess the state's use of its property. The basic standard for deciding how to classify a particular property is whether or not public communication is compatible with the state's use of the property. Even if a court takes into account the availability and adequacy of alternatives when deciding how to classify a property, it assesses the alternatives for public communication in general and not for a specific act of communication. The complete insulation of a private forum from access claims rests on a general conclusion that public communication will interfere significantly with the state's property use and on an assumption that as long as communication is permitted in public forums, there will be adequate space for communication and it will be unnecessary for the state to compromise its use of the private forum. On the other hand, the requirement that the state accommodate expression in a public forum rests on a general conclusion that compelling access for communication will not significantly impair the state's use of the property and on an assumption that the property is an important forum for communication.

Lamer C.J.C., McLachlin and L'Heureux-Dubé JJ. accept that there is a role for the court in protecting opportunities for public communication on state-owned property, yet they are reluctant to become deeply involved in assessing and adjusting the distribution of property rights. Each of their judgments is characterized by a tension between, on the one hand, a recognition of a right to a broad and flexible right of access that ensures adequate space for public discourse and, on the other hand, a reluctance to engage in an open-ended and potentially unmanageable assessment of the adequacy of communicative opportunities. They rely on different approaches to contain the distributive dimension of the issue and to keep the focus on the particular restriction on access.

However, the general rules and categories that the members of the Court rely on to limit judicial review of the state's property use and the fair distribution of communicative power, are unclear and unstable. These rules come under pressure when it becomes apparent that there are not adequate alternatives for the communication of a particular message — when the unstated assumptions about alternative forums do not seem to hold. The Chief Justice gives general priority to the state's use of its property by limiting the protection of subsection 2(b) to expression that is consistent with the state's property use; yet the consistency standard is vague and flexible and its application is easily influenced by a desire to accommodate important access claims. The distinction between public and private forums, relied on by L'Heureux-Dubé and McLachlin JJ., rests on a general finding about the compatibility of public communication with the state's use of the particular property. But the location of the line separating public forums (the balancing of competing interests) and private forums (the giving of priority to the state's property use) will depend on the decision-maker's views and assumptions about the need for space for public discourse in general and in specific circumstances.

I. The Judgment of Lamer C.J.C.

A. *Summary of Judgment*

Early in his judgment Chief Justice Lamer describes the access issue as the accommodation or balancing of two competing interests. On the one hand, there is the interest of the individual "wishing to express himself in a place suitable for such expression ..."[14] The individual's interest in access is simply that "the dissemination of an idea is most effective when there are a large number of listeners" and "the economic and social structure of our society is such that the largest number of individuals, or potential listeners, is often to be found in places that are state property" such as parks and roads.[15] On the other hand, there is the government's interest "in [the] effective operation of the place owned by it."[16] Public communication will sometimes interfere with the state's "public" use of its property.

Lamer C.J.C. considers that the government's ownership of a particular property "cannot of itself authorize an infringement of the freedom guaranteed by s. 2(b) of the *Charter*."[17] Government ownership is "quasi-fiduciary" in nature. The government owns "places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns."[18] For this reason state property is not outside the scope of constitutional review and insulated from all claims of access. Behind the assertion that ownership does not give the state an automatic right to exclude access, is a concern that "an absolutist approach" to the right of ownership would severely restrict the opportunities for communication of many individuals. According to Lamer C.J.C., limiting freedom of expression "solely to places owned by the person wishing to communicate ... would certainly deny the very foundation of the freedom of expression."[19]

Although the Chief Justice considers that ownership does not give the government an automatic right to exclude communication, and although he often describes the restriction of communication on government property as a restriction on freedom of expression, he argues that the reconciliation of the competing government and individual interests should take place under subsection 2(b), as a matter of the definition of the freedom's scope, rather than under section 1, as a matter of the proper balance between competing values or interests. The Chief Justice considers that the access issue should be resolved under subsection 2(b) rather than under section 1 because he thinks that the onus of establishing a right of access should remain on the person seeking access and, more significantly, because he considers that the right should be limited to access that is compatible with the state's use of its property. In spite of his early references to the *balancing* of interests, when the Chief Justice articulates the test for deter-

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[14]*Committee for Commonwealth, supra* note 6 at 153.
[15]*Ibid.*
[16]*Ibid.*
[17]*Ibid.* at 155.
[18]*Ibid.* at 154.
[19]*Ibid.* at 155.

mining when access should be permitted, he seems to give complete priority to the state's interest in advancing and protecting the use to which it has put its property.

According to Lamer C.J.C., "the individual will only be free to communicate in a place owned by the state if the *form* of expression he uses is compatible with the principal function or intended purpose of that place." [emphasis added][20] A restriction on communication (other than a content-based restriction) that protects or advances the state's use of its property will not violate subsection 2(b) because expression that interferes with the state's use does not fall within the scope of freedom of expression. The state does not have unreviewable power to exclude communication from its property; but its property *use* is not subject to review by the courts under the standards of section 1 and need not yield to any claim of access, even access that contributes significantly to freedom of expression values.

For Lamer C.J.C. an important advantage of the compatibility test is its flexibility. The test does not create a category of "public forums," where access is virtually guaranteed, subject only to restrictions that advance substantial and compelling state purposes; nor does it insulate a category of property ("private forums") from all access claims. He rejects "the nominalistic approach developed by the American courts" in favour of an approach that directly "balances" the interests that underlie the public forum doctrine.[21]

Lamer C.J.C. illustrates the flexibility of his test using the example of the Library of Parliament:

> [N]o one would suggest that an individual could, under the aegis of freedom of expression, shout a political message of some kind in the Library of Parliament or any other library. This form of expression in such a context would be incompatible with the fundamental purpose of the place, which essentially requires silence. When an individual undertakes to communicate in a public place, he or she must consider the function which that place must fulfil and adjust his or her means of communicating so that the expression is not an impediment to that function. To refer again to the example of a library, it is likely that wearing a T-shirt bearing a political message would be a form of expression consistent with the intended use of such a place.[22]

The Chief Justice's test does not insulate a particular class of properties from all claims of access because the test is not whether communication is *generally* consistent with the state's use of the particular property but rather whether this *particular* claim of access is compatible with the state's property use.

In the case before the Court, the Chief Justice finds that the airport authorities' exclusion of the respondents from the public areas of the terminal build-

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[20]*Ibid.* at 156. The reference to "form" emphasizes the Chief Justice's understanding of this exclusion from the scope of s. 2(b) as an extension of the exclusion in *Irwin Toy*, *supra* note 12, of expression that has a violent form. It may also indicate that expression is not incompatible with the state use of property just because its *message* is critical of the state or the state's property use.

[21]*Committee for Commonwealth*, *ibid.* at 152. Lamer C.J.C. further notes that: "The American experience shows that the 'public forum' concept actually results from an attempt to strike a balance between the interests of the individual and the interests of the government" (*ibid.*).

[22]*Ibid.* at 157. This example is reminiscent of the case of *Brown* v. *State of Louisiana*, 86 S. Ct. 719 (1966), which involved a silent protest in a segregated library.

ing was contrary to subsection 2(b) because the respondents' political communication was compatible with the use of the property as an airport. In his view:

> [T]he distribution of pamphlets and discussion with certain members of the public are in no way incompatible with the airport's primary function, that of accommodating the needs of the travelling public. An airport is in many ways a thoroughfare, which in its open areas or waiting areas can accommodate expression without the effectiveness or function of the place being in any way threatened.[23]

After he finds that the respondents' expression was compatible with the operation of the airport, Lamer C.J.C. considers the application of section 1 (even though the only arguments the state put forward to justify the restriction were first, that its ownership of the airport gave it the right to exclude access and second, that access was incompatible with the airport's operation). He finds that the airport regulation did not cover the respondents' political expression, so that the "limitation imposed on the respondents' freedom of expression arose from the action taken by the airport manager ... when he ordered the respondents to cease their activities."[24] In the Chief Justice's opinion this action by the manager, although based on established policy, was not a "law" and so did not satisfy the section 1 requirement that a limit on the freedom be "prescribed by law." Therefore the restriction was not justified under section 1.[25]

B. Discussion of Judgment

The decision to give the state's property use priority over access claims is never clearly explained by the Chief Justice. At one point he states that "the *Charter* does not protect 'expression' itself, but *freedom* of expression."[26] However, he does not explain the basis for this distinction and he does not say how it is to be reconciled with the Court's earlier judgments, which take a broad view of the scope of protected expression under subsection 2(b) (excluding only expression that has a violent form) and require that restrictions on expression be justified under the terms of section 1. Elsewhere, the Chief Justice points out that the state uses its property to advance the interests of *citizens as a whole*.[27] He seems to assume that the state use of the property represents the collective interest, which should prevail over the individual's interest in free expression. But why should a restriction on communication that protects the state's use of its property be treated differently from restrictions that protect other public values or concerns? Restrictions on expression that protect racial minorities from harm or children from manipulation are addressed under section 1 and must meet proportionality and minimum impairment standards.[28]

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[23]*Committee for Commonwealth, ibid.* at 158-59.

[24]*Ibid.* at 164.

[25]Section 1 of the *Charter* permits the imposition of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[26]*Committee for Commonwealth, supra* note 6 at 156.

[27]*Ibid.* at 155. Lamer C.J.C. continues:

> The fundamental government interest, and by the same token that of the citizens as a whole, is thus to ensure that the services or undertakings offered by various levels of government are operated effectively and in accordance with their intended purpose (*ibid.* at 156).

[28]*Irwin Toy, supra* note 12. See also *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 [hereinafter *Keegstra* cited to S.C.R.].

At one point in his discussion of the compatibility test, the Chief Justice states that "[e]ven before any attempt was made to use [state-owned property] for purposes of expression, such places were intended by the state to perform specific social functions."[29] The suggestion here perhaps is that these properties would not be forums for communication if the state had not put them to a use which drew a crowd — the roads, or the legislature — so that those seeking access can hardly complain if their claim is treated as secondary to the state's use of the property. Indeed, the usefulness of the place as a forum for communication might be lost if the state function were undermined by the frequent occurrence of incompatible communication. In some cases the conflict between the communicative access claimed and the state use of the property is not coincidental. In a case such as yelling from the Parliamentary Gallery, the communication may be significant only because it disrupts the state's property use.

However, what really seems to lie behind the adoption of a compatibility test is a concern that any approach that does not give priority to the state's use of its property (*i.e.* does not regard this as unreviewable background) and instead seeks to balance under section 1 the access claim against the state use will be unmanageable. The issue raised by a claim of access to state property is not simply, as the established model of adjudication assumes, whether or not the state is justified in silencing a particular form or instance of expression because it causes harm to an important individual or collective interest. Instead a claim of access raises specific questions about the reconciliation or compromise of competing claims to use a particular state-owned property and larger questions about the creation and protection of opportunities to communicate on state-owned property in general.

The resolution of the access issue under section 1 would involve an assessment and balancing of the competing individual and government property use claims. An assessment of the government's exclusion of access would require the courts to second-guess the government's judgment about the use of its property, as a prison or as a roadway for example, and the sort of communicative access that interferes with this use. The government's judgment that certain forms of expression are incompatible with its use of the property will reflect its particular understanding of the function or purpose of the property (the function of a prison or the purpose of the roadways) and may involve considerations that are complex and technical (what is necessary to prison security? what are the economic and safety costs of accommodating demonstrations on the roads?). A court cannot anticipate all the ways in which the state's use of its property will be affected by a decision to allow communication on the property.

The court would have to compare the importance of the state's use of its property (street or prison) and the need for the exclusion of access (to freely flowing traffic or prison security) with the importance of the freedom to communicate on these properties, which depends significantly on the kinds of alternatives available to the person seeking communicative access. The courts would have to assess both the availability and the adequacy of alternatives for particular individuals or for particular viewpoints. A political protest may be less

[29]*Committee for Commonwealth, supra* note 6 at 156.

powerful if it is held in a park located on the outskirts of the city than if it is held on the grounds of the City Hall. And, of course, access to a park for a political protest will be more important if the protest cannot take place at the City Hall.

Instead of adopting a version of the public forum doctrine to contain the open-ended and distributive character of the access judgment, Lamer C.J.C. seeks to avoid entirely the problem of having to choose between competing property use claims, simply by giving priority to the state's use of its property, and excluding any formal consideration of the importance or value of the communicative access claim.

His approach fits awkwardly with the established model of freedom of expression adjudication, which provides that any restriction on expression (generously defined) will be unconstitutional unless justified under section 1. The awkward fit of the Chief Justice's approach becomes clearer once we recognize that sometimes it may be difficult to decide whether the restricted expression is incompatible with the state's use of its property or is simply in conflict with a more general interest or value. Or put another way, it sometimes will be difficult to distinguish between a restriction which advances or protects the state's property use and a restriction which protects a more general public interest. Is the noise restriction meant to protect the special use of the property or is it simply a way of protecting individuals in a particular context from irritating or undesirable noise? If the restriction protects the state's use of its property it will *not* violate subsection 2(b). However, if the restriction advances a more general value or interest it will violate subsection 2(b), although it may be justified under section 1.

Similarly there might be some question as to whether a particular act of communication is incompatible with the state's use of the property, and so outside the protection of subsection 2(b), or whether it is the combination or accumulation of a number of similar acts that is incompatible, so that the issue falls to be resolved under section 1 — a matter of distributing a limited number of opportunities to communicate. A particular instance of public communication in the airport terminal might be compatible with the movement of travellers but if there were many instances of expression occurring at the same time the ordinary use of the terminal would be impaired.

It is unclear how far Chief Justice Lamer's compatibility test will avoid judicial second-guessing of the state's property use. The Chief Justice's test may require the courts to impose their own views about what is and what is not compatible with the state's use of its property or it may permit the courts to defer generally to the government's views on the question. If the courts defer to the state's judgment about what is incompatible with the property's use, there is a risk that the state will define the exclusion very broadly; prison authorities, for example, are notorious for taking a broad view of what is necessary to prison security. But, on the other hand, if the courts are willing to second-guess this judgment by the state, their views about compatibility will be affected by their particular, and potentially controversial, understanding of the property's use. For example, a court's judgment about what is necessary to the operation of a

prison will almost certainly be affected by its understanding of the purposes of imprisonment.

As well, it is unclear how well the compatibility test will avoid a balancing of interests and contain the distributive dimension of the access issue. A compatibility standard may be broadly interpreted so that the access right is limited significantly. It is almost always possible to find that a particular act of communication is incompatible or inconsistent, to some degree, with the state's property use because it causes some disruption or inconvenience. For example, communication by religious groups on street corners may be considered "incompatible" with the ordinary use of the streets because it may impede the flow of pedestrian or automobile traffic.[30] Chief Justice Lamer seeks to avoid this possibility by narrowing the test under subsection 2(b) to incompatibility with the *fundamental* purpose, or the *very* or *principal* function, of the place.

But what is the *principal* function of the place and how will the courts distinguish it from minor aspects of the state's use of its property? By what standards should the courts measure the trade-off between minor uses of the property and competing communicative access claims? Is it possible to distinguish between interference with a minor function of the property and a minor interference with the property's principal function (*e.g.* a minor interference with the flow of pedestrians on public sidewalks)? Will a minor interference with the principal function of the state property always be excluded from the protection of subsection 2(b)?[31]

Any effort to avoid a broad application of the compatibility test opens the door to some balancing of competing interests. Undoubtedly when important access claims are made, not only will the courts insist on a tighter connection between the state's use of the property and the exclusion of communication but as well they will push the state to accommodate some communication and to suffer a degree of interference with its use of the property. Some balancing of the sort the Chief Justice tries to avoid with his compatibility test is bound to

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[30]Lamer C.J.C. puts it this way:

> For example, if a person tried to picket in the middle of a busy highway or to set up barricades on a bridge, it might well be concluded that such a form of expression in such a place is incompatible with the principal function of the place, which is to provide for the smooth flow of automobile traffic. In such a case, it could not be concluded that freedom of expression had been restricted if a government representative obliged the picketer to express himself elsewhere (*ibid.* at 157-58).

