

Constitutional Commentaries: An Assessment of the 1991 Federal Proposals

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Reflections/Réflexions

Reflections/Réflexions is a publications series of the Institute of Intergovernmental Relations. Contributions present the personal thoughts and arguments of their authors on a variety of subjects having to do with federalism and intergovernmental relations. The series is intended to place new ideas into the public forum, where they will be open to challenge and rebuttal.

Reflections/Réflexions est une collection de l'Institut des relations intergouvernementales. Les articles publiés sont l'oeuvre d'auteurs dont les points de vue ou les thèses abordent divers sujets touchant le fédéralisme et les relations intergouvernementales. Cette collection se propose de livrer à l'opinion publique de nouveaux motifs de réflexion pouvant prêter au débat de fond, voire à la polémique.

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Social Values Projected and Protected: A Brief Appraisal of the Federal and Ontario Government Proposals

Craig Scott

The purpose of my presentation is to inject into the debate some discussion of a possible constitutionalized "social charter," such as that put on the table by Ontario's recent discussion paper. As the title of my comments suggests, I feel it is important to think in terms both of the images a constitution normatively projects and of how it institutionally protects its normative vision. I will address the question of the projection of values less extensively, thanks to the preceding presentation by Charles Taylor. Instead, I will approach the constitutionalization of norms and institutions mostly from the vantage point of means of protection.

That being said, I would like to add a few points that I think complement what Charles Taylor had to say. Both documents, the current federal proposals and the Ontario social charter discussion paper, are very much steeped in the notion of constitutions as fundamentally declaratory and constitutive of whom we are. The idea of "shared values" permeates both documents. We should take this choice of language seriously. Both the federal and Ontario documents are laced with a rhetoric of belonging, of membership, of full participation in Canadian society. In short, to go back to what Charles Taylor was saying, there seems to be a concern with equal citizenship — citizenship being understood more metaphorically, I hope, than literally.

There is, of course, a snowball effect created by the way in which the governments have conceived and presented their proposals and points for discussion. By this I mean that there is a dynamic at work for all Canadians, based on their different (and often overlapping and cross-cutting) sites of identity, to wish to see themselves in a renewed constitutional text. This is

Charles Taylor's "politics of recognition," which I think we must realize is of crucial importance for understanding how it is that minimalist approaches to constitutional change face serious hurdles. One implication of constitutional rhetoric of inclusion or recognition is that failure to achieve constitutional recognition is unlikely to be a neutral event for those who are excluded. In any society where the constitution tends to be an authoritative source of discourse, constitutional silence speaks loudly about the place in society at large of those whose values or self-understandings are not given recognition. In light of this problem of negative constitutional space for those for whom the constitution has none of the features of a mirror, it is fair to ask, as a kind of test, how well the two proposals deliver on the premise and promise of all-inclusiveness with respect to those who find themselves socially and economically marginalized in Canadian society.

At the outset, I should state that the federal government proposals fare badly on this test. The Ontario discussion paper fares much better. However, while I will endorse some options raised in the Ontario paper (notably, the role a new institution of the federation could play), I will argue that, in its range of options, Ontario does not take social and economic exclusion seriously enough. Specifically, it falls short by not discussing the potential "prodding" role that the courts could play with respect to a social charter. This results from a too-hasty endorsement of a negative rights vision of justiciable constitutional rights and a related overly-rigid conceptualization of the separation of powers. Indeed, I detected at times what might be called a "high policy" approach in the document. From the outset, when we are presented with the philosophical starting-point of social *policy* values as the metaphorical railway that now binds Canadians together, there is a tendency to think in terms of a relatively abstract value which Canadians place on a cluster of collective goods known as social programs. The dominant conception is one of persons as units of policy rather than of persons with individual needs and entitlements. In short, while the Ontario document laudably seeks to protect an aspect of Canada's heritage that scarcely finds mention in the federal proposals, there is something lost in the failure to probe fully the possibilities of thinking of social policy in terms of the social rights of citizenship.