[31]For a discussion of the limits of a compatibility test see Moon, *supra* note 3 at 354-56. Similarly, Justice McLachlin in *Committee for Commonwealth*, *supra* note 6 at 235, criticises the compatibility test: "Does it mean normal function? Optimum function?" She assumes that only if the impairment of function were severe would s. 2(b) be held inapplicable, with limitations relating to major (as opposed to minor) function falling to be justified under s. 1:

> In some cases, the right of free expression might be considered important enough to interfere to some extent with the function of government property. In others, the impairment of function will be so great in comparison with the interest in free expression as to justify exclusion or limitation of the expression. The concept of function is thus seen to involve a balancing of interests which arguably serves better as part of the s. 1 test than as a threshold for screening out claims which raise no *prima facie* free expression interest (*ibid.*).

play a role given the flexibility of the test and the not easily suppressed desire to increase opportunities for communication — particularly in cases where there are not adequate alternative forums. Although formally excluded under a compatibility test, the demands of freedom of expression re-enter the analysis, affecting the shape and standard of the compatibility requirement. A balancing of competing state and individual interests occurs under subsection 2(b) rather than under section 1 and is hidden behind the vague language of compatibility. The degree to which the state will be required to accommodate access and compromise its use of the property is uncertain.

II. The Judgmeut of McLachlin J.

A. *Summary of Judgment*

McLachlin J. adopts what she regards as the reasonable middle course on the issue of communicative access to state property, "between the extremes of the right to expression on all government property and the right to expression on none."[32] She considers that if the state had "the absolute right to prohibit and regulate expression on all property which it owns," as an incident of its ownership, the right's "purpose — to permit members of society to communicate their ideas and values to others — would be subverted."[33]

She also rejects as extreme the position that any denial of communicative access to government-owned property will violate freedom of expression and, unless justified under section 1, will violate the *Charter*. She questions whether "the framers of the *Charter* intend[ed] s. 2(b) to offer protection to the citizen's speech in even the most private state-owned property" such as "private government offices, state-owned broadcasting towers and prisons." And she points to the absence of any historical right to communicate on these properties: "Freedom of expression has not traditionally been recognized to apply to such places or means of communication ..."[34]

However, the substance of Justice McLachlin's argument against this "extreme" position lies neither in history nor in the intentions of the drafters but rather in her understanding of the values that underlie freedom of expression. She believes that the purposes of freedom of expression do not justify "conferring on the public the constitutional right to express itself publicly on *all* public property, regardless of its use and function."[35] In her view: "To say that freedom

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[32]*Committee for Commonwealth, ibid.* at 242.

[33]*Ibid.* at 230.

[34]*Ibid.* at 231. McLachlin J. continues at 231-32: "To say that the guarantee of free speech extends to such arenas is to surpass anything the framers of the *Charter* could have intended."

Her appeal to the framers' intentions is not supported by any specific evidence of their views and is simply a way of asserting the unreasonableness of the "extreme" position. Of course, appeals to intention give the impression that the conclusion is not simply the judge's own view but has a neutral constitutional basis.

And, as Justice McLachlin acknowledges, the historical argument, while not irrelevant, may not have much weight since the *Charter* is understood to guarantee rights against existing and future state practices. However, history or convention has a role in giving particular shape to individual rights and collective responsibilities.

[35]*Ibid.* at 231.

of expression extends to all state-owned property is to overshoot the actual purpose of the freedom, to extend the protection of the *Charter* to situations where the values underlying the right are absent."[36] In more practical terms she observes that the state should not be required to defend its restriction of expression under section 1 if the expression does not contribute to the values or interests traditionally associated with the guarantee.

Adopting the approach set out by the Supreme Court in its earlier judgment of *Irwin Toy*, McLachlin J. says that in reviewing any state restriction on communication (including a restriction on access to state property), the Court must ask whether the impugned state act has as its *purpose* the restriction of expression or has only the *effect* of restricting expression. If the state act has as its purpose the restriction of expression, then it will violate subsection 2(b) and, unless it can be justified under the terms of section 1, it will violate the *Charter*. However, if the state act has simply the effect of restricting expression, it will be found to violate subsection 2(b) only if those attacking its constitutionality can show that the restricted expression (including its time, place and manner) advances one of the values underlying the freedom such as truth, democracy or self-realization.[37]

McLachlin J. recognizes that the restriction of communication on state-owned property may in some cases be content-based, intended to restrict the communication of certain messages.[38] However, she considers that in most cases the restriction of access to state-owned property is intended to protect the state's use and so has only the *effect* of restricting expression. In these cases the person claiming access must show "that the expression on the public property in question engages traditional free speech concerns and hence falls within the ambit of s. 2(b)."[39] The Court's examination will focus on "whether the forum's relationship with the particular expressive activity invokes any of the values and principles underlying the guarantee."[40] If the Court decides that the access that has been restricted would not have advanced the freedom's values, then the restriction will not violate subsection 2(b). But, if the Court decides that the restricted access would have advanced the freedom's values and so falls within

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[36]*Ibid.* at 232.

[37]For a critical discussion of the purpose/effects distinction set out in the *Irwin Toy* case see R. Moon, "Drawing Lines in a Culture of Prejudice: *R.* v. *Keegstra* and the Restriction of Hate Propaganda" (1992) 26 U.B.C. L. Rev. 99 at 106-08.

[38]See *e.g. Committee for Commonwealth, supra* note 6 at 238, where McLachlin J. says:

> A restriction on the forum for expression may be content-based. For example, a ban on anti-war messages on Parliament Hill might be viewed as essentially content-based. In a place where political messages of all sorts are traditionally tolerated, a restriction is placed on one particular type of message *because of its content.*

[39]*Ibid.* at 232-33.

[40]*Ibid.* at 239. McLachlin J. also says:

> The line it draws reflects the purpose of the guarantee of free expression. The guarantee extends only so far as can be justified having regard to these purposes, beyond which the Crown is not called upon to justify its legislation or conduct under s. 1. Claims which clearly do not raise the concerns central to the guarantee are eliminated at the start, avoiding the danger that the right may be trivialized while the burden imposed on members of the public seeking to invoke *Charter* protection is not unduly onerous (*ibid.* at 242).

the scope of subsection 2(b), the Court must then consider whether the government's restriction is justified under section 1.

According to Justice McLachlin, at the section 1 stage, "the concern should be primarily one of weighing and balancing the conflicting interests — the individual's interest in using the forum in question for his or her expressive purposes against the state's interest in limiting the expression on the particular property."[41] The balancing must be done "contextually, having regard to the facts and values of the particular case before the court."[42] McLachlin J. considers that content-neutral restrictions that are found to violate subsection 2(b) because the restricted expression advances the values underlying the freedom, "may be easier to justify [under section 1] than content-based restrictions" because they are "likely to be (a) more closely tied to the function or purpose of the place in question, and/or (b) less objectionable than content restrictions."[43] Presumably, content-neutral restrictions are less objectionable because they simply restrict the time, place or manner of expression and often leave adequate alternatives — other times, manners or places in, or at which, the same message can be expressed.[44]

In the case before her, Justice McLachlin considers that the airport's restriction on expression is not meant to favour one point of view over another and is aimed at the consequences of expression generally. Although she finds that the restriction is content-neutral, she has no doubts that the respondents' expression advanced the freedom's values so that its restriction violated subsection 2(b):

> The respondents in this case were seeking to present political views in a location frequented by many members of the community passing *en route* from one place to another, a location which can be considered to be a modern equivalent of the streets and by-ways of the past. This establishes a relationship between the respondents' use of the airport for expression and one of the purposes of the free expression guarantee.[45]

Under section 1 she compares the respondents' interest in access for communication with the state's interest in excluding communication. She concludes that the restriction is not justified since the state has little or no reason to limit communication in the public areas of the terminal. The respondents' expression was entirely compatible with the operation of the airport.

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[41] *Ibid.* at 237.

[42] *Ibid.* at 245-46 (on the application of s. 1). McLachlin J. asks a number of questions to achieve the necessary balancing:

> How suitable is the location for effective communication of the message to the public? Does the property in question have special symbolic significance for the message being communicated? Are there other public arenas in the vicinity in which the expression can be disseminated? In short, what does the claimant lose by being denied the opportunity to spread his or her message in the form and at the time and place asserted? (*ibid.* at 250)

[43] *Ibid.* at 248.

[44] There is the obvious question of whether any "time, place or manner" restriction is truly content-neutral.

[45] *Committee for Commonwealth*, *supra* note 6 at 243.

B. Discussion of Judgment

Justice McLachlin claims that her approach to the access issue is faithful to the established model of freedom of expression adjudication. According to McLachlin J., the task at the subsection 2(b) stage is "primarily definitional rather than one of balancing ..."[46] She stresses that the limited scope of the subsection 2(b) right to communicate on state-owned property is based "on the values and interests" that underlie freedom of expression and not on the characteristics of particular government properties. However, McLachlin J.'s application of the subsection 2(b) test seems to yield a categorical distinction between public and private forums. She assumes that the test will result not simply in the exclusion of particular access claims to state-owned property but rather in the general insulation of a particular set of state properties from all claims of access.[47]

More specifically McLachlin J. says that under her test, expression in prisons or prison cells, judges' private chambers, private government offices and publicly-owned broadcasting facilities will not receive protection under subsection 2(b).[48] She considers it self-evident that the purposes of freedom of expression will not be served by public expression in these places:

> These are not places of public debate aimed at promoting either the truth or a better understanding of social and political issues. Nor is expression in these places related to the open and welcoming environment essential to maximization of individual fulfillment and human flourishing.[49]

A restriction on access for communication to a "private" state-owned property will not violate subsection 2(b) and so will not require justification under section 1. On the other hand, McLachlin J. considers that the purposes of the guarantee of free expression are served by permitting expression in public forums, "places which have by tradition or designation been dedicated to public expression ..."[50] The use of these places for political, social or artistic expression "would clearly seem to be linked to the values underlying the guarantee of free speech."[51] A restriction on access to a public forum will violate subsection 2(b) and so will require justification under section 1.

However, if the test under subsection 2(b) is simply whether the restricted communication advances the values underlying freedom of expression, it is dif-

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[46]*Ibid.* at 237.

[47]McLachlin J. says: "In my view, the guarantee of free expression in s. 2(b) of the *Charter* cannot reasonably be read as conferring a constitutional right to use *all* government property for purposes of public expression" (*ibid.* at 228).

[48]*Ibid.* at 241.

[49]*Ibid.*

[50]*Ibid.*

[51]*Ibid.* at 242. I have argued elsewhere, Moon, *supra* note 37 at 107, that the assessment under s. 2(b) of state acts which have the effect but not the purpose of restricting expression ("time, place and manner restrictions") is not as the Court suggests simply a matter of deciding whether or not the expression advances the values underlying the freedom but is in fact a limited form of balancing of competing interests — a way of avoiding the demanding standards of s. 1 and the *Oakes* test.

ficult to see why it should yield a categorical distinction between public and private forums. It seems to me that the insulation of particular properties from any and all access claims must rest not simply on a judgment about whether or not the access advances the freedom's values but also on an assessment of the degree to which the access interferes with the state's use of its property. In defining the scope of the freedom under subsection 2(b), Justice McLachlin does not simply assess (positively) the contribution of expression on the particular property to the freedom's values, she also takes account (negatively) of the degree to which the restricted expression might interfere with the state's use of the property.

It may be that in many cases, access for communication to prisons, private government offices and other similar state-owned properties, will not generate reflection or debate but will simply interfere with the state's use of its property. But we cannot in every case exclude the possibility that communication on one of these properties may advance the freedom's values, particularly if we accept that communication is deserving of protection even when it is disruptive and confrontational.[52] In spite of Justice McLachlin's assurances to the contrary, it is hard to resist the conclusion that her judgment that certain state properties (private forums) should be insulated from all claims of access rests, at least in part, on the detrimental impact of access on the state's use of these properties.

It seems then that the division of properties into public and private forums does not simply rest, as McLachlin J. claims, on the contribution of expression on a particular property to the values underlying the freedom but is rather the outcome of some form of balancing or accommodating of competing claims — the importance of communicative access to a prison against the costs of access to prison security and discipline or the value of access to a publicly-owned broadcasting facility against the administrative and other costs of compromising the state's absolute control over the facility. The conclusion that access to a prison or to a publicly-owned broadcast facility does not advance the values underlying subsection 2(b), and should be insulated from all claims of access, reflects the assumption of McLachlin J. that public expression is incompatible with the state's use of these properties and is not important enough to support a compromise of the state's use.

The use of the private/public forum distinction is a way of containing to some degree the open-ended balancing of competing state and individual interests. Instead of assessing and balancing competing state and communication interests in each case, the Court makes a general threshold judgment about the compatibility of access with the state's use of its property.[53] A property that is generally open and able to accommodate public communication will be classified as a public forum; while a property that is closed to the public and performs a function that will not easily accommodate public communication will be classified as a private forum.

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[52]See Justice McLachlin's judgment in *Keegstra*, *supra* note 28 at 832.

[53]See *Committee for Commonwealth*, *supra* note 6 at 236-37, where McLachlin J. says that "[t]he analysis under s. 2(b) should focus on determining when, as a general proposition, the right to expression on government property arises."

Different standards of review apply to each of the categories of state-owned property. If a property is classified as a public forum because public communication is reasonably compatible with its use by the state, the state will have to make some efforts to accommodate communication, even if this involves a compromise of the state's use.[54] The state will be permitted to restrict expression only if the restriction can be justified under section 1, although McLachlin J. suggests a lowered standard of justification for time, place and manner restrictions. On the other hand, those state properties that are considered private forums because public communication is generally incompatible with their use by the state, will be insulated from all claims of access. A restriction on access to a private forum will not violate subsection 2(b) and so will not require justification under section 1, even if the *particular* access claim is important and might reasonably be accommodated.

The use of the public/private forum distinction allows the courts to avoid examining carefully the state's judgment about when communication is incompatible with its use of a particular property and assessing specifically the availability and adequacy of alternative forums for communication. The distinction rests on the *compatibility* of communication with the state's use of the property, and so there is no direct or formal consideration of the availability of alternative forums. As well, because the distinction rests on a *general* assessment of the compatibility of public expression with the state's use of the property, there is no examination of particular access claims to decide if they are incompatible with the state's property use. The complete insulation of private forums seems to rest on an assumption that it is not necessary to compromise state use of the property as long as communication is permitted in public forums. Public forums will provide adequate space for communication. In contrast, the state must accommodate expression in a public forum because it is an important location for public expression and because public expression will not significantly impair its use by the state.

According to McLachlin J., her test "offers sufficient flexibility to permit development of a legal doctrine sensitive to emerging concerns and new situations."[55] However, her use of the public forum/private forum categories is meant

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[54]McLachlin J. explains:

> In some cases, the right of free expression might be considered important enough to interfere to some extent with the function of government property. In others, the impairment of function will be so great in comparison with the interest in free expression as to justify exclusion or limitation of the expression. The concept of function is thus seen to involve a balancing of interests which arguably serves better as part of the s. 1 test than as a threshold for screening out claims which raise no *prima facie* free expression interest (*ibid.* at 235).

[55]*Ibid.* at 242. Justice McLachlin considers that the compatibility test put forward by Lamer C.J.C. is not flexible enough. Under the Chief Justice's test, she says, the freedom will not extend to the Parliamentary library "because silence is essential to its function." She observes, however, that "the Parliamentary library could function quite well despite the presence of demonstrators holding placards" (*ibid.* at 234, 235). This is a surprising criticism for two reasons.

First it is unfair because it misrepresents the Chief Justice's position. The Chief Justice does not argue for an *a priori* insulation of certain properties from access claims under the *Charter*. His view is simply that the judgment about whether a *particular* claim of access should be permitted should take place under s. 2(b) and should turn on whether or not it is compatible with the state use of

to limit some of this flexibility and to avoid *ad hoc* balancing. With some of the properties McLachlin J. describes as private forums, the detrimental impact of communicative access on the state's use might be significant enough to outweigh the value of the access every time, particularly if we assume a reasonably stable background of alteruative opportunities to communicate in public forums such as streets and parks. But with other private forums there may be certain kinds of expression that will not interfere significantly with the state's use of the property (*e.g.* Lamer C.J.C.'s example of the silent protest in the Parliamentary library or perhaps even controlled access to a prison).

More significantly, there may be times when access is so important that the state should be required to accommodate communication even if this involves compromising the state's use of the property. The assumption that there are many public forums in the community which provide adequate alternatives for the expression of messages that are banned from private forums, may not always hold. Because the issue under subsection 2(b) is determined categorically (does communication in a prison advance the values underlying the freedom?), flexibility is lost in the assessment of the costs and benefits of access. If the issue were understood differently, as a matter of the contribution to the freedom's values of a particular instance of communication within a prison, compared with the costs of this communication to other values such as the safe and secure operation of the prison, then in almost all cases the restriction of access to a prison would be straightforward. But there might be at least some cases in which the claim of access would prevail because it is particularly important and/or because it does not significantly interfere with the property's function. Such flexibility might be desirable in the prison context, where the requirements of security are significant but the need for communicative opportunities is also great. There are no alternatives for inmates if communication is restricted in a prison. As well, there will be little opportunity for the public to supervise the operation of the prison system if the press and representatives of public interest groups are denied access.

The flexibility of McLachlin's J.'s approach will depend on how broadly or narrowly she defines the category of state-owned "private" properties, which are insulated from all claims of access. McLachlin J. says some things that suggest that the category of "private forums" may be broadly defined. For example, when she describes the private forum/public forum distinction she draws on the language of the American public forum doctrine and says that "the use of places which have by tradition or designation been dedicated to public expression for purposes of discussing political or social or artistic issues would clearly seem to be linked to the values underlying the guarantee of free speech."[56]

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the property. He uses the Parliamentary library to illustrate the application of his test and says in very clear terms that while most claims to communicate there do not fall within the scope of s. 2(b) because they are inconsistent with the operation of the library, certain claims, such as a silent vigil, might be consistent with its operation and so should be recognized under s. 2(b).

Secondly it is an odd criticism for McLachlin J. to make because her categorical exclusion of certain state properties from the scope of s. 2(b) seems more inflexible than the Chief Justice's compatibility test.

[56] *Ibid.* at 241-42.

However, an important way in which her approach may show flexibility and take into account the value of access for communication and the absence of alternative forums is with its definition of a particular private forum. Forums do not come neatly packaged with clear and fixed parameters.[57] A private forum may be narrowly defined, carved from a larger forum — a judge's chambers rather than a courthouse or a prison cell rather than a prison. The narrow definition of these private forums may reflect a concern that if the state is permitted to restrict all instances of expression throughout the courthouse or the prison, important communication for which there is no alternative outlet will be silenced.

McLachlin J. believes that the test she proposes for determining when a right arises to use government property for public expression "is sufficiently clear and precise."[58] But the clarity and precision of her test are illusory. The initial classification of the property as either a public forum or a private forum rests not simply as McLachlin J. claims on an assessment of the contribution of particular instances of access to the values which underlie the freedom (a vague and indeterminate standard in itself) but rather on an intuitive and general assessment of the compatibility of public communication with the state's property use. The line separating public and private forums is bound to be indeterminate and unstable. There is simply no correct or obvious place to draw the line between those properties that are generally compatible with expression and must be open to public communication, unless the state can justify the particular restriction of communication, and those properties that are generally incompatible with public communication and are insulated from all claims of access regardless of the merits of the specific claim.

The division of state property into public and private forums (rather than a direct balancing of interests) represents an unstable compromise between competing institutional concerns — on the one hand a commitment to a broad-based freedom of expression protected by the courts and, on the other hand, a reluctance to second-guess legislative judgment about what is necessary to the effective operation of its property and a desire to contain the open-ended character of the access decision.

The line between public forums (and the accommodation of public expression) and private forums (and the insulation from public expression) will be pushed by the demands of freedom of expression to protect a wider range of opportunities for public discourse in general and to protect specific instances of expression that may be excluded in the general assessment of compatibility. And it will be pulled in the opposite direction by the desire to contain judicial involvement in the assessment and redistribution of property rights and the power to communicate.

III. The Judgment of L'Heureux-Dubé J.

A. Summary of Judgment

The approach of Justice L'Heureux-Dubé is, at least at first glance, more expansive and more flexible than that of either Lamer C.J.C. or McLachlin J.

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[57]See Moon, *supra* note 3 at 351.

[58]*Committee for Commonwealth*, *supra* note 6 at 242.

In her view, any attempt by the state to restrict communication on its property should be treated as a restriction on freedom of expression and a violation of subsection 2(b).[59] She considers that the balancing of the competing individual and state interests should take place under section 1. For example, she says:

> Were a group of demonstrators to choose our own Chambers as a forum for their protestations, the government may legitimately prohibit such activity. However, the attempt to do so would abridge the freedom of expression, albeit in a manner that would likely be demonstrably justified under s. 1.[60]

For L'Heureux-Dubé J., no other approach fits with the broad construction the Supreme Court has given to subsection 2(b) in its earlier decisions.

According to L'Heureux-Dubé J. the government cannot justify the restriction of communicative access under section 1 simply by relying on its ownership of the property in question. She recognizes that "[i]f members of the public had no right whatsoever to distribute leaflets or engage in other expressive activity on government-owned property (except with permission), then there would be little if any opportunity to exercise their rights of freedom of expression."[61] Any restriction of expression on state property must satisfy the rationality, minimum impairment and proportionality standards of section 1 and the *Oakes* case. However, L'Heureux-Dubé J. believes that these standards should not be applied strictly in access cases. She says that:

> If all restrictions relating to noise, litter, orderliness, and access to property, which may obliquely impinge upon the freedom of expression, had to be predicated upon momentous governmental objectives under the *Oakes* test, government would hardly ever be able to legislate effectively with respect to these matters.[62]

In the case before the Court, L'Heureux-Dubé J. finds that the airport's restriction on communication in its public areas violates subsection 2(b) and is

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[59] *Ibid.* at 189, where L'Heureux-Dubé J. states:

> Suffice it to say for the moment that, in my view, certain governmental restrictions cannot be automatically excised from the s. 2(b) guarantee strictly on the basis that they do not apply to locations traditionally associated with public expression. While such limitations may prove reasonable, it is a burden that the government must discharge under s. 1.

[60] *Ibid.* L'Heureux-Dubé J. continues:

> Those arguing for the contrary position have asked rhetorically whether this means that the government's regulation of resources such as CBC radio and television constitutes a restriction on freedom of expression, and hence violates s. 2(b) of the *Charter*. In fact, such restrictions, along with the Judges' Chambers example, are paradigmatic illustrations of (usually) content-neutral, reasonable time, place, and manner regulation. However, as they constitute violations of s. 2(b), they must also be demonstrably justified under s. 1 before they can successfully withstand a constitutional challenge (*ibid.* at 190).

[61] *Ibid.* at 198. L'Heureux-Dubé J. continues by explaining that if only those persons with enough wealth to own land, or mass media facilities, were able to express themselves to the larger public, the achievement of the *Charter*'s basic purposes — the free exchange of ideas, open debate of public affairs, the effective working of democratic institutions and the pursuit of knowledge and truth — would be frustrated (*ibid.*).

[62] *Ibid.* at 222. L'Heureux-Dubé J. continues: "In addition, what may be applied strictly in the context of criminal law may warrant more relaxed implementation with respect to social issues" (*ibid.*).

not justified under section 1. In her view the regulation violates subsection 2(b) because its effect, if not its purpose, is to restrict political expression. She considers that airports have become "contemporary crossroads," the functional equivalent of other public thoroughfares, and so should be on the same "constitutional footing" as streets and parks.[63] She notes that the respondents

> are asserting a right to use inexpensive means of communication — leafletting and solicitation — in a government venue that by its nature concentrates a significant number of persons in one place at one time. Furthermore, many of those persons have time to kill and little to do, and so might be more receptive to information and ideas than they would be in other contexts.[64]

Her conclusion that the restriction cannot be justified under section 1 is based on two concerns that push in different directions. First, she thinks that the restriction is *so vague* that it does not "constitute a limit prescribed by law and must be struck for that reason alone as unconstitutional."[65] She believes that an individual reading this regulation would not be able to tell whether his/her conduct was proscribed. Secondly, she considers that the restriction is *too broad* to constitute a reasonable limit on freedom of expression. It seems to cover "virtually all conceivable activity involving freedom of expression at airports."[66] A restriction that covers the public areas of the airport has no rational connection with the objectives of security and efficiency put forward by the government.

B. Discussion of Judgment

Justice L'Heureux-Dubé calls for a broad and flexible approach to the definition of the right to communicate on state property, which relies on a balancing of competing state and individual interests under section 1. She says that:

> When calibrating the s. 1 barometer, the political quality of the stifled expression must be weighed against whatever governmental arguments are raised in opposition. ... [Section 1] enables us to construct *a contextual rather than a categorical approach*, focusing not only on the scope of the right, but also on the setting in which the freedom of expression claim is made. [emphasis added][67]

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[63] *Ibid.* at 204-05. L'Heureux-Dubé J. continues:

> While airport terminals do not have a monopoly on high concentrations of passers-by, few locations offer similar opportunities to encounter such a wide cross-section of the community. ... [T]he non-security zones within airport terminals, in my view, are properly regarded as public arenas. Therefore, the government cannot simply assert property rights, or claim that expression is unrelated to an airport's function, in order to justify the restriction (*ibid.* at 206).

[64] *Ibid.* at 193.

[65] *Ibid.* at 209.

[66] *Ibid.* at 217.

[67] *Ibid.* at 192. L'Heureux-Dubé J. also says:

> First, the measure's purpose must be considered. The more significant the purpose, the greater will be the latitude for regulating time, place and manner of expression. Second, the restriction should be tailored to its objectives, such that it did not overreach its purpose. Third, the courts should consider whether the restrictions are designed in a manner which tends to be free from excessive official discretion or undue arbitrariness. Fourth, courts should assess whether in the circumstances, adequate alternative avenues for expression are left open. Fifth, courts should evaluate the extent to which the restriction ensures that the property at issue can be effectively used by the government

She rejects the "rigid categorization" of the American public forum doctrine.[68] In her view, "certain government restrictions cannot be automatically excised from the s. 2(b) guarantee strictly on the basis that they do not apply to locations traditionally associated with public expression."[69] She believes that:

> An overly rigid characterization focusing exclusively on place would tend to lose sight of the forest for the trees. The First Amendment as well as the *Canadian Charter of Rights and Freedoms* were designed to protect people, not places. While certain areas can acquire a distinctive character, and people's expectations may be affected by where they find themselves, the rights and freedoms do not extend to the locations, but rather to the people occupying them.[70]

However, she does believe that certain state properties can, as a matter of fact, be described as public forums or arenas,[71] in the sense that they are generally and easily open to public communication. And she accepts that the public character of these properties is "indispensable when evaluating what is a reasonable restriction on 'place' in the review of a time, place, and manner regulation" under section 1.[72]

When discussing the grounds for limiting communicative access under section 1, L'Heureux-Dubé J. says that a guarantee that encompasses all government property "is not necessary to fulfill the *Charter*'s purposes, or to avoid a stifling of free expression."[73] In her view, "some, but not all, government-owned property is constitutionally open to the public for engaging in expressive activity."[74] More specifically she says that

> the *Charter*'s framers did not intend internal government offices, air traffic control towers, prison cells and Judges' Chambers to be made available for leafletting or demonstrations. It is evident that the right to freedom of expression under s. 2(b) of the *Charter* does not provide a right of access to all property whether public or private. ... [W]hile the *Charter* should be given a broad and generous interpre-

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> and the public for the governmental function or activity for which it was intended, apart from its use as a public arena for expression (*ibid.* at 220).

[68] *Ibid.* at 202. L'Heureux-Dubé J. also notes that "the different structures of our two constitutional documents require that the balancing test be undertaken at different stages of the analysis" (*ibid.* at 178).

[69] *Ibid.* at 189.

[70] *Ibid.* at 202.

[71] *Ibid.* at 202-04. The term "public arena" is used to avoid confusion with the American "public forum" doctrine. However, the confusion is not so easily escaped. L'Heureux-Dubé J.'s approach has much in common with the American approach.

[72] *Ibid.* at 190. L'Heureux-Dubé J. explains:

> [The public forum discussion] is almost indispensable when evaluating what is a reasonable restriction on "place" in the review of a time, place and manner regulation. Nevertheless, on the basis of our *Charter*'s drafting, structure, and subsequent interpretation, such review belongs under s. 1, and I will treat it there (*ibid.*).

She continues:

> Certain criteria, while not in themselves dispositive, can assist in determining what locations are appropriately open for public expression, and bear the earmarks of "public arenas" (*ibid.* at 199).

See *infra* note 77 and accompanying text regarding appropriate considerations for determining whether a location is a "public arena."

[73] *Ibid.* at 198. "Stifling of free expression" suggests a very low standard of justification.

[74] *Ibid.*

> tation, "it is important not to overshoot the actual purpose of the right or freedom in question."[75]

This sounds very similar to the reasoning that leads McLachlin J. to conclude that communication on certain state-owned properties does not fall within the scope of subsection 2(b). However, for L'Heureux-Dubé J. the complete insulation of these "private" state properties from access claims is the outcome of balancing under section 1 and is not a matter of the definition of the freedom's scope under subsection 2(b). She says that "[r]estrictions on expression in particular places will be harder to defend than in others. In some places the justifiability of the restrictions is immediately apparent."[76]

However, the division of state-owned properties into two categories, private and public forums (arenas), indicates some limits on the flexible balancing of competing interests. In determining whether a property is "public" or "private," L'Heureux-Dubé J. says that the courts are to consider such things as: "[t]he traditional openness of such property for expressive activity"; "[w]hether the public is ordinarily admitted to the property as of right"; "[t]he compatibility of the property's purpose with such expressive activities"; "[t]he impact of the availability of such property for expressive activity on the achievement of s. 2(b)'s purpose"; and "[t]he availability of other public arenas in the vicinity for expressive activities."[77] While the classification of a property as either a public forum or as a private forum turns on the availability of alternatives and the significance of the state use, it remains a general and categorical judgment that preempts consideration of specific and exceptional claims.

Attaching the label public or private forum is simply the first step in the section 1 analysis of L'Heureux-Dubé J. It matters how a state-owned property is classified because the two kinds of forum seem to attract different standards of review. On the one hand, if a property is classified as a public forum, the courts will consider that public communication must be permitted unless the state can show good reasons for restricting it. In the words of L'Heureux-Dubé J., "those areas traditionally associated with, or resembling, sites where all persons have a right to express their views by any means at their disposal should be vigilantly protected from legislative restrictions on speech."[78] The state will be required to accommodate public communication, even though this may involve some compromise of the state's use of the property. On the other hand if the property is classified as a private forum, state use of the property will have priority and restrictions on access will always be justified.

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[75]*Ibid.* Her statement that "the right to freedom of expression under s. 2(b) of the *Charter* does not provide a right of access to all property ..." might suggest that the limitation is under s. 2(b). But as she develops her approach it becomes clear that the limit is under s. 1. This statement is taken directly from the submissions of the Attorney General of Ontario, who did argue that the limit arises under s. 2(b).

[76]*Ibid.* at 198-99.

[77]*Ibid.* at 203. Another factor is "[t]he symbolic significance of the property for the message being communicated" (*ibid.*). But this would not seem to be a factor in making a general finding about the property — but only the particular claim.

[78]*Ibid.* at 225.

It is clear that open access would interfere with the recognized use of a judge's chambers or a prison cell and so would be injurious to important public interests. But this is a general conclusion to which exceptions may be found. Attaching the label private forum to a particular property because public communication is generally incompatible with its use by the state, will mean the exclusion of all access claims, perhaps even claims that do not interfere in a significant way with the state's use of the property. The significance of this over-exclusion will depend on how broadly the private forum category is defined, and Justice L'Heureux-Dubé's description of the category makes it sound potentially very broad.

As well, Justice L'Heureux-Dubé's use of generally defined categories of property may mean the exclusion of specific access claims that should be accommodated because they are important and because there is no adequate alternative forum. The priority she gives to the state's property use of private state-owned properties seems to rest on an assumption that in the background there are alternative forums for communicating any message that might be communicated in a private forum. Generally it may be true that the exclusion of all communication from a private forum is not very significant because there are a variety of public forums in the community. But in some cases there may not be adequate alternatives for the excluded communication, no matter how many public forums are recognized. Again the case of communication in a prison illustrates the point. For prisoners the consequences of a general ban on communication in the prison (or even a prison cell) are so serious that even though prison discipline and security are very important, and may be made more difficult by communication in the institution, there should be some effort on the part of the prison authorities to accommodate some forms or instances of communication.

Justice L'Heureux-Dubé's approach to the definition of the access right seems to involve a flexible balancing of competing freedom of expression and state interests, but at least some of this flexibility is lost with the insulation of certain state properties from all access claims. She wants to hold on to a limited version of the public forum doctrine because she fears that in the absence of such a doctrine the government will have virtually no "power to regulate expressive activities" on its properties.[79] Why this should be so is unclear, particularly given her willingness to set a lower standard for justifying time, place and manner restrictions under section 1.[80] The real difficulty with a flexible balancing of competing interests under section 1 is that it involves a consideration of the distribution of communicative power and an assessment of the requirements of different state functions.

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[79]*Ibid.* at 202.

[80]L'Heureux-Dubé J. says:

> If all restrictions relating to noise, litter, orderliness, and access to property, which may obliquely impinge upon the freedom of expression, had to be predicated upon momentous governmental objectives under the *Oakes* test, government would hardly ever be able to legislate effectively with respect to these matters. ... If the purposes are legitimate, and the measures taken are reasonable having regard to all the circumstances, the standard of absolute minimum impairment need not be applied (*ibid.* at 222).