I have already indicated that both the projection and the protection of values in the constitution are important. They are also related in obvious ways. Notably, the lack of protection can affect the status of the values that one is seeking to project. Especially in a society that, since 1982, increasingly (for better or worse) looks to the courts to protect us *from* the state, the lack of some corresponding judicial role for claims *upon* society through the medium of the state risks marginalizing those unprotected values. Even though the current Charter explicitly and implicitly contains some positive rights, it is hard to deny that the vision projected upon social and political debate by the privileging of

current Charter rights is very much that of "negative liberty." Short of de-constitutionalizing rights discourse entirely and returning to pre-Charter politics, the question must be asked whether it is not important to create a parallel constitutional priority for social rights reflecting the positive dimension of liberty — unless one is willing to argue that values have no constitutive influence on political and social discourse when those values are expressed in terms of justiciable constitutional rights.

I do not consider myself a Charter-phile, but I believe that we can grant a role to the judiciary without resigning ourselves to a resultant sterilization of moral and political discourse or to the much-feared "Americanizing" of our politics. Charles Taylor ended his comments with the plea to keep the courts out of any constitutional changes. I very much sympathize with the sources of this plea. It would seem related to the work he has done which distinguishes the "litigious" from the "participatory" strains in our culture. However, I tend to think that this dichotomy approaches being a false dichotomy, or, at least, is nowhere near a full dichotomy. I do not have the time to elaborate on this contention, about which I have written at length elsewhere, except to say that we should be willing to see a much more fluid role for both litigation and the courts in a broader social dialogue.

The Federal Proposals

The federal proposals do not take seriously social values in the way I am talking about them. The ambitious and controversial economic union proposals are not accompanied by proposals for a parallel social union. There are extensive fetters on the spending power, with serious consequences for the federal ability to promote our common citizenship through nationally-supported social programs. Another indication of the general drift of the proposals is the proposed withdrawal from legislative jurisdiction over workforce training and housing, with ambiguous implications for the spending power in these areas.

Indeed, for all the evocative discussion of inclusion and exclusion in the federal background paper entitled *Shared Values: The Canadian Identity*, the proposals themselves essentially limit the projection of these inclusive values to the shopping-list symbolism of the proposed "Canada clause" — apart, of course, from the separate and crucial treatment of recognition of Quebec as a distinct society and of aboriginal peoples' (to-be-negotiated) right to self-government. In the proposed Canada clause, we do admittedly find "a commitment to the well-being of all Canadians," a phrase similar to that found in current section 36(1)(a) of the *Constitution Act, 1982*. In the same Canada clause, we see a "commitment to fairness, openness and full participation in Canada's citizenship by all people without regard to race, color, creed, physical or mental disability, or cultural background," a laudable principle that is

nonetheless notable for its failure to even hint that social and economic status compromises the ideal of full participation. Poverty is not treated as the pervasive feature of Canadian reality that it is, but is lost in a sea of euphemisms ("well-being") or economistic, even trickle-down, thinking. Thus it is that the focus of the economic union proposals is on creating wealth and a more prosperous future, which will (it is contended) thereby ensure economic security and well-being. The one area in which redistribution is explicitly discussed is through a somewhat ambiguous reassertion of the section 36 provisions under which the federal government "will maintain its ability" (p. 27) to help Canadians share their wealth.

Finally, mention must be made of the *Proposals*' discussion of the current Charter of Rights and Freedoms. There is a long paragraph that discusses the resonance of current Charter equality rights among Canadians. The tone of the commentary could lead a casual reader to believe that all that is necessary to remedy discriminatory "social, political and legal disadvantage" already exists in the form of section 15 of the Charter. Suddenly, the right to property is parachuted in as a proposed addition to the current Charter. I cannot think of a better word than "parachuted," for there is no justification of any weight offered for this proposal. The entire discussion in the *Proposals* reads as follows (at p. 3):

The Government of Canada reaffirms unequivocally its support for rights guaranteed in the Charter. However, the Charter does not guarantee a right to property. **It is, therefore, the view of the Government of Canada that the *Canadian Charter of Rights and Freedoms* should be amended to guarantee property rights.**

One also seeks in vain for any further argument or justification in the federal background paper, which, in a section entitled "A Mutually Supportive Society," merely throws in two one-sentence references to the rights of property as being something Canadians value. In that same section we see sentences, even paragraphs, describing social programs in Canada and the values Canadians place on them as uniting them east to west. We find the following statement (p. 21):

We believe that all Canadians are *entitled*, as Canadians, to basic services regardless, of where they live in the country. ... Canadians generally want to ensure that their fellow citizens and their families are cared for when they fall on hard times. (emphasis added)

Yet, despite the heavy balance of attention being directed to social entitlements in the background paper's discussion, it is the right to property that suddenly drops in out of the blue in the proposals themselves. Given this disparity of attention in the discussion of fundamental values in Canada, it is quite ironic that property rights can be used to reinforce existing advantage. It takes very

little imagination to see that these rights have the potential to be invoked not simply as a defensive tool by the corporate sector faced with governmental regulation but also actually to undermine social programs and entitlements. I am not suggesting that we should see the federal property right proposal and the Ontario social charter proposal as somehow the antithesis of each other, such as to set up a potential one-for-one cancellation of the two proposals. However, property rights are indicative of a very different set of concerns than those that animate the social charter idea and are also a potential threat to the social charter, whether or not the social charter is itself constitutionalized in terms of individual rights.

The Ontario Proposals

There are a couple of motivating concerns in the Ontario proposals. One of these is harmonization. The harmonization concern is driven by the fear of the "race to the bottom" that could follow from economic union and an intra-Canadian free trade competition. There is also a separate concern with optimization of protection based on a vision of national citizenship and worries about Ottawa's retreat from previous levels of cost sharing for various social programs. The language of "national standards" is the reference point for optimization which, however, is to go only as far as is compatible with legitimate diversity in the federation. This counterpoint allows for differences in social programs and levels of social entitlement across the country above any floor provided by national standards.

Interspersed in the document are references to the courts. The idea is expressed at one point that "whenever appropriate" they would have a "central enforcement role." Appropriateness tends to follow a negative rights paradigm, explicitly so in a few places. However, it is also clear that the Ontario document also sees features of existing programs, notably in health and education, to have the potential to be expressed in a constitutional document in negative rights terms. I think that this is important, for it implicitly, perhaps only unconsciously, taps into a stream of thinking known as "baseline analysis." In brief, the idea is that our baseline for analysis in Canada in 1991 is not some fictional or notional state of nature, but is rather a social state that binds us together in a community of mutual responsibility. In the Ontario document, there is a discussion of various options for drafting the norms to be contained in a social charter, among which the following statements are made (pp. 14-19):

[S]ome national norms and standards in social policy, such as portability or universality can be expressed as negative rights enforceable by the courts [W]e may choose to be even more specific [than earlier suggested options], especially in the case of programs which are well developed and where public expectations and consensus are well-defined. In the case of health care and primary and

secondary education, a clause could entrench the principles that these should be provided equally to all, and be publicly administered. Depending on the precise wording, some elements of this option could be enforced by the courts.

The document is not as explicit as it could be with respect to how its negative rights conception and our existing social programs interact. But implicit is the notion that there is much in the Canadian social state that we could consider as givens, derogation from which would amount to an interference with entrenched guarantees, or in other words, as violations of negative rights.

The foregoing ties into another way of thinking about the thrust of the Ontario document. Throughout the document, I think that there are at least two approaches implicitly at work. One approach might be called the preservation project. This is close to how, in 1982, most conceived of the current Charter, that is to say, a statement of who we were, what we had achieved, and what rights reflected fundamental values enjoyed in Canada in 1982. This might be thought of as "first order constitutionalism." It relates to the above-discussed notion of negative social rights, notably in the areas of health and education, as being possible first order constitutional values which we can now contemplate entrenching. At this level, the message seems to be that there would be no major problem in seeking to secure some constitutional protection for some fundamental features of the social state in Canada.