L'Heureux-Dubé J.'s approach may limit to some degree consideration of these matters because it declines to consider that the state's use of private forums which are not ordinarily used for public communication should sometimes yield to the demands of freedom of expression. A version of the public forum doctrine creeps into her "balancing" as a way of insulating the use of certain state properties from effective review under section 1 and of containing the issue of the fair distribution of communicative power. Like the approach of McLachlin J., that of L'Heureux-Dubé J. involves an intuitive judgment about when balancing and accommodation are required and when state property use should be insulated from competing expression claims and the requirement of justification under section 1. If the courts take seriously the *Charter*'s commitment to freedom of expression, they will define the category narrowly. But if the courts feel uncomfortable with the task of reviewing the state's property use, they will define the category broadly.

Conclusion

The judgments of Lamer C.J.C. and McLachlin and L'Heureux-Dubé JJ. set out different approaches to the issue of public communication on state-owned property. Each approach represents an effort to fit the access issue into the established model of freedom of expression adjudication. (Indeed all three judgments claim to follow the adjudicative steps set out by the Court in *Irwin Toy*.) All three judgments hold that the state cannot without reason exclude communication from its property. But none of the judgments is prepared to engage in an open-ended review of state property use requiring the state to justify every restriction on access for communication under the terms of section 1.

Lamer C.J.C. gives explicit priority to the state's property use by holding that an act of communication will fall within the protection of subsection 2(b) only if it is compatible with the state's use of the property. While the Chief Justice purports to follow the established two-step model of adjudication, his approach does not seem to fit within this model. He considers that state-owned property should not be outside the scope of judicial review — the state should not be able to exclude communication simply by asserting its property rights; however, he is not prepared to treat a restriction on access as simply a limitation on the freedom, which must be justified under section 1. A restriction on expression violates subsection 2(b) only if the expression is compatible with the state's use.

Both McLachlin and L'Heureux-Dubé JJ. purport to follow the established two-step model, which first defines the freedom's scope in terms of the values underlying the freedom and then balances the competing individual and state interests. However, both judges seek to contain the flexible balancing of interests by introducing into the established model a version of the public forum doctrine which rests on a judgment about the general compatibility of expression with the state's use of a particular property and results in some properties having to accommodate communication and other properties being insulated from all claims of access. Justice McLachlin slips the public/private forum distinction into the subsection 2(b) issue of whether the restricted expression advances the

values underlying the freedom. And while Justice L'Heureux-Dubé purports to resolve the access issue under section 1 simply by balancing competing state and expression interests, she seems to smuggle into the balancing process a version of the public forum doctrine which insulates a range of state properties from all claims of access.

With all three approaches, the effort to contain the scope of review is unstable. Chief Justice Lamer's approach rests upon a test of consistency or compatibility of communicative access with the state's property use. However, the compatibility standard is vague and malleable and in application is bound to draw on a variety of considerations such as the importance of the access claimed and the availability of alternative forums. The Chief Justice's formal test, which seeks to avoid the second-guessing of government property use and the assessment of alternative forums in the background, will be eroded to an uncertain degree by a recognition that access to state-owned property is vital to the exercise of freedom of expression and that opportunities for public communication, generally, or for the communication of a particular viewpoint, may be inadequate.

The approaches of McLachlin and L'Heureux-Dubé JJ. are no less indeterminate and manipulable. With both approaches, a lot turns on whether the property is classified as a public forum or as a private forum. Yet it is difficult to know when the public forum label will be attached so that the court balances under section 1 the importance of the access claim and the need for restriction (adherence to the formal test) or when the private forum label will be attached so that priority is given to the state use of its property (insulation of the property from all claims of access). Neither judge offers a clear account of why or when a particular property will fall outside the ordinary review process under section 1. The insulation of certain properties from review simply reflects a desire to limit the scope of judicial review of the state's use of its property. But working against this is a commitment to ensure that there is adequate space for public discourse in all its forms and aspects. The general rules and categories which recognize the importance of access to state-owned property, but which seek to contain this right and limit the assessment of the state's use of the property and the background of opportunities for communication, will come under pressure in different ways when they fail to identify and protect important access claims.

BOOK REVIEWS
CHRONIQUES BIBLIOGRAPHIQUES

John Tibor Syrtash, *Religion and Culture in Canadian Family Law.* Toronto: Butterworths, 1992. Pp. xxiv, 189 [$50.00]. Reviewed by Shauua Van Praagh*

Bringing the *Charter* Home

As an institution of Canadian social and legal life, the family in all its varied forms has long been removed from the "private" sphere to which it once was relegated. Traditionally perceived as facets of private life protected from state intrusion, marriage, divorce, and the custody of children have been acknowledged as subjects of public scrutiny and influence. Lawyers well-versed in the interaction between our society and family issues may overlook, however, the fact that authority with respect to marriage, separation and parent-child relations comes not only from the state but also from religious and cultural institutions and systems. Indeed, religion and culture provide significant, extensive and detailed systems of laws, rules and practices with respect to the family. Religious doctrine and cultural norms may have something to say about one's choice of spouse, marriage vows, the timing, purpose and how-to details of sexual relations, the availability of divorce, and the discipline and education of children. Far from being "private," or free from outside influence, issues such as these can be fundamental to the fabric of a vibrant community.[1]

Standards of human behaviour upheld by a religious or cultural community do not necessarily mirror the secular norms espoused by the state. The community in question may hold significantly different views with respect to forms of

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[1]See C. Weisbrod, "Family, Church and State: An Essay on Constitutionalism and Religious Authority" (1987-88) 26 J. Fam. L. 741 at 747, for an argument that, at least in the United States, the family should be understood as an "entity that is subject to the overlapping authority of two legal orders, one described as secular and at least theoretically integrated, and the other described as religious and containing many individual subsystems."

the family, behaviour of its members, and its dissolution and the impact of such dissolution especially on children — views which require careful consideration in legal decision-making. Any justification for interfering with those standards in a pluralistic society such as Canada has not yet been demarcated in a definitive manner. Indeed, the question as to whether such demarcation is necessary or possible remains open to debate.

Overlap of what might be labelled the separate jurisdictions claimed by the state and its religious or cultural communities forms the basis for the recently published book *Religion and Culture in Canadian Family Law*, written by John Tibor Syrtash.[2] Syrtash sets himself the task of investigating the spheres of authority represented by the normative systems of religious and cultural communities which co-exist in Canada, and of addressing the issue of how the *Canadian Charter of Rights and Freedoms*[3] may affect not only the resolution of family law disputes over divorce and child custody but also the nature of the fora in which those disputes are addressed. This is a huge project, the scope of which defies complete treatment in one book, and any critique must take into account the boundaries within which Syrtash's work has been carried out. As a family lawyer, Syrtash offers an analysis that is often more practice-oriented than theoretical. Further, as a specialist who played an important role in legislative reform responding to the problem of the *get* in Jewish divorce, his coverage of this issue is particularly thorough when compared to the rest of the book.

A realistic assessment of the extent to which the issues raised can be covered in a book of this size and proportion reveals that *Religion and Culture in Canadian Family Law* cannot fully live up to the broad goals expressed by the author — that is, "to explore the extent to which Canada's majority culture respects and accommodates its own multicultural legal principles and minority religions and cultures."[4] The book does provide, however, a good introduction to the intersection of family law and constitutional rights in Canada and to the meaning of the protection of multiculturalism in the context of family issues. Syrtash offers useful examples, references and sources, and his survey of Canadian case law will prove very helpful to family and constitutional lawyers. Most importantly, Syrtash poses difficult questions and challenges that need thoughtful responses, and neither he nor his readers should be frustrated or surprised that those responses have not yet been provided in full. The exploration that Syrtash begins here invites further work to be done, both of a legal academic nature and of a social sciences nature, before we can articulate clearly the way in which freedom of religion, multiculturalism and family law work together in Canada.

Syrtash's book, with its focus on three areas — the cultural identity of children as an element of custody decision-making, the validity of religious and aboriginal proceedings and institutions, and the state's role in the removal of bar-

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[2]J.T. Syrtash, *Religion and Culture in Canadian Family Law* (Toronto: Butterworths, 1992).

[3]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[4]Syrtash, *supra* note 2 at 179.

riers to religious remarriage — comes at an opportune time. The Supreme Court of Canada heard appeals from British Columbia and Quebec on the question of religion and child custody in early 1993;[5] aboriginal rights have been recognized by section 35 of the *Charter* and appear to be close to a transformation into some form of aboriginal self-government;[6] and both litigation and strong political mobilization by Jewish women are to be expected with respect to the issue of Jewish divorce.[7] Syrtash is quick to herald the effect that the *Charter* will have on family law. As he points out, subsection 2(a), which guarantees freedom of religion, and section 27, which mandates interpretation of the *Charter* in a way consistent with the enhancement of the multicultural heritage of Canadians, may dramatically change the landscape of some family law issues. Unlike the United States, where family law has long been associated with fundamental constitutional rights, especially the right to privacy, Canada has not been quick to link *Charter* rights and freedoms to issues relating to spouses, parents and children.[8] Syrtash foresees an end to that reluctance in the near future, and provides the reader with much to contemplate as to the desirability and workability of the *Charter*'s application to the family.

I. Religion and Cnlture for Children

Syrtash addresses the subject of his work in three major chapters and this review will mirror that structure with a discussion of each chapter followed by general commentary on the intersection of and relationship among the topics.

The author begins by looking at the accommodation by courts of religious and cultural heritage. He does so by investigating the approach of courts to custody decision-making in situations where religion or culture of the parents and child is at issue. Traditionally, the custodial parent has had control over the religious upbringing and education of the child. While this "rule" finds its roots in English common law, whereby a father had near-absolute control over the reli-

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[5]*Young* v. *Young* (1990), 50 B.C.L.R. (2d) 1, 75 D.L.R. (4th) 46, 29 R.F.L. (3d) 113 (B.C.C.A.), rev'g (1989), 24 R.F.L. (2d) 193 (B.C.S.C.); *Droit de la famille – 1150*, [1991] R.J.Q. 306, [1991] R.D.F. 112 (C.A.), aff'g [1988] R.D.F. 40 (Que. Sup. Ct.). Application for leave to appeal granted, 16 May 1991 (L'Heureux-Dubé, Gonthier and Iacobucci JJ.). Both appeals were heard together at the end of January 1993.

[6]According to the *Charter*, s. 35(1), "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The Supreme Court has begun to fill out the meaning of this protection (*R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385). Further and more importantly, First Nations have taken an active role in constitutional discussions in asserting their right to self-government within Canada. Even with the failure of the Charlottetown Accord (*Consensus Report on the Constitution, Charlottetown, August 28, 1992, Final Text* (Ottawa: Supply and Services Canada, 1992) [Cat. No. CP22-45/1992]), aboriginal self-government will likely retain priority status on the agenda of constitutional reform.

[7]This has been and continues to be the case in New York (see *e.g.* L. Lagnado, "Of Human Bondage" *The [New York] Village Voice* (14 July 1992) 10, with respect to the response to and political mobilization around *get* legislation and case law) and in Israel. Given the political pressure that went into the introduction of *get* legislation in Canada (see *e.g.* D. Lipovenko, "The Ties that Continue to Bind" *The [Toronto] Globe and Mail* (28 January 1989) D2), it is easy to imagine ongoing conflict and development in this area. The *get* is discussed in Part C of this Review.

[8]See *e.g.* D.A.R. Thompson, "Why Hasn't the Charter Mattered in Child Protection?" (1989) 8 Can. J. Fam. L. 133.

gious identity of his child,[9] it has continued to form part of the distinction between custody and access for Canadian parents. The parent having custody generally directs the religious or cultural development of the child, while the access parent, with the right to visitation of the child, acquiesces to the custodial parent's wishes in this respect.

In a multicultural country such as Canada, where intermarriage is common, conflicts between parents of different religions or cultures are exposed in the courts when divorce litigation includes the issue of custody. Questions of religious observance and belief and of cultural behaviour and standards, usually resolved by and within each family, are handed to judges. Thus begins the juggling act among the best interests of the child, the individual freedom of religion of the parents, the scope of custody, and the *Divorce Act* which mandates as much contact as possible between a child and each of the parents after marriage breakdown.[10] With section 27 of the *Charter* and its principled support of multiculturalism in Canada superimposed on the decision-making process, judges exercise an especially daunting responsibility. Syrtash urges judges not only to discard their prejudices against religions and cultures which do not correspond to their own, but also to respond positively to the claims of access parents, usually fathers, who wish to share their beliefs and practices with their children in a way which might "conflict" with the desires of the custodial parents, usually mothers.[11]

Syrtash undertakes an overview of the jurisprudence of the ten provinces and the approaches that have been taken by courts to the question of religion or culture in custody decision-making.[12] The overview attempts to be complete, and, indeed, it paints a good general picture of the state of the law in Canada prior to the enactment of subsection 16(10) of the *Divorce Act* and to the introduction of the *Charter*, as well as of the key cases since then that signal what Syrtash calls the move away from the traditional approach.[13] The reader begins to get a sense of the complicated factual scenarios that form the basis for the legal issues at stake. Should custody be curtailed for a parent who joins a fun-

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[9]This control went along with general custodial rights of the father. For a review of the issues and trends affecting children, parents and the state in the United Kingdom, see *e.g.* A. Bainham, *Children, Parents and the State* (London: Sweet & Maxwell, 1988).

[10]*Divorce Act*, R.S.C. 1985 (2d Supp.), c. 3, s. 16(10). The subsection reads "[t]he court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child."

[11]See generally Syrtash, *supra* note 2 at 67-91.

[12]*Ibid.* at 7-49, entitled "Traditional Judicial Approaches and Principles."

[13]The organization of the overview leaves something to be desired: in Part II, Syrtash covers what he calls traditional judicial approaches and principles, and, in Parts IV and V, he updates that overview in light of s. 16(10) of the *Divorce Act* and the *Charter*. This structure for the chapter is clear in theory but Syrtash confuses it by introducing the post s. 16(10) and *Charter* cases throughout the summary of "traditional" approaches. For example, see the section on Quebec, starting at 32, where he begins with reference to the decision of the Court of Appeal in *Droit de la Famille – 955*, [1991] R.J.Q. 599, [1991] R.D.F. 255 (C.A.), but then leaves description of the facts and discussion of the case to a section of the text found forty pages later. It would have been preferable for Syrtash to have stated that he was trying to offer a full picture of each province's position in the overview and that analysis of the key cases involving freedom of religion would follow.

damentalist Protestant sect which disapproves of public school, mandates dress standards, and demands hours of time every week on the part of the parent? If a Jehovah's Witness parent has visitation rights, should they be limited according to the wishes of the custodial parent who practices a different religion? What if the teachings of the religion of one parent clash dramatically with those of the religion of the other? Must a deeply religious Orthodox Jew accept compromise as dictated by a secular court with respect to the nature of his or her practices? Can a trial judge determine the best interests of a child in this context without comparing religions or cultures and deciding which is less "harmful" from a secular perspective? Does such a decision unjustifiably contravene freedom of religion?

Syrtash offers a fairly clear summary of the partial answers offered by the courts when confronted by these questions. He also tries to sketch a general approach to be taken by the law to these and other, hypothetical, situations, but he is less successful in this endeavour.[14] From Syrtash's perspective, Canadian courts, especially those in Ontario, British Columbia and Quebec, are moving away from a traditional approach to custody.[15] That is, instead of allowing the custodial parent to exercise control over the religious or cultural identity of the child — an approach which, Syrtash admits, has the advantage of stability — courts are now allowing access parents to modify the scope of custodial rights. Syrtash fully encourages what he calls this erosion of custodial prerogative. He is an enthusiastic supporter of the full development of a child's cultural identity, and he assumes that custodial rights, as traditionally defined, undermine the recognition and full flourishing of that identity.

Syrtash's response is based on a dichotomy between a traditional pro-custodial approach and a "new" pro-access approach, where the latter is much preferred. The reader should ask, at this point, about the risks inherent in a custody decision-making process that invites complication and conflict. We may agree with Syrtash that a child can grow up with a mix of cultures and religious beliefs without being harmed in any way, at least in any way with which the law should concern itself. Still, we may worry about the possibility of abusive access parents who brandish their religious rights over the heads of custodial parents. Syrtash places his trust in expert testimony in order to deal with this possibility. He argues that evidence put before the judge should indicate the degree to which each parent is tolerant of the beliefs and practices of the other. Says Syrtash, "the more a litigant attempts to accommodate his partner's religious ideology and way of life, the more sympathetic both the court and the assessors will be to his claim for custody or enhanced access."[16] The Canadian

[14]Very little attention has been paid to these questions in Canadian legal literature. See J. Mucci, "The Effect of Religious Beliefs in Child Custody Disputes" (1986) 5 Can. J. Fam. L. 353; V. Toselli, "Religion in Custody Disputes" (1990) 25 R.F.L. (3d) 261; F.H. Zemans, "Cultural Diversity in Custody Disputes" in R.S. Abella & C. L'Heureux-Dubé, eds., *Family Law, Dimensions of Justice* (Toronto: Butterworths, 1983) 137.

[15]Contrary to this trend, the Quebec Court of Appeal decision in *Droit de la famille – 1150*, *supra* note 5, on appeal to the Supreme Court of Canada, does exemplify the approach criticized by Syrtash.

[16]Syrtash, *supra* note 2 at 85.

response, as offered by Syrtash, to the issue of religion or culture in custody decision-making thus appears to be grounded in tolerance and flexibility. If the custodial parent seems hostile to the behaviour and influence of the visitation parent, custody may be limited or indeed terminated. On the other hand, if the access parent is unreasonable and unaccommodating, visitation rights may be severely restricted.

The approach that Syrtash puts forward must be commended in several respects, the most important being its implied critique of judges who rely on their own mainstream values and beliefs and fail to show adequate concern for minority groups and extreme communities. Syrtash is right to question the reasons for which judges treat isolated fundamentalist sects in a way different from that in which recognized religions and cultural norms are treated. Further, Syrtash is correct in his speculation on the *Charter*'s growing significance with respect to custody issues. Sections 2(a) and 27 definitely will appear more often in legal argument as relevant to the assessment of best interests in the resolution of custody disputes. However, while his solution of tolerance is nice in theory, several substantial concerns remain and require careful consideration.

First, Syrtash is happy to restrict the "traditional" scope of the rights of the custodial parent, but traditional assumptions are also to be found at the root of claims regarding visitation rights made by the access parent. That is, the idea that the full recognition of individual freedom of religion includes the ability to pass on one's religious beliefs to one's children and to enforce religious practices within the family, is not a new one and, in fact, has informed the traditional concept of custody. Rather than challenging that idea, Syrtash seems content merely to extend it to the realm of visitation, thus ensuring that both parents as individuals can exercise their freedom in the form of power over their children.[17] In the United States, this has led to an evolution from complaints by custodial parents about the activities of visitation parents to claims by the non-custodial parent with respect to the behaviour of the parent with custody. Privacy rights combined with the right of the free exercise of religion have been enforced on behalf of the access parent such that post-divorce life for the custodial parent becomes extremely difficult. The custodial parent may have "physical" custody, meaning that the child actually resides with her, but the access parent, granted "spiritual" custody in the interest of protecting his individual freedom, can make decisions with respect to religious education and practices in a way that may severely curtail the custodial parent's lifestyle and, indeed, beliefs.[18] Such intrusion on the part of courts in the day-to-day life of parents and children should serve as a danger signal to Canadian lawyers who may genuinely want to foster the cultural heritage of children. Second, the problem outlined above is especi-

[17]For views in the United States similar to that expressed by Syrtash, see *e.g.* Note, "The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation" (1984) 82 Mich. L. Rev. 1702; R.C. Mangrum, "Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases" (1981) 15 Creighton L. Rev. 25.

[18]See J.C. Paul, "'You Get the House. I Get the Car. You Get the Kids. I Get their Souls.' The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents" (1989) 138 U. Penn. L. Rev. 583.

ally serious from the perspective of mothers and lawyers who care about gender equality in family law reform. Syrtash acknowledges that women should be wary of what he welcomes as the erosion of custodial rights,[19] but he dismisses valid concerns without adequate discussion. It is significant that many or most of the cases in which religion or culture is raised as a factor in custody decision-making, are those in which the father seeks to expand his rights to visitation.[20] It is certainly the case that the appeals before the Supreme Court of Canada on this issue involve fathers who are arguing on the basis of individual freedom of religion that their visitation rights were unfairly and unconstitutionally limited by the trial judge who determined the best interests of the child. Both in *Young* v. *Young* and in *Droit de la Famille – 1150*,[21] the Jehovah's Witness father initially was ordered by the trial judge to restrict his religious activities when with his children. While the Quebec Court of Appeal left that order untouched, the British Columbia Court of Appeal in *Young* took the approach supported by Syrtash and loosened the restrictions, saying that the sharing of religious beliefs by the father could take place subject to any harm thereby caused to the child.[22] While it is true that we should welcome the open-mindedness of judges who accept a multiplicity of normative value systems, and that we should be slow to accept any rigid approach to the identity formation of children who, especially when the offspring of an intermarriage, are never simple and monolithic, it is also true that custody must be meaningful and as stable as possible. If, as would be expected, subsection 2(a) freedom of religion is breached by a court order that "gags" a parent with respect to religious discussions and practices with his children, then the attendant section 1 analysis must include consideration of the meaning of custody. The prospect of custodial mothers being subject to a clever constitutional attack whereby their freedom is curtailed and the primary importance of care-giving in any assessment of best interests set aside, is not a happy one.

Third, the notion of harm to children has delineated the limit of a parent's freedom of religion. Syrtash retains harm as the appropriate test but could be more clear on what he thinks harm should mean and in what circumstances it should affect custody or visitation. Harm to children might be embodied in religious norms, beliefs and teachings. In another sense, children may be seriously hurt as punishment for non-conformity with tenets of a religious community. In yet another context, the insularity of the community may shield parents and the community itself from recognition of and response to the harm children may experience. Finally, courts may consider not only the harm associated with the practices of one of the parents, but also the supposed harm caused by conflict

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[19]Syrtash, *supra* note 2 at 68: "Given that the custodial parents are usually women, those concerned with 'women's issues' may well be alarmed to see that the rights of the custodial parent are being further eroded as a result of these legislative changes and judicial decisions."

[20]This is true of the cases described in Syrtash's survey of Canadian case law, as the author himself recognizes.

[21]*Young* v. *Young*, *supra* note 5; *Droit de la famille – 1150*, *supra* note 5.

[22]But see the dissenting judgment of Southin J.A. in *Young* v. *Young*, *ibid.* at 8, for an eloquent rejection of the majority's position in favour of the concept and scope of guardianship as it has been understood in law. Madam Justice Southin expresses some of the same concerns as are raised by this Book Review.

between parents who hold different beliefs and are members of different communities.[23] If full recognition of the individual's freedom of religion includes the ability to share one's religious beliefs with one's children, then limiting that freedom in the name of harm calls for careful steering between discrimination on the basis of religion or culture and the valid protection of the interests of children. Refusal to grant custody or generous visitation rights to a parent, partly because of the harm associated with that parent's religious or cultural practices, may be the result of pure bias on the part of the judge. On the other hand, it may be the result of a thoughtful and extremely complex consideration of the interests of a child in Canada, which, while well-motivated and worthy of applause, may still be experienced by some religious or cultural communities as a direct attack.[24] It is in the realm of the latter kind of decision-making that further articulation and guidance are needed.

Child custody decision-making is never easy and, when made subject to the *Charter*, becomes even more sensitive. Syrtash suggests that, when it comes to children, no rules or presumptions should apply.[25] Instead, a mix of factors should be taken into account in each case and, from that mix, the appropriate court order should be fashioned. The miraculous nature of such an exercise is illusory, and it is slightly misleading and inconsistent for Syrtash to insist on individual rights for parents but refuse to offer any general guidelines on behalf of the children themselves whose development as bi- or multi-cultural individual Canadians is at stake.

Syrtash turns his attention to how children themselves may be brought into the analysis in a significant way in a short section of the first chapter, entitled "Custody, Access and Child Protection Disputes Among Aboriginal Peoples."[26] In a terse and limited discussion, Syrtash touches on an area of the law that may prove to be the most fruitful in the ongoing development and analysis of these issues in Canada. Lawyers and others working with aboriginal children, whether in custody, access or placement contexts, know too well the need for sensitivity and understanding with respect to the identity of aboriginal children and their vital membership in the aboriginal communities of Canada. Further, the risks and consequences of racism and bias in rules developed in Canadian law are under constant investigation, and it has been recognized that different norms exist in different communities.

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[23]On "direct" and "indirect" harm of the consequences of parental religious freedom in the context of child custody decision-making, see Toselli, *supra* note 14. According to Toselli, a distinction can be drawn between cases in which the specific religious practices are deemed harmful ("direct") and those in which exposure to the clash of different religious beliefs has been found harmful to the child ("indirect").

[24]This is not to say that such "interference" in response to harm to children is not necessary. It is a recognition that, no matter what solution is reached in a case, unless perhaps that solution is offered by the community itself, the individual parent and his or her religious or cultural community may perceive state criticism of their beliefs and practices.

[25]Syrtash, *supra* note 2 at 91, asserts this in the context of a section entitled "The Charter Cases and Medical Opinion: Law vs. Medicine" where he discusses the psychological implications of growing up with exposure to two religious or value systems and concludes that there should be no problem with this if the parents in any given case are sufficiently flexible. The statement is made, however, as a general conclusion to the chapter.

[26]*Ibid.* at 49-67.

Here, Syrtash's rejection of presumptions or rules with respect to children may be meaningful. Instead of perceiving a need to balance "native rights" against a child's "best interests," we can work towards an understanding of the intertwining relationship between the two concepts. From the perspective of the children themselves, the strong support of aboriginal communities is crucial; from the perspective of those communities, the ability to pass on cultural identity to the next generation is fundamental. Syrtash offers a select review of jurisprudence and legislation and rightly points out that a change in process is a preliminary and effective step in the gradual evolution of substantive law. Thus, as a striking example of willingness to recognize the community's claims with respect to young members, the Ontario *Child and Family Services Act* perceives of the particular Indian band as a party to child placement proceedings with claims or interests to be considered.[27] Syrtash also refers to the 1991 *Report of the Aboriginal Justice Inquiry of Manitoba* and the Report's assertion that "[t]he Aboriginal view of the 'best interest' of the child takes into account the needs of the family and of the community."[28] Instead of framing the issue in terms of the constitutional rights of the parent, Syrtash moves closer to his goal of truly responding to the cultural needs of Canadian children.

II. Resolving Conflict within the Community

In the second chapter, entitled "Alternative 'Cultural' Dispute Resolution,"[29] Syrtash addresses more directly the interactions among secular and religious or cultural systems of "law." Again, the conflict between traditional aboriginal customs, ceremonies and standards, and those dictated by family law, is perhaps the most topical in the early 1990s in Canada. Syrtash draws attention to situations where customary living arrangements have been considered equivalent to marriage, with all its attendant consequences including property division, and where aboriginal "adoptions" have been considered valid. In addition to the aboriginal experience, many religions have comprehensive systems of law which respond to all matters related to the family. Syrtash refers to Orthodox Judaism, Catholicism and Islam for examples of religious legal systems, but could compare more clearly, for the benefit of the reader, the parallel yet distinctive structures that they offer with respect to entry into and exit from marriage, and the fora they envisage for the resolution of conflict.

The question which Syrtash asks is whether "accommodation" will be expanded under the *Charter* as religious and cultural group rights are recognized and strengthened. While he does not commit himself as to the desirability of alternative cultural dispute resolution, he does seem sympathetic to the idea of cultural or religious groups convening their own "courts" in order to deal with conflicts in accordance with their own particular norms, customs and laws.

The serious issues at stake here starkly illustrate the complexity of existing as a diverse society made up of many communities. Here again, while he suc-

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[27]*Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 39(1)4, discussed in Syrtash, *ibid.* at 56-57.

[28](Manitoba: Queen's Printer, 1991), discussed in Syrtash, *ibid.* at 64.

[29]Syrtash, *ibid.* at 94-109.

ceeds in outlining the current state of Canadian law and the factors that deserve consideration, Syrtash falls down in his ability to articulate the problems and a consistent approach to be taken in resolving those problems. How far should Canada be prepared to go in "respecting" alternative dispute resolution based on culture, when such respect might mean that members of communities are forced to forego the jurisdiction and legislative policy of the state? In conflicts between secular and religious, general and specific, state interference requires careful justification. That justification can only be articulated after full discussion in which all the voices which will be affected can be heard. This is especially true for women, who stand to suffer a great deal if subjected to the norms of a patriarchal religion or culture, and who may prefer to take advantage of gains in the area of equality made in Canadian family law. Syrtash acknowledges that "disadvantaged spouses" — that is, women — may be adversely affected by a family law system that defers to religious or cultural traditions,[30] but he is willing to welcome, even if cautiously, some movement toward the dissemination of family issues in the hands of those in power in each community. Indeed, he implies, albeit in the following chapter, that accommodation, which may be constitutionally mandated, might put into question the civil law status of Canadian family law.[31]

The reader should adopt Syrtash's position with caution. However exciting it is to live in a state derived from many communities, the rights of which may be protected by the state's constitution, family law matters remain within the civil law of a progressive, democratic nation such as Canada.[32] The fact that Canadian citizens may define themselves as members of many communities and may feel obliged to follow the norms of those communities, does not put the general status of family law in jeopardy. That is, even substantive recognition of parallel jurisdictions in some matters, while it exposes the myth of a monolithic family and family law, does not erase the state's interest and responsibility for family law matters. Thus, autonomous aboriginal tribunals may be desirable, and greater understanding of the beliefs and practices of religious communities may be necessary, but abdication to communal jurisdictions without adequate insurance for members, especially women and children, is irresponsible.

Canada is not at any immediate risk of having its family law chopped up depending on the religious or cultural identity of each Canadian and his or her

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[30]While Syrtash deserves some credit for noting the concerns of women members of aboriginal communities (*ibid.* at 107, 109), he fails to indicate how those concerns should affect a principle whereby civil law courts should defer to or enforce the decisions of aboriginal courts. Further, he mentions the systems of rules that govern Jewish, Islamic, Catholic and Anglican family matters, but does not consider the concerns of women in these contexts (*ibid.* at 99-106).

[31]*Ibid.* at 146. In his discussion of the *get*, Syrtash disputes the statement by a court that law relating to marriage and divorce is a civil matter and can't become schismatic by reference to various religions. That is, says Syrtash, courts will now have to take into account those various religions. The reader is left wondering how to reconcile the notion of the civil law of marriage and divorce with accommodation that may indeed result in fragmentation.

[32]This is not to suggest that family law is uniform across Canada (provincial jurisdiction over property division and child custody and support, for example, ensures that it is not); nor is it to deny the need for further flexibility in family law in response to the norms of different cultural communities.

membership in a particular group. Syrtash's inference that this might be possible is problematic and, indeed, surprising given the third and final substantive chapter of his book which deals with the removal of barriers to religious remarriage. In that chapter, he addresses explicit interference by a liberal democratic state with the jurisdiction of Jewish law and its implementation. Legislative steps taken by the state itself are accepted as sometimes necessary for the exercise of the right to freedom of religion that Syrtash emphasizes as so crucial.

III. Divorce in Jewish Law and Canada's Legislative Response

In "Removing the Barriers to Religious Remarriage: Rights and Remedies,"[33] Syrtash concentrates on the issue of the Jewish divorce or *get*.[34] Briefly put for the purposes of this review, Jewish women face severe hardship in the form of the *get*, or bill of divorce. While divorce is acknowledged by Jewish law and rules surrounding marriage breakdown and the expectations and protection of the spouses have been part of the legal apparatus for millenia, the device of the *get* can be extremely disadvantageous for women. Upon divorce, a Jewish husband must give a *get* to his ex-wife, and the wife must accept it. The procedure for giving and receiving a *get* is relatively simple — the document is supervised by rabbis and signed by witnesses, and is essentially a private rather than religiously ordained act. If the husband refuses to give a *get*, the wife cannot remarry according to Orthodox Jewish practice. Furthermore, if she remarries in a civil ceremony, for example, her children will be labelled *mamzerim* and will not be recognized as full members of the Orthodox Jewish community in that they too will be denied the opportunity of marriage within the precepts of Jewish law. Syrtash correctly points out that this problem is not restricted to the relatively small Orthodox Jewish community in Canada; instead it has repercussions for all Jews who wish to follow this traditional procedure and who want their children to be recognized as full members of the Orthodox Jewish community should they so desire. If, alternatively, the woman refuses to receive the *get*, the husband can appeal for a type of rabbinical dispensation such that he can remarry. However, even if he fails to do so, any children of a second marriage will follow the religion and status in the community of the mother and therefore will not be subject to the same stigma.