A second approach could be called the change-promoting project, which also implicitly receives some attention in the document. This would entail a constitutional commitment about who we would like to be, the values we cherish at some deep level but which are far from realized, and the values we would therefore like to be under pressure to take seriously as a society. One might think in terms of "second order constitutionalism." We are not there yet; we know that it will be slightly painful to get there; but we want some prodding at a constitutional level. In fact, the current Charter does contain elements of this kind of change-promoting, or second order, vision. Some of the changes made to drafts of the Charter — especially sections 7, 15 and 28 — reflect a certain intention at the time that the document was not only concerned with the status quo. Of course, even the most preservationist of rights can grow with interpretation and changes in understandings, and take on more radical overtones, such that there is no firm line between first and second order constitutionalism. Nonetheless, it does make broad sense to think in terms of first and second order constitutionalization of values, for this will have a lot to say about the relative degree of inclusion of various sectors of any society to which a constitution pertains. Entrenching social programs (whether or not expressed as claimable rights) is not an inherently radical enterprise. A social charter can be accomplished in a way that is highly "middle-class," and which is only partly informed by the needs and plight of those who experience the marginalization of poverty.

This is where so-called positive rights come into play. I am using "positive rights" here as short-hand for rights with respect to which our progress as a society to date is seriously inadequate, and potentially getting worse, such as in the areas of shelter and housing, food and nutrition. This lack of progress is all tied to serious poverty in this country. Social security, and the resulting ability to command financial resources to provide for one's own food and housing needs, would therefore be one area that must be conceptualized in tandem with deprivation of basic necessities of life. With respect to second order constitutionalism and the tendency to associate it with the notion of positive rights, the final point I would make at this stage of exposition is that the Ontario document has an interesting discussion of the role a reformed Senate or other institution of the federation could play. The prime concern would be to enhance participation by creating what could be called a constitutional spotlight on matters of social policy and social entitlement.

Options

I would like now to discuss some options in as cooperative a spirit as possible, especially given that I have detected at this conference a consensus that the idea of a social charter is fundamental, at least if the federal reforms proposed for the national economic framework are adopted. We are therefore talking about what norms and what institutions we wish to see in the document that will do justice to this consensus. I should say that I would endorse the approach of the Ontario document when it suggests that we should think in terms of layers of protection, and not in terms of mutually exclusive alternatives.

The very first point of purchase is obviously the notion of "directive principles" (a term taken from the Irish and Indian constitutions) that place non-justiciable obligations on government. In section 36 of the constitution, we already have such statements in quite general terms with respect to the kinds of values under discussion here. In essence, the federal government's proposed Canada clause follows this approach of non-justiciable general principles, although it might be given greater interpretive weight given its apparent status as a preambular clause. The Ontario discussion paper also suggests the possibility of something similar, either as a general clause mentioning various social responsibilities of governments or as an expanded and more specific section 36. If this were as far as the social charter proposal were to go, I would add only that we should at least express its provisions in terms of rights or entitlements and not use the disempowering language of governmental responsibility and collective goods. However, in my view, such a statement of non-justiciable rights would still be an insufficient response to the consensus on the need for a social charter.

Beyond this very general symbolic approach, there are perhaps three conceptions around which we can organize the constitutionalization of social charter norms and institutions.¹ The first conception involves a social union parallel to the federal proposed economic union. The social union concept of the social charter would be jointly driven by a harmonization concern and some degree of optimization based on the notion of national standards and the overriding theme of national citizenship. The second conception or angle is an entitlement or basic social rights perspective. I will argue that we should be willing to discuss some subjective constitutional rights that can involve courts and administrative tribunals, without dismissing out of hand this layer of protection because we have preconceived and rigid ideas about courts or justiciable rights. The third conception, very much tied to the first two, is the intergovernmental equalization obligation as well as the capacity of the federal government to exercise its spending power (and to be bound by formal commitments and legitimate expectations generated once Ottawa has begun to spend in an area). I will only address the first two conceptions; although it represents a crucial layer for any social charter, I will not be discussing the third conception.