The importance of the *get* to Jewish women has made it an ideal tool for blackmail. What Syrtash refers to as "recalcitrant spouses" may refuse to grant a *get* until serious concessions on issues of property division and support are made by the "victimized spouse." In terms which indicate more clearly the non-gender-neutral character of the problem,[35] husbands hold a disparate amount of power with respect to their wives when it comes to divorce proceedings. Wives who fail to receive a *get* are fittingly referred to as *agunot* or "chained women."

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[33]Syrtash, *supra* note 2 at 111-78.

[34]Syrtash refers to the *GET* spelled in block letters throughout his discussion, ostensibly to indicate that this is not an English word. This seems jarring to the reader and this Review will italicize the word instead.

[35]Syrtash tries to be gender-neutral throughout the chapter, but this attempt is extremely awkward in the context of a gender-specific problem.

Further, a *get* given by the husband as a result of pressure — for example under threat of fine or imprisonment — by a secular court, could be characterized as coerced and therefore invalid according to Jewish law. Any attempt by the state and its courts to aid a wife who has not been granted a *get* must be carefully designed such that it achieves its objective without contravening either the religious law itself, which the litigants ostensibly follow and obey, or the principle of the separation of church and state.

Syrtash rightly asserts that Canada and New York State have been leaders in enacting legislation as a response to a serious problem in the Jewish community.[36] As he points out, the coercive aspects of the *get* from the perspective of Jewish women in Canada have been surveyed and documented by B'nai Brith Canada in a study entitled "The Use of 'Get' as a Bargaining Tool in Jewish Divorce Proceedings."[37] Ensuing awareness of the phenomenon and pressure from Jewish women has led to legislative reform both of the Canadian *Divorce Act* and of the Ontario *Family Law Act*.[38] Under the latter, a court may set aside a separation agreement if removal of a barrier to remarriage formed part of the consideration of the contract.[39] This option mirrors the principles of coercion and unconscionability in contract law which have been utilized, especially in New York State,[40] prior to and parallel with legislation, but Syrtash warns that resort to the provision may be impractical, largely because of the possibility that *get*-giving perceived to be coerced will be invalidated by Jewish law.

More clever and useful is the "affidavit route" available in essentially the same form under both the *Divorce Act* and the Ontario *Family Law Act*. Syrtash, as an Ontario family lawyer, pays more attention to the provincial legislation than to the federal, and, indeed, Ontario preceded Canada in introducing remedial provisions. This review, however, will refer primarily to the *Divorce Act* but not without a passing word of support for further initiatives on the part of provinces other than Ontario. The affidavit route, set out in section 21.1 of the *Divorce Act*, stipulates that, in any proceedings under the Act, one spouse may file an affidavit stating that the other spouse has failed to remove all barriers to remarriage within his or her control. If, within fifteen days, the barrier has not been removed, the court may dismiss any application filed by the withholding spouse. Thus, in any application or defense relating to the granting of a divorce itself, custody of the children, child support or spousal support, the fact that the *get* has not been given upon request may have a severe impact on the position of the "recalcitrant" spouse, usually the husband. Unless that spouse has no interest in making or defending a claim, he thus will be heavily encouraged to

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[36]In Canada, *An Act to Amend the Divorce Act (Barriers to Religious Remarriage)*, S.C. 1990, c. 18, amending R.S.C. 1985 (2d Supp.), c. 3, s. 21.1 [hereinafter *Divorce Act*]; *Family Law Act*, R.S.O. 1990, c. F.3, ss. 2(4)-(6), 56(5)-(7) [hereinafter *Family Law Act*]. In New York State, N.Y. *Domestic Relations Law* §253 (Consol. 1990).

[37]Syrtash, *supra* note 2 at 121-22.

[38]*Divorce Act*, s. 21.1; *Family Law Act*, ss. 2(4)-(6), 56(5)-(7).

[39]*Family Law Act*, s. 56(5)-(7).

[40]See *e.g. Avitzur* v. *Avitzur*, 446 N.E. 2d 136 (N.Y. 1983), cert. denied, 464 U.S. 817 (1983); *Perl* v. *Perl*, 512 N.Y.S. 2d 372 (N.Y. App. Div. 1987); *Golding* v. *Golding*, 581 N.Y.S. 2d 4 (N.Y. App. Div. 1992).

give the *get* and thereby remove any barrier to remarriage. According to Syrtash, this route avoids the risk of invalidation of the *get*-giving within Jewish law because the secular court, rather than ordering a *get* or making it a condition for an agreement between the ex-spouses, merely makes a decision on an application dealing with a civil matter. Sleight of hand, perhaps, but this is a realm of jurisdictional overlap where manipulation of particulars may make all the difference to general interpretation, whether by judges or rabbis.

Syrtash undertakes an in-depth examination of the *get* legislative reforms and his discussion in this third and most comprehensive part of the book can be roughly divided into areas of principle and detail. While the detailed treatment, complete with sample affidavits and suggestions on the timing and exercise of the relevant procedures, should be very helpful to family lawyers, this review will focus on the principled arguments relating to the constitutionality of the legislation. The constitutional challenge expected in the future will invoke subsection 2(a) of the *Charter* and will argue that the legislation impermissibly interferes with individual freedom of religion. The lawyers who will argue the case, at present still hypothetical, would be well advised to start with Syrtash's book for initial references and the outline of an argument in favour of constitutionality. Indeed, the author's discussion of the issue and his inclusion of both a memorandum by Dean John D. Whyte[41] prepared for the purposes of the Ontario legislature that introduced and passed the *Family Law Act* reforms, and the speech made by the Minister of Justice in the House of Commons regarding the change to the *Divorce Act*,[42] form the basis for a strong appellate factum.

At stake here is the purpose and content of subsection 2(a) protection of freedom of conscience and religion. The scope of subsection 2(a) of the *Charter* has received little attention by the Supreme Court of Canada to date, although Dickson C.J.C.'s reasons for the majority judgment in *R.* v. *Big M Drug Mart*[43] set out a general purpose of the provision whereby individual religious belief and practice may be neither coerced nor constrained by the state.[44] In order to argue for the constitutionality of the *get* legislation, it is necessary to overcome two general objections: first, that, by addressing one specific religious predicament, the state supports or recognizes that religion; and, second, that the attachment of civil consequences to religious actions unjustifiably interferes with or coerces religious practice. These two objections roughly follow the two prongs of anti-establishment and free exercise of religion under the *First Amendment* of the United States Constitution, and it is interesting to speculate that the *get* issue might force Canadian courts to confront the question of how similar the contours of subsection 2(a) protection are to those characterizing *First Amendment* jurisprudence.[45]

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[41]Syrtash, *supra* note 2 at 137-43.

[42]*Ibid.* at 153-57.

[43][1985] 1 S.C.R. 295; 18 D.L.R. (4th) 321 [cited to S.C.R.].

[44]*Ibid.* at 336ff.

[45]According to the *First Amendment*, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." For arguments with respect to the constitutionality of the New York "*get* statute" and cases overturning separation agreements on the basis of *get*-related coercion, see *e.g.* T. Rostain, "Permissible Accommodations of Religion: Reconsidering

When these objections are considered in the context of the *get* legislation, the fact that the terms of the provision are religion-neutral and never mention the term *get* clearly will not hide the obvious purpose of remedying a phenomenon found in Judaism; neither will the argument that the granting of the *get* is not *per se* a religious act in Jewish law, given the fact that the procedure is neither solemnized nor holy, overcome the assertion that the court is interfering indirectly with a practice associated with religious belief and affiliation. Aside from these arguments, however, Syrtash draws on the memorandum by Dean Whyte in order to characterize the legislative relief embodied in the *Divorce Act* as *necessary* for the recognition of freedom of religion, rather than as impermissible state recognition or establishment of religion. Thus, goes the argument, subsection 2(a) is not breached when a religious practice is not explicitly imposed by the state; nor is it breached when acknowledgement of the religion by the legislatures and courts is in the interest of freedom of religion itself.

While this position is appealing from the perspective of supporters of the legislation, it may miss its mark if applied exclusively to subsection 2(a) and not to a section 1 analysis under the *Charter*. That is, comprehension of the extortionate potential of the *get*-holder's power is crucial to the upholding of these reforms to divorce legislation. These are remedial provisions passed in response to the voices of women in a particular community, and any assessment of their constitutionality in the context of freedom of religion must balance the purposes of the reforms against the minimal intrusion and entanglement that those reforms represent. Section 1 is ideally suited to such an analysis. Indeed, the Supreme Court of Canada has indicated, perhaps most clearly in Dickson C.J.C.'s reasons for the majority judgment in *R.* v. *Keegstra*,[46] its readiness to give an extremely wide scope to section 2 freedoms and to leave to section 1 any balancing of the severity of the breach against the reasons for the legislation and the other *Charter* rights and freedoms that may demand it. The arguments that Syrtash offers on behalf of the validity of the amendments to the *Divorce Act* and the Ontario *Family Law Act* probably will find themselves in a section 1 analysis in the future, where the role of Canada as a democratic society with an obligation to protect rights and freedoms of both individuals and groups in a meaningful way can be explored.

Comparison with the United States, both with respect to the scope of the protection of freedom of religion and to the case law surrounding the *get* issue in New York State, deserves mention here. Syrtash is right to suggest that courts in Canada may draw valuable guidance from *First Amendment* jurisprudence and from the approach of judges to the complicated situations that may arise with respect to the *get*. Readers of his book, however, should be careful not to assume that he offers complete coverage in this regard. Far from doing so, Syrtash promises comparison between the "*get* legislation" in New York State and Canada, but fails to deliver.[47] More seriously, he refers to U.S. cases on the *get*

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the New York *Get* Statute" (1987) 96 Yale L.J. 1147; L.S. Kahan, "Jewish Divorce and Secular Courts: The Promise of *Avitzur*" (1984) 73 Georgetown L.J. 193; M. Feldman, "Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get" (1989-90) 5 Berkeley Women's L.J. 139.

[46][1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1.

[47]Syrtash, *supra* note 2 at 176-78.

in a hit-or-miss manner that is, at best, misleading, and, at worst, incorrect. The most glaring example is his assertion that the "most dramatic development that has helped to dispel many fears as to the constitutionality of a court's intervention to compel a husband to give a *GET*, was a decision of the United States Supreme Court in *Shragai*."[48] The "decision" to which he refers is a one sentence dismissal of a petition for writ of certiorari given in response to a request to stay an order of imprisonment by the Appellate Division of the Supreme Court of New York.[49] It would be highly questionable to rely on the dismissal as evidence that the U.S. Supreme Court would uphold court interference with the giving of a *get* as constitutionally valid under the *First Amendment*. In general, readers would be well advised to start with the references to American case law and literature referred to by Dean Whyte in his memorandum and to carry out up-to-date research on the *get* on their own.

With respect to the meaning of the free exercise and anti-establishment clauses, U.S. jurisprudence and literature continues to evolve, and Syrtash could be more honest about the fact that his book cannot possibly begin to cover the debates over necessary accommodation as opposed to state establishment.[50] In addition, and most significantly, the notion of importing doctrine from the United States to Canada in the area of freedom of religion should be treated with healthy suspicion. Not only is *First Amendment* doctrine of free exercise and anti-establishment in a state of flux in the United States, but the differences between the two countries, in terms of history and present political reality, are especially marked in the area of religion and the state. There is no reason to suppose that the approaches to constitutional rights of the individual and community in that area would not also be strikingly different.

IV. Overlapping Issues and Jurisdictions — the Interaction of Cultural Communities and Multicultural Canada

In the foreword to his book, Syrtash asks to what extent Canadian multiculturalism finds its legal expression in the family law statutes and court decisions of Canada. In conclusion, he recounts the developments that have been discussed in the areas of religious and cultural identity of children, the format of decision-making in family matters, and divorce law reform: developments that give some indication of what Syrtash calls a move in a "multicultural direction."[51] The open-ended conclusion that multicultural legal principles must be respected and accommodated needs some concrete character if it is to be meaningful. As is the case throughout his writing, Syrtash is stronger on specific, practical explanation than on theoretical argument or discussion.

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[48]*Ibid.* at 136-37.

[49]*Shragai* v. *Shragai*, 523 N.Y.S.2d 333 (App. Div. 1988), appeal dismissed 524 N.E.2d 147 (1988), reconsideration denied 528 N.E.2d 1227 (1988), cert. dismissed 489 U.S. 1073 (1989).

[50]On the current status of the debate in the U.S., see *e.g.* M.W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion" (1990) 103 Harv. L. Rev. 1409; M.W. McConnell, "Accommodation of Religion: An Update and a Response to the Critics" (1992) 60 George Washington L. Rev. 685; I.C. Lupu, "Reconstructing the Establishment Clause : The Case Against Discretionary Accommodation of Religion" (1991) 140 U. Pa. L. Rev. 555; I.C. Lupu, "The Trouble with Accommodation" (1992) 60 Geo. Wash. L. Rev. 743.

[51]Syrtash, *supra* note 2 at 180.

A comment should be made here, however, that even the strongpoints of the book are adversely affected by a lack of careful editing. At times, sections are cluttered and confusing such that the reader must wait until the conclusion of each discussion for clear organization and analysis. Further, and definitely a fault to be ascribed equally to the publisher, typographical and other errors in the text are so prevalent that they occasionally make reading annoying and difficult. These fall along a spectrum of seriousness, but the misspelling of the past Chief Justice of Canada as "Dixon J." cannot be readily excused.[52]

In general, Syrtash's careful summaries at the end of each of the major sections of the book, which encapsulate the present approach to an issue in Canadian law, are extremely useful. Yet, a closer look at the way in which those sections relate to each other would yield a more substantial conclusion as to the relationship between religion or culture and the state with respect to influence and control over family matters. In the absence of a comprehensive tying together of the different parts of Syrtash's study by the author himself, I offer several comments here on the intersection of the three major topics and the themes, indicators and issues shared by them.

First, it is significant to note that not only do the areas that Syrtash has chosen to address differ in substance, but they also offer different fora in which that relationship is explored. Issues of religion and culture in child custody primarily involve the courts; the procedures in making decisions regarding marriage, divorce and children may be dictated by culturally specific tribunals; and legislatures respond to a problem within a religious community with remedial legislative reforms. Thus, courts, legislatures and forms of alternative dispute resolution coexist and cooperate in addressing conflicts between communal norms and those of the state. They are the actors responsible for the three major "encouraging developments"[53] that Syrtash pinpoints in his text — respect for aboriginal cultural concerns in child protection, remedial legislation for Jewish spouses, and fitting together the different pieces of a Canadian child's cultural identity — and it is important to accord them full recognition.

Second, in realizing that various mechanisms are at work in the evolution of "freedom of religion," "multiculturalism" and "aboriginal rights" in the context of family law, we can also appreciate the fact that the impact of a state's legal action on the internal workings of a religious or cultural community has its limits. That is, instead of continually asking about the legal permissibility of state involvement or interference with religious or cultural norms, we can also ask about the effectiveness of that involvement. This moves us into the sphere of political action, whereby change in the civil law may be mirrored or surpassed by change within the community itself. As an example of such unrest and change from within, we need look no further than Syrtash's discussion of the *get*. More attention should be given to the fact that Orthodox Jewish women are not merely waiting for secular courts to grant them the relief they need and deserve. Instead, they are undertaking political activism within their communi-

[52] *Ibid.* at 75.
[53] *Ibid.* at 179.

ties and exerting pressure on not only their ex-husbands but also on the leaders and rabbis who might in turn influence an eventual change in the Jewish norms and practices themselves. The complex interaction between the legal system of the state and that of a community within the state, in the form of carefully researched and worded legislation, will not resolve the problem of the *get* for Jewish women. It may provide a serious signal, however, in addition to the women's voices themselves, that substantive change is required in Jewish law. Awareness that communities themselves have the final responsibility for change in response to the needs and requirements of their members does not mean that Canadian law should turn its attention elsewhere. As discussed earlier in the context of alternative cultural dispute resolution, family matters remain under the umbrella of domestic civil law. As should be apparent by this point, the perspective of women with respect to each of the three substantive areas that Syrtash addresses provides a connecting theme in this respect. It is easy to suggest that erosion of custody rights and respect for community standards will further the principles and practices of multiculturalism in Canada. From the perspective of women who stand to be silenced in the face of arguments on behalf of an access father's freedom of religion, or by the power-based infrastructure within a specific community, it is crucial not to define multiculturalism in a way that omits their concerns. Again, the inclusion of the discussion on the *get* and the fact that Syrtash was one of the lawyers who worked on the *get* reforms should indicate a willingness to incorporate gender equality into the remoulding of state-community relations in the wake of the *Charter*.

Finally, it must be emphasized that the issues that Syrtash chooses for his book are illustrative rather than comprehensive. Syrtash should make this fact more clear in order to avoid a situation where readers might find his treatment of religion and culture in Canadian family law somewhat unbalanced. If the book were meant to treat all religious communities in Canada then it might be fair criticism to say that Jewish law with respect to marriage and divorce receives disproportionate attention here, with Catholicism, Anglicanism and Islam receiving what amounts to passing mention, and other religions receiving none. Of course, Syrtash does not intend to give a full picture of the legal and normative structure of every religious and cultural community in Canada, and the examination of Jewish law and the *get* issue provides an example rather than one part of a complete survey.

Implicitly then, Syrtash's work invites further work to be done as we develop a Canadian approach to the intersection of the state with the many communities of which it is comprised. Just as Syrtash brings expertise in the area of Jewish law, others will bring parallel knowledge of other normative orders and interest in the issues that face other communities. Similarly, Syrtash is most familiar with the law in Ontario, although he also emphasizes to some extent Quebec and British Columbia. Lawyers and academics in other parts of the country, especially those working in and with aboriginal communities, will complement the ideas put forward in Syrtash's book with their own experiences and context. In addition, this is an area that invites comparative work, and Canadian law would be well advised to consider the ways in which other countries,

including and beyond the United States, interact with religious and cultural subcommunities on issues pertaining to the family.

The *Charter*'s protection of freedom of religion, multiculturalism and aboriginal rights may indeed change the landscape of Canadian family law in the future. Syrtash succeeds in raising many of the crucial questions that must be addressed as we think about the cultural identity of all Canadians, both children and adults. We must ask how and under what circumstances constitutional law will affect the scope and practice of family law; what individual freedom of religion includes and what limitations might be justifiable; and how the reality of multiculturalism in Canada influences and is influenced by the constitutional principle. Syrtash provides concrete situations in which the answers to those questions will have a real impact. As we continue to investigate those situations and others, lawyers and policy-makers will begin to construct the broad characteristics of what may be a uniquely Canadian interweaving of cultural identity and constitutional rights in the context of family law.

Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws*. Cambridge: Harvard University Press, 1992. Pp. 530 [$39.95]. Reviewed by Mark I. Schwartz*

Introdnction

Over several decades, both the Canadian and the American governments have enacted legislation prohibiting employers from discriminating against employees or potential employees on the basis of various criteria. While the majority of scholars as well as the public at large support this legislation, there have been, in recent years, voices calling for the repeal of such legislation.[1] The grounds for such calls vary from the rights of the individual as they pertain to contractual freedom, to the claim that while the goals of the Employment Discrimination Laws (EDLs) are well intentioned, they lead to perverse secondary long-run consequences which hurt society as a whole and specifically those individuals they seek to protect and assist. One person calling for the repeal of EDLs is Richard Epstein.

In the above-captioned book Epstein[2] develops a common law defense to the regulation of labour markets and goes on to tell us how society would be better off from a utilitarian point of view if EDLs were repealed. He traces the long history of American law and jurisprudence prior to the *Civil Rights Act of 1964*,[3] wherein racism was widespread. He reasons that the suffering was mainly the result of public discrimination, not private discrimination, and cites the decision of *Plessy* v. *Ferguson*[4] as an example of public discrimination at work. In an attempt to eliminate this suffering, the United States Congress passed the *Civil Rights Act of 1964*. However, according to Epstein, this *Act* is fatally flawed in that, in addition to removing "Jim Crow" restrictions on the freedom of contract, *i.e.*, prohibiting public discrimination (which he lauds), it prohibits private discrimination.

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[1] See *e.g.* T. Sowell, *Markets and Minorities* (New York: Basic Books, 1981); R. Posner, *Economic Analysis of Law*, 3d ed. (Chicago: Little, Brown, 1986).

[2] Richard A. Epstein is James Parker Hall Professor of Law at the University of Chicago. He is also the editor of the Journal of Legal Studies. He is best known for his book *Takings, Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985), a treatise on the meaning of the *Fifth Amendment* takings clause ("nor shall private property be taken for public use, without just compensation"), and the misinterpretations given it by the Courts.

[3] 28 U.S.C. §1447 (1988).

[4] 163 U.S. 537 (1896).

Epstein distinguishes public from private discrimination, public discrimination being the result of discriminatory acts (generally legislative) of local, state or federal governments, and private discrimination being the result of discriminatory acts (generally contractual) of individuals or corporations.[5] Epstein reasons that public discrimination cannot be tolerated while private discrimination should be. The reasons for this are found in the classical liberal belief that power in the hands of the State inevitably causes oppression and suffering, while this same power, once it is dispersed in the hands of citizens with disparate and divergent interests and needs (*i.e.* in a relatively free market) becomes a key element of individual freedom.[6]

He notes that the prohibition of private discrimination has had the perverse effect of permitting, *inter alia*, discrimination against whites and men (*i.e.* reverse discrimination), and it has become permissible to charge firms with discrimination on the basis of purely statistical surveys of ethnic imbalances within their workforces.[7] Epstein argues convincingly that while there are both forms of private discrimination which people do not find offensive and forms which people do find offensive, neither should be prohibited. His reasoning is that, in both cases, private discrimination is often rational and that, in any event, the consequences of using the blunt instrument of legislation to rectify disparate and imperfect market situations are likely disastrous and far more severe than private discrimination.[8]

In elaborating on these arguments, Epstein takes aim at court decisions which have been rendered since the passage of the *Civil Rights Act of 1964*, including the 1971 Supreme Court decision in *Griggs* v. *Duke Power Co.*,[9] and the 1989 Supreme Court decision in *Wards Cove Packing Co.* v. *Atonio*,[10] which have expanded upon the *Civil Rights Act of 1964* by developing the doctrine of Disparate Impact. Disparate Impact is the doctrine which allows courts to infer illegal discrimination without evidence of illegitimate motive and solely on the basis of the disparate consequences of employers' hiring procedures or tests.[11]

Epstein goes on to discuss non-race related labour market discrimination, including discrimination on the basis of gender, age and disability.[12] He finds no valid reason why legislation prohibiting these forms of discrimination should be viewed any differently than legislation prohibiting discrimination on the basis of race.

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[5]R.A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge: Harvard University Press, 1992) at 91-94.

[6]See for example J. Locke, *Two Treatises of Government* (London: Everyman Classics, 1924); see also J.E.E. Dalberg-Acton, Baron Acton, *Selected Writings of Lord Acton*, vol. 1 (Indianapolis: Liberty Classics, 1985); H. Spencer, *The Man versus the State* (Indianapolis: Liberty Classics, 1981).

[7]Epstein, *supra* note 5 at 77-78.

[8]*Ibid.* at 266.

[9]401 U.S. 424 (1971) [hereinafter *Griggs*].

[10]490 U.S. 642 (1989).

[11]Epstein, *supra* note 5 at 160.

[12]*Ibid.* at 267-494.

This review will seek to explain and critique Epstein's reasons for calling for the repeal of EDLs, viewed both from the utilitarian as well as the natural rights viewpoint, with particular emphasis on race-related employment discrimination.

I. The Utilitarian Approach Versus the Natural Rights Approach

Epstein commences his book with a section on the analytical foundations of his theory. While his theory is based on a method of analysis (economic analysis) that has been with us for some time, he uses it to take aim at an area which has heretofore been left relatively untouched: EDLs. Epstein's whole approach is based on the premise that the absence of EDLs produces greater social utility (wealth) to more individuals (including traditionally oppressed groups) than the existence of EDLs produces.[13] This is a utilitarian opposition to EDLs. The utilitarian opposition is to be contrasted with what I will refer to as the natural rights opposition. The natural rights opposition to EDLs is based on the premise that the absence of EDLs provides the greatest amount of liberty to all individuals (including traditionally oppressed groups) and, as a result, EDLs should be eliminated.

Epstein's utilitarian approach to EDLs is centred on his belief that discrimination is often rational (and therefore EDLs are not rational) both from the point of view of the firm and the society as a whole.[14] This is the main thrust of his book. Epstein reasons, for example, that there often exists a rational desire on the part of employers to increase homogeneity within the workplace, *i.e.*, a deliberate desire to decrease the variance of opinion with regard to some key issues. This is rational because when opinions within a group vary significantly, it becomes difficult, if not impossible, to take decisions for the common good.[15] (Indeed, Canadians who have participated in the decade-long constitutional debate can attest to the fact that too much variance of opinion can hinder progress and dispute resolution.) Epstein states the following:

> Any social policy that requires that membership in a private association should be randomly drawn from a subset of the larger whole is an invitation to trouble. Even the ideal set of contractual terms can go only so far toward buffering the problems and tensions of long-term legal relationships. In many senses the single most important contractual decision is a business decision: the selection of contractual partners. Choosing the right partners reduces the stresses on any set of legal relationships. Choosing the wrong partners exacerbates them. Governance costs are a function of the level of variation within the firm.[16]

This, however, does not mean that the benefits of homogeneity are necessarily universally true. According to Epstein, so long as they are partially true they explain why some firms are organized along specialized lines while others

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[13]*Ibid.* at 242-66.

[14]*Ibid.* at 59. This view is distinctive to Epstein, as the other proponents of the repeal of EDLs have based their claim exclusively on the belief that competitive markets render most discriminatory behavior inefficient. See *e.g.* Sowell, *supra* note 1 at 50; Posner, *supra* note 1 at 615-25.

[15]Epstein, *ibid.* at 62-64.

[16]*Ibid.* at 64-65.

are not.[17] Therefore, EDLs are very dangerous because they act as blunt instruments which not only prevent the bigot from hiring individuals on the basis of race, gender, etc., but also the non-bigot who rightfully and rationally views his firm as being a more efficient entity when it is composed of a more homogeneous group.[18]

Epstein's point becomes even more evident when viewing the opposite situation. The case can be made for an employer having a rational desire to decrease homogeneity in the workplace, *i.e.*, increase the variance of opinion with regard to some key issues, as for instance in situations where variance of opinion would be sought because it was required to arrive at the solution to a problem that could not easily be found. It is often claimed that important discoveries are made by approaching a problem from a different angle. Having a greater variety of opinions increases the likelihood of approaching the problem from different angles, and therefore, increases the likelihood of solving the problem as well as the speed with which it can be solved. This is a common and accepted practice in business recruiting, as well as a basis for the consistently broad interpretation given the *First Amendment* as it regards protected speech.[19] Can we justify allowing a decrease in homogeneity below the norm for cases which so require such a decrease but not allowing an increase in homogeneity above the norm when it is so required?

In addition, Epstein points out that EDLs are not rational because they deleteriously affect the minority groups they are put in place to assist.[20] Epstein claims that these effects are very similar to the effects of minimum wage laws.[21] These laws forbid employers from offering positions to prospective employees below a certain rate and are an attempt to increase the standard of living of those who would otherwise earn less than the minimum wage. It has been shown that such laws create unemployment by forcing marginally profitable enterprises out of business[22] and by automating tasks in other enterprises.[23] Therefore, the very workers which these laws were intended to assist are hurt. Incidentally, minority

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[17]*Ibid.* at 68.

[18]*Ibid.* at 78.

[19]The following remark was once made by Judge Learned Hand. The *First Amendment*, he said, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritarian selection. To many this is, and always will be folly; but we have staked upon it our all" (*NAACP* v. *Button*, 371 U.S. 415 at 433 (1963)).

[20]Epstein, *supra* note 5 at 73, 261-64.

[21]*Ibid.* at 73-74, 243, 261-62.

[22]See *e.g.* M. Friedman, *Free to Choose: A Personal Statement* (NewYork: Harcourt Brace-Jovanovich, 1980) at 237-38.

[23]This phenomenon has been referred to as the Caesar Chavez effect. Caesar Chavez made a name for himself by mobilizing farm workers in California to form unions and to work for fairer wages. While some farm workers benefited from his efforts by way of higher wages, many more became unemployed and were replaced by automated harvesting devices. These devices were introduced when farm workers priced themselves out of the market and machines became capable of performing the same tasks at a lower cost to the farmer. For more on the Caesar Chavez effect, see W. Block & M. Walker, *Lexicon of Economic Thought* (Vancouver: Fraser Institute, 1989) at 64-67.

The lesson to be learned is that while some people do benefit from such legislation, there are hidden deleterious effects that call into question the social utility of the legislation in the first place.

groups appear to be disproportionately affected by the hidden effects of minimum wage laws since several minority groups are disproportionately represented amongst those who would earn less than the minimum wage.[24]

In similar fashion, according to Epstein, EDLs disproportionately reduce employment opportunities for minorities in the long run in that they reduce the number of firms that can enter the marketplace and also increase the likelihood that marginally profitable firms will be forced out of business.[25]

Epstein further reasons that if employers rationally or even irrationally perceive minority labour to be of lower value than non-minority labour, they will inevitably seek ways to comply with the EDLs but evade their sting.[26] One of Epstein's examples is locating a firm's new plants and facilities in areas with smaller percentages of minorities notwithstanding their less than perfect suitability to the firm.

In essence, Epstein's utilitarian opposition to EDLs can be summed up by the following truism: in attempting to right a wrong, governments (and individuals for that matter) all too often choose solutions by looking at the specific and short-term consequences of their actions all the while neglecting the diffuse, more serious and long-term consequences.[27]

It is unfortunate that Epstein relies almost exclusively on the utilitarian rather than the natural rights approach in stating his opposition to EDLs, for while his claims are well founded, they nevertheless lack the moral underpinnings, which the natural rights approach provides, to justify the repeal of such legislation. Demonstrating the economic inefficiency of legislation is often viewed as an insufficient reason to repeal it. What is generally required in addition to, or instead of, this is a belief within the population at large that this legislation, or the concept upon which it is based, is somehow wrong or immoral. The natural rights opposition to EDLs provides this foundation by expounding on the belief that the freedom of contract is merely a subset of individual liberty, and that individual liberty must be promoted over and above all other interests. A belief in the primacy of individual liberty means that it is wrong for the State to use its coercive apparatus for the purpose of getting some citizens to aid others, or to prohibit or mandate the activities of people for their own good or protection.[28] Indeed, more than simply being *wrong* such State interference is viewed by natural rights proponents as a step taken towards a society where individuals have lost their freedom because the State uses this coercive apparatus in overwhelming fashion in every aspect of human life.[29]

It is for instance the natural rights approach which has triumphed in the area of freedom of speech.[30] It is commonly accepted in North America today

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[24]Epstein, *supra* note 5 at 261.

[25]*Ibid.* at 73, 181.

[26]*Ibid.* at 262-63.

[27]See *e.g.* H. Hazlitt, *Economics in One Lesson* (New Rochelle, N.Y.: Arlington House, 1979).

[28]R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at ix.

[29]Examples include all communist countries and the socialist democracy of Sweden.

[30]Epstein, *supra* note 5 at 149; B.H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980) at 248-64.

(though more so in the United States than in Canada) that the word "speech" should be interpreted broadly[31] and that restrictions on speech should be few because all forms of censorship are dangerous (and immoral) in that they allow the state to use its coercive apparatus to control the dissemination of information.[32]

Is there any reason why the freedom of contract (EDLs are a restriction on the freedom of contract) should be viewed more restrictively from a natural rights point of view than freedom of speech?[33] Indeed, there is some justification for claiming that a better case can be made for regulating speech than almost any other freedom, including the freedom of contract, speech being potentially the most dangerous of all freedoms. Bernard H. Siegan, Professor of law at the University of San Diego School of Law states that:

> Even assuming that hazards are of the magnitude alleged in the calls for regulation, they cannot pose so great a risk to the public welfare as misleading, distorted or false information. Expression may be the most dangerous of all freedoms. It can lead to war, depression, tyranny, terrorism, revolution, and insurrection, since the final decision on these and numerous other critical issues rests with a public dependant on news media for accurate information.[34]

In summary, arguably, a very rational (some might say the most rational) reason for opposing EDLs is their anti-libertarian nature regardless of their social utility (utilitarian value). They force associations amongst individuals who would not otherwise associate, and this goes contrary to the natural rights view of individual liberty as being the sole and ultimate good.

II. Disparate Treatment, Disparate Impact and the Burden of Proof

Apart from their anti-utilitarian and anti-libertarian nature, another argument for the repeal of EDLs is that they inevitably lead to the shifting of the burden of proof from the employee to the employer. This shift stems from the primordial belief that all forms of discrimination are wrong, and therefore, that all means necessary should be taken to root out discrimination. The absurdity of this shift in the burden of proof is demonstrated by Epstein's review of recent caselaw and the doctrine of Disparate Impact which has emanated therefrom.[35]

Disparate Treatment is the doctrine which allows courts to infer illegal discrimination on the basis of an employer's illegitimate motives.[36] According to

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[31]See *R.A.V.* v. *City of St-Paul, Minnesota*, 60 U.S.L.W. 4667 (1992), a recent unanimous Supreme Court decision, which held to be unconstitutional an ordinance which prohibited the display of symbols which one knew or had reason to know aroused anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender.