1. A Social Union. I now come to an excellent aspect of the Ontario options. This is the suggestion of a possible reformed Senate which would be an institution of the Canadian federation, not of the federal government, with implementation of the social charter being one of its functions. The Ontario discussion paper reads in part (p. 24):

[W]hatever institution is developed to implement the charter, it would have to be open and allow for significant public consultation and input. It may be required, for example, to hold public hearings, submit public reports, or to establish panels of members of the public to comment on specific issues In addition to broad public participation by individuals and groups, the creation of a non-governmental review mechanism also could be considered. For example, the social charter could include a provision that a public forum, made up of lay persons and/or experts in social policy, will periodically review the progress governments have made in promoting national standards.

I would like to emphasize that this approach is very much in line with that being taken at the international level, for instance in the monitoring by the U.N. Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights, to which Canada is party.

The idea at work in this approach is that a process that genuinely provides for the participation of affected groups (notably groups that are the most vulnerable and disadvantaged in society) can prod governments and society at

1 I owe this categorization to a conversation some time ago with my colleague Robert Howse.

large to take substantive commitments seriously. We might want to think in terms of a constitutionalized time table and procedural conditions for the kind of process discussed by the Ontario government. In this way, a constitutional spotlight will shine at least at periodic intervals on disadvantaged persons (and groups representing them) who can mobilize to inject a critical voice into the evaluation by the institution of the federation of social charter commitments. There could also be a constitutional obligation for governments to involve affected sectors of society in preparing reports to the institution of the federation, and to require copies to be submitted to representative groups so that criticisms could be annexed thereto before being submitted for scrutiny. It would also be desirable that hearings be periodically required and designed so as to hear the views of persons who feel that their social rights have not been met; then, the process of scrutiny can benefit from a kind of sharpening of focus that generalized discussion of policy cannot accomplish on its own.

The procedures of any institution of the federation should have some correspondence to those being developed or recommended by the fledgling U.N. Committee. We should strive for a symbiotic relationship between international and constitutional scrutiny of Canada's social rights obligations. I would add that the courts' role would be a limited but important one, namely that of interpreting and policing the process. If constitutional obligations regarding the process were not respected, there would be justiciable violations of the constitution.

The social union idea could be taken even further, although this would very much push the limits of the concern with legitimate provincial diversity mentioned in the introduction, and would depend on how the economic union proposal evolves. With respect to the latter, there have been suggestions that an economic commission could be created for the federation which would issue directives to enhance the functioning of the economic union. These directives would then be subject to ratification by a democratic and representative institution of the federation such as a reformed Senate. There is perhaps the potential for a parallel social commission whose directives would presumably be geared to harmonization and would also have some element of optimization by way of the notion of national standards. Presumably, as with the European Community on which this model is based, courts would be permitted, indeed required, to enforce the ratified directives.

2. Justiciable Basic Entitlements. What role could we envisage for the courts apart from policing the process or enforcing the directives discussed above? At minimum, there are three effects that a social charter should have on adjudication, effects which should be made explicit in the charter. First of all, social rights should be phrased as the basis for legal standing of individuals and groups to hold governments to their statutory and intergovernmental commitments in the social rights field. This would reflect the most fundamental of "rule of law"

premises, that governments, too, are bound by the law and, in this context, cannot undertake commitments that are not enforceable. Second, social rights must serve as an authoritative reference point for statutory interpretation and, in particular, for the kinds of interpretive presumptions that courts develop as to how broadly or narrowly statutory provisions should be construed. The presence of constitutional social rights would require, for instance, ambiguities to be resolved in favour of the persons whose claims are at stake, and would preclude a general attitude of deference to the executive with respect to the meaning of social statutes. Third, social rights or a social charter, however worded, should be available to inform the interpretation of section 1 of the current Charter and the limits that can reasonably be placed on Charter rights, especially those rights that have been interpreted to give some protection to commercial actors. This is especially important if the proposed right to property survives and makes its way into the Charter, without an explicit savings clause attached to it. The Supreme Court of Canada has eloquently stated on several occasions that the Charter must not be interpreted so as to undermine governmental attempts to remedy disadvantage and to roll back legislative gains made on behalf of more vulnerable sectors of society. Despite the doctrinal openness of the Supreme Court of Canada at the moment to using section 1 as a shield against certain Charter rights, this openness may not continue in the future without an explicit savings clause tied to the social charter.

These are, in my view, the minimum implications of a social charter for the role of the courts. However, we should ask whether we might not go further to protect directly the values contained in any social charter. As already discussed, the Ontario paper puts on the table the possibility of giving the courts a role with respect to certain fundamental features of social programs where we have done well (and which may be considered as baselines or givens of the social state in Canada). This is not the main emphasis of the Ontario discussion paper; indeed, it is in some tension with a general tendency to treat the social charter as being mostly about political obligations. However, we should be willing, as a country seeking to re-state what we stand for, to ask whether there are not fundamental features of the existing social state that we wish to preserve and treat as constitutional fetters on politics in Canada.

Finally, I come to the possibility of a limited court role with respect to basic social rights. Should individuals ever be able to go to court and claim a right to societal protection and assistance as a constitutional matter? In my view, yes. Courts should by virtue of a meta-democratic decision of Canadian society be permitted to engage in limited second order constitutionalism with respect to the most basic of social rights. Courts could be given the institutional role of prodding the political and policy-making process by dealing with individual circumstances that cry out for remedies. Courts would be concerned with results and would issue individual remedies requiring that a basic result be achieved

(housing a person freezing in the street in safe and adequate shelter) leaving the precise means (notably financing) to government (subject to ongoing scrutiny with respect to the sufficiency of the government's proposed or actual method of accomplishing the result). We could think in terms of the courts "putting the government to means."

Without wishing to be accused of a naive view of law or reality, there is, in the modern social state of Canada, a fundamental balance that the courts and governments can seek to work out between principle and policy. This balance is at the very least a regulatory ideal that can inform a dialogue between the courts, the executive and legislature as to when remedying individual circumstances is so fundamental to our self-understanding as an inclusive society that the courts can properly step in. The courts' role would tie into the view taken at the international level by the U.N. Committee that *all* states party to the Covenant are legally bound by a "minimum core obligation" to ensure the satisfaction of minimum essential rights such as those to essential foodstuffs, primary health care, basic shelter and housing and the most fundamental forms of education.

At a certain point, we have to eschew abstract doctrines on the role of the courts in favour of asking whether we should stand on such doctrines in concrete cases of serious suffering of persons in our midst. In a speech on the legitimate role of passion in judicial decision making, former U.S. Supreme Court Justice William Brennan has described how in *Goldberg v Kelly*,² a landmark case on procedural due process, "[t]he brief for the [social benefits] recipient told the human stories that the state's administrative regime seemed unable to hear" and went on to quote an extract:

After termination, Angela Velez and her four young children were evicted for non-payment of rent and all forced to live in one small room of a relative's already crowded apartment. The children had little to eat during the four months it took for the department to correct its error. Esther Lett and her four children at once began to live on handouts of impoverished neighbours; within two weeks all five required hospital treatment because of the inadequacy of their diet. Soon after, Esther Lett fainted in a welfare center while seeking an emergency food payment of \$15 to feed herself and her children for three days.³

This extract apparently profoundly influenced Justice Brennan's approach to the case. *Goldberg v Kelly* only involved indirect protection, namely the right to a hearing when social benefits are cut off. However, the point of the illustration is to demonstrate the impact that individual story-telling can, and

2 397 U.S. 254 (1970)

3 Brennan, "Reason, Passion and 'The Progress of the Law'" (1988) 10 *Cardozo Law Review* 3, 21

should, have on how we deal with matters otherwise cordoned off as areas of "social policy."

I could tell numerous other real stories from the Canadian context which would similarly challenge you on whether you wish categorically to state that this is not the place for the courts. If you answer that the response of society is indeed purely a matter of social policy and general politics when faced with a homeless person living on the street (or in wretched or degrading conditions in temporary shelter) or with a malnourished child whose mother has been refused social assistance because she does not know who the father of the child is (and has not therefore made a "reasonable" effort to seek paternal support), then I will respect the fact that you have made that choice. But in my view, we would be a better society if we were to welcome the prodding role that courts could play in forcing us to truly treat as human beings and common members of society those suffering in our midst.

Session II

Summary of Discussion

Just as the presentations in this session ranged widely over the normative bases of the federal proposals, so did participants in the audience comment, contest, and question from many perspectives.

Bev Baines (Law, Queen's) led off with a comment on Taylor's analysis. She agreed that the issue of what binds the community together is a fundamental one. In contrast to Taylor, however, Baines argued that the communal glue could be supplied only by abandoning neutrality, which he seemed reluctant to do. Since an objectivist stance inevitably collapses differences, Canadians should instead unite in a collective effort to recognize and affirm the differences among various groups, realizing equality in practice through the empowerment of the disadvantaged. She further pointed out that such a position promoted responsible and representational equality, and was unlikely to be advanced by collections of middle-class white males, citing as evidence the panel's failure to reflect upon its composition.

Rob Howse (Law, University of Toronto) also took issue with Charles Taylor. Seizing on the Aristotelian conception of equality that Taylor advanced, he argued that such a view is entirely compatible with hierarchy; indeed, Aristotle's equality allowed even for slavery. Implying that Taylor's "difference recognition" would lead to such inequalities when applied to groups, Howse suggested that only a fundamental recognition of individual equality could secure freedom. Recognizing the differences between groups as a basis for limiting individual rights (as with the distinct society clause in the federal proposals) would lead inevitably to unequal freedom for the members of different groups. Further, he claimed, the direction of history is not towards the recognition of groups' diversity and their distinctive rights. Instead the lesson of history is that a choice must be made between nationalism and individual rights, the latter constituting the only reliable bulwark against the oppression that collectivities can inflict upon minorities and individuals.

Alan Cairns (Political Science, University of British Columbia) took the discussion into the area of aboriginal rights, which had been touched upon by

the panel only in general terms. He outlined how native peoples were involved in the constitutional reform process through several mechanisms that allowed for their special participation — the Royal Commission, the four parallel processes among the native communities, and, prospectively, through special representation in a First Ministers' Conference. Cairns linked the unique nature of aboriginal participation to Ovide Mercredi's statement to Joe Clark, that the latter simply could not speak for or represent the First Nations, because he was not a member of their community. Cairns pointed to the problems that could arise from this assumption and the several processes afoot. First, different recommendations or conclusions could be reached by the various special mechanisms now underway, each of which was likely to be accorded different degrees of legitimacy by the various actors in the overall constitutional reform process. More important, basic constitutional contradictions were likely to emerge when the recommendations of various uncoordinated processes were brought together. One stream of recommendations involved special arrangements for aboriginal representation in the Senate (*Shaping Canada's Future Together: Proposals*), and probably also in the House of Commons (anticipated recommendation of the Lortie Royal Commission on Electoral Reform). A second stream of recommendations would clearly be directed to enhancing aboriginal powers of self-government, thus removing aboriginal peoples from the jurisdiction of federal and provincial legislatures for the functions they would henceforth carry out themselves. At some point, the simultaneous strengthening of aboriginal representation in legislatures, and the limited or extensive removal of aboriginal peoples from the jurisdiction of those legislatures would produce a variant of the "Trudeau problem" (the incongruous positions of Quebec MPs, should that province gain special status and unique powers, of having full voting rights in the House of Commons over laws that do not affect Quebec but which will apply in the rest of the country). Should the constitutional result be that aboriginal communities come to exercise special powers, would one not have to ask whether aboriginal peoples should also continue to exercise the same voting rights held by other members of the electorate? Or, if there were special aboriginal representation in the Senate or the House of Commons, would not the constitutional question be raised