[32]Siegan, *supra* note 30 at 249. See also *supra* note 19.

[33]See for example Posner, *supra* note 1 at 627-38; A. Scalia, "Economic Affairs as Human Affairs" (1985) 4:3 Cato Journal 703.

[34]Siegan, *supra* note 30 at 263.

[35]Epstein, *supra* note 5 at 159-241. An even more absurd consequence of EDLs is "race norming." See *ibid.* at 238-41. Race norming is the practice, endorsed by the National Research Council, whereby the score of an individual on a test is reported only as a percentile relative to that individual's own race, not the tested population as a whole.

[36]*Ibid.* at 160.

this doctrine the complainant carries the initial burden of establishing a *prima facie* case of racial discrimination.[37] Once this is accomplished, the burden shifts to the employer to show a non-discriminatory reason for the employee's rejection. The *Civil Rights Act of 1964* is based on this doctrine.[38]

However, as Epstein relates, recent court decisions have developed a new doctrine: the doctrine of Disparate Impact.[39] Disparate Impact is the doctrine which allows courts to infer illegal discrimination solely on the basis of the disparate consequences of an employer's hiring procedures or tests.[40] The watershed case in this regard is the *Griggs* decision.[41] According to this doctrine, the complainant carries the burden of establishing *prima facie* that the selection rate for the race, ethnic group or sex in question is less than the group with the highest rate.[42] Once this is accomplished, the burden shifts to the employer to show business necessity;[43] in other words, the employer must show that the practice which leads to the differing selection rate is essential to the firm's survival.

In the more recent decision of *Wards Cove Packing Co.* v. *Atonio*,[44] the oppressive burden of business necessity was replaced by a somewhat less oppressive two-step process:[45] the complainant must show that the legitimate employment goals of the employer do not justify the practices that lead to the differing selection rate; if the employer prevails on this point, the complainant must then show the availability of alternate practices, with less racial impact, to achieve the same business ends.

Congress became frightened by this change of course, and sought to pass the *Civil Rights Act of 1990*, succeeding with the *Civil Rights Act of 1991*.[46] Though this legislation was promoted as a restoration of the principles enunciated in the *Griggs* decision, it in fact imposes more stringent standards of liability on the employer than were imposed pursuant to *Griggs*, especially as they relate to the scope of basic liability and the damages for which the employer would be liable.[47]

Although Epstein's review of recent court decisions is exhaustive and he provides overwhelming reasons as to why the doctrines of Disparate Treatment and Disparate Impact should be discarded, he does not sufficiently explain the historical foundations for placing the burden of proof on the accuser rather than on the accused. Indeed, vis-à-vis EDLs, placing the burden of proof on the employer after having established no more than a statistical discrepancy in

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[37]*Ibid.* at 167.

[38]*Supra* note 3. See Epstein, *ibid.* at 186-92, 197.

[39]Epstein, *ibid.* at 182-241, 252.

[40]*Ibid.* at 160.

[41]*Supra* note 9. See also Epstein, *ibid.* at 207.

[42]Epstein, *ibid.* Generally, the rate must be less than 4/5 the rate of the group with the highest rate.

[43]*Ibid.* at 212-22.

[44]*Supra* note 10.

[45]Epstein, *supra* note 5 at 233-36.

[46]Pub. L. No. 102-166, 105 Stat. 1071.

[47]*Epstein, supra* note 5 at 234-36.

selection rates reverses centuries of the common law regarding the presumption of innocence. This presumption is based on well established principles of equity and justice, as well as on more recent, and equally well founded, studies of cost-benefit analysis.[48]

It is because our legal system is premised on the belief that it is better to err on the side of innocence (or lack of civil responsibility in civil matters) than on the side of guilt (or civil responsibility) that the burden of proof has traditionally been on the accuser. Maintaining the burden of proof on the accuser is, arguably, more sound because it forces the individual who accuses the employer of wrongdoing to demonstrate his basis for this accusation. Reversing the burden of proof significantly decreases the cost of making an accusation and increases the cost of defending against it. Inevitably this shift leads to an exponential increase in such accusations and a corresponding increase in convictions. The ultimate result is a dramatic increase in the number of convictions of employers who in fact did not violate the law, this mainly because of the prohibitive cost associated with overcoming the burden of proof.

Indeed, if there are to be EDLs, it is arguable that they should require the demonstration by the complainant of an intent on the part of the employer to discriminate. After all, a selection rate of a minority group which is significantly less than the group with the highest rate may be caused by one of several non-discriminatory factors. These may include: few minorities with the requisite training or aptitude; few minorities residing in the vicinity of the employer; or few minorities interested in that form of work.[49]

III. The Constitution, Positive Rights and EDLs

America's recent advocacy[50] of EDLs is attributable to the period prior to the 1960s.[51] It was during this period that local and state governments, with the assistance of the judiciary, enacted racial restrictions on practically all private behaviour, including voting, marriage, economic arrangements and schooling.[52] These restrictions, dubbed "Jim Crow," had the effect of prohibiting a whole range of private consensual arrangements between American citizens, and resulted in the segregation of the races. By way of example, Epstein discusses the Supreme Court decision of *Plessy* v. *Ferguson*.[53] The State of Louisiana enacted legislation in 1890 which required all railway companies carrying passengers to provide *equal but separate* accommodations for its black and white customers. This legislation was challenged under the equal protection clause of the Constitution on the ground that it infringed the rights of black citizens to equal protection under the law, which it clearly does. However, the Supreme

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[48]Posner, *supra* note 1 at 520-21.

[49]*Ibid.* at 622.

[50]That this advocacy has not ceased is evidenced by two recent pieces of legislation: i) the *Americans with Disabilities Act of 1990*, 42 U.S.C.S. §12101 (Law. Co-op. Supp. 1992); ii) the *Civil Rights Act of 1991*, *supra* note 46.

[51]Epstein, *supra* note 5 at 91-144.

[52]*Ibid.* at 91-115.

[53]*Ibid.* at 99-115; *Plessy* v. *Ferguson*, *supra* note 4.

Court turned justice on its head by interpreting the statute as one which granted freedoms, in this case the right to be free from being forced to commingle with individuals of the opposite race, when its true purpose and effect was the prevention of contractual freedom between the railroad company and its customers, both black and white.[54]

While these prohibitions were gradually removed as a result of the Supreme Court decision in *Brown* v. *Board of Education of Topeka*,[55] Epstein claims that the past spectre of discrimination and segregation has led to a situation where all forms of employee-related discrimination are dismissed as necessarily invidious and to be prohibited. The pre-eminent legislation in this regard is the *Civil Rights Act of 1964*. Epstein notes that:

> The experience of Jim Crow was so powerful that it pushed to one side any conceptual understanding of discrimination and its consequences in private markets. Economic analysis, game theory, and the like formed no part of the discourse. The question of civil rights was perceived first and foremost as a moral issue, as a question of simple justice, which admitted only one categorical answer: any form of discrimination on grounds of race is morally wrong and ought to be illegal. It was the practice of discrimination that mattered. What was wholly irrelevant was its source, public or private.[56]

In addition to eliminating Jim Crow restrictions on the freedom of contract (which Epstein rightfully lauds),[57] the *Civil Rights Act of 1964* prohibits employers from refusing to hire or from discharging individuals on the basis of their race, colour, religion, sex or national origin. While Epstein disputes the need for such legislation as it regards private discrimination, he fails to sufficiently emphasize that there appears to be little constitutional basis for the *Civil Rights Act of 1964* in that regard.[58] Indeed, much has been written about the Constitution being based principally upon *negative* rather than *positive rights*.[59] Negative rights are rights which accrue to the benefit of every individual under the jurisdiction of the Constitution, and generally, are viewed as negative in that vis-à-vis any one individual, all others must refrain from doing something. Examples of these rights are freedom of association, freedom of speech, freedom of the press, the right to one's person and to one's property and the freedom of contract.[60] On the other hand, positive rights are viewed as positive in that vis-à-vis any one individual, all/some others must act in some positive fashion towards that individual. Often the positive contribution is monetary in nature. Examples of these rights are the right to a decent wage, the right to a job, the right to three meals a day and a roof over one's head.[61] Therefore, it is apparent

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[54]Epstein, *ibid.* at 107.

[55]347 U.S. 483 (1954).

[56]Epstein, *supra* note 5 at 93.

[57]*Ibid.* at 248, 251-52.

[58]*Ibid.* at 130-43.

[59]See *e.g.* F.A. Hayek, *Law, Legislation and Liberty: A New Statement of Liberal Principles of Justice and Political Economy*, vol. 2, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976) at 101-06; Block & Walker, *supra* note 23 at 114-15, 289-92.

[60]For example, the freedom of contract is a negative right in that the contracting parties have the right to demand that all others refrain from interfering with their contractual relationship.

[61]Hayek, *supra* note 59 at 103; Block & Walker, *supra* note 23 at 114-15, 289-92.

that positive and negative rights conflict and, arguably, cannot coexist if they are to be given full meaning.

The *Civil Rights Act of 1964* is clearly a form of "positive rights" based legislation in that it forces employers into some contractual relations which they would otherwise resist. It is, regardless of one's view of this legislation, in the true sense, a restriction on an individual's contractual freedom.

It is only relatively recently in constitutional history that the courts have held with regularity that positive rights are founded in the Constitution (thereby undermining the existence of certain negative rights), and there has been much in the way of criticism of this jurisprudence.[62] Siegan asserts that:

> The province of the judiciary is not to undertake wealth redistribution or to make some people wealthier than others; its role is limited to ensuring that when the legislature engages in such tasks, it does not do so oppressively at the expense of individual liberties. The Framers did not desire, and the Constitution does not warrant, that the Supreme Court legislate. The Court has a role in progress, equality, and redistribution, but it is one that is tied to individual achievement, initiative, and creativity. As the protector of individual liberties, the Court assures society that private people, as the major source of progress, will continue, individually or in concert with others, to apply themselves to undertakings of their own choice. The greatest threat to progress and well-being comes when legislators eliminate the opportunity for individual advancement.[63]

Indeed, in the American context, much of the legislation generally affirming positive rights and specifically restricting the negative right of the freedom of contract may, arguably, violate the Constitution. In particular, the provisions which may be violated are the contracts clause (Section 10 of Article I), the due process clauses (*Amendment V* and *Amendment XIV*), the takings clause (*Amendment V*) and the equal protection clause (*Amendment XIV*).

Section 10 of Article I of the Constitution reads, in part, as follows:

> **Section 10.** (States prohibited from the exercise of certain powers.)
> **1.** No State shall ... pass any ... law impairing the obligation of contracts ...

While these provisions are not viewed by today's Supreme Court as denying government the right to legislate positive rights, such as EDLs, previous Supreme Court decisions and strong dissenting opinions have held otherwise.[64] In fact, until the mid nineteen-thirties, when the first of eight new Supreme Court Justices[65] was named to the bench by then President Franklin D. Roosevelt with the explicit intention of facilitating the implementation of many constitutionally questionable aspects of his New Deal, the United States' Supreme Court had repeatedly declared unconstitutional many "positive rights" based

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[62]See for example Siegan, *supra* note 30 at 304-17; Posner, *supra* note 1 at 589-98.

[63]Siegan, *ibid.* at 315.

[64]See for example the dissenting opinion of Chief Justice Marshall in *Ogden* v. *Saunders*, 25 U.S. 213 (1827).

[65]These were: Hugo Black, Stanley Reed, Felix Frankfurter, William Douglas, Frank Murphy, James Byrnes, Robert Jackson and Wiley Rutledge.

laws, such as minimum wage laws,[66] maximum hour laws,[67] laws creating state monopolies or prohibiting market entry[68] and laws prohibiting "yellow dog" contracts,[69] on the basis that these laws violated the above-mentioned constitutional provisions protecting the freedom of contract.[70] It was only in specific instances, when the State could demonstrate clear and convincing reasons for curtailing the freedom of contract, that this sort of legislation was upheld.[71] In the fifty years since this long line of decisions was overturned by the New Deal Court few have dared to question the validity of this Court's decisions, with the result that more and more "positive rights" based laws have been declared constitutional, all on the basis of this Court's Escherian architecture.

Recently, however, some legal scholars have called for a review of these New Deal Court decisions and hence a revival of the contracts clause and related constitutional provisions.[72] And in a recent decision, in an eloquent *obiter dictum*, Judges Posner and Easterbrook of the Seventh Circuit Court of Appeals, writing for the majority, derided the caselaw which has denuded the contracts clause of any utility.[73] They claim that a correct reading of the Constitution necessitates interpreting the freedom of speech and freedom of contract clauses equally broadly.

The fact that the above-mentioned constitutional provisions are no longer interpreted as prohibiting much of the legislation which affirms positive rights, such as EDLs, is indicative of a general splintering by the judiciary of constitutional rights since the commencement of the New Deal Court. This splintering has led to the formation of two subsets of rights which are treated differently by the judiciary: economic rights (*e.g.*, the freedom of contract pursuant to the contracts clause and related constitutional provisions) and non-economic rights (in

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[66]See *e.g. Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); *Murphy* v. *Sardell* (October 19, 1925) District of Arizona 18 (U.S.S.C.); *Donham* v. *West Nelson Manufacturing Co.* (January 17, 1927) Eastern District of Arkansas 118 (U.S.S.C.); *Morehead* v. *New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

[67]See *e.g. Lochner* v. *New York*, 198 U.S. 45 (1905).

[68]See *e.g. New State Ice Co.* v. *Liebmann*, 285 U.S. 262 (1932); *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897). However, see *contra* the *Slaughter House Cases: Butcher's Benevolent Association of New Orleans* v. *Crescent City Live-Stock Landing and Slaughter- House Company*, 83 U.S. (16 Wall.) 36 (1872) where the U.S. Supreme Court upheld, by a 5-4 decision, a decision by the Louisiana legislature to grant an exclusive privilege to a private corporation to operate the slaughterhouse business in the City of New Orleans.

[69]See *e.g. Adair* v. *United States*, 208 U.S. 161 (1908); *Coppage* v. *Kansas*, 236 U.S. 1 (1915).

[70]*Contra* see *Nebbia* v. *New York*, 291 U.S. 502 (1934), where the U.S. Supreme Court upheld, by a 5-4 decision, a state law which regulated the retail price of milk by making it a crime to sell a quart of milk for less than nine cents.

[71]See *Allgeyer* v. *Louisiana*, *supra* note 68 and *Lochner* v. *New York*, *supra* note 67.

[72]These include Antonin Scalia, Richard Posner, Robert Bork, Alex Kozinski and Frank Easterbrook. See *e.g.* D. Bernstein, "Equal Protection for Economic Liberty: Is the Court Ready?" (Cato Institute, Policy Analysis No. 181, 5 October 1992) at 14-15. See also *Chicago Bd. of Realtors* v. *City of Chicago*, 819 F.2d 732 (1987); R. Bork, "The Constitution, Original Intent, and Economic Rights" (1985) 23 San Diego L. Rev. 829; A. Scalia, "Originalism: The Lesser Evil" (1989) 57 University of Cincinnati L. Rev. 856; A. Kozinski, "The Judiciary and the Constitution" in J.A. Dorn & H.G. Manne, eds., *Economic Liberties and the Judiciary* (Virginia: George Mason University Press, 1987) xi.

[73]*Chicago Bd. of Realtors* v. *City of Chicago*, *ibid.* at 744.

other words, civil rights, *e.g.*, freedom of speech). Economic rights are viewed as less important than non-economic rights, and as a result, have been less stringently protected by the courts. This schism exists despite the fact that there appears to be no constitutional basis whatsoever for their differential treatment.[74] Indeed, the Founders' views on the equal importance of economic and non-economic rights, as expressed in the Constitution, is supported by the prevailing view in this day and age that economic freedom is necessary for the promotion of political freedom.[75]

Epstein has once again made a very important contribution in a controversial area of the law. While his approach is strictly utilitarian, and while he provides an insufficient discussion of the historical origins of the placing of the burden of proof on the accuser rather than on the accused, as well as the constitutional underpinnings, if any, of EDLs, his book breaks much new ground in the area of EDLs, especially as it pertains to their potentially pernicious effects and to the often rational way in which employers act when they discriminate. Finally, his review of the related caselaw from the turn of the century onwards offers a rare and detailed analysis of an extremely important era in American jurisprudential history.

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[74]A. Kozinski, *supra* note 72 at xi-xviii; A. Scalia, *supra* note 33 at 703-09.

[75]M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 9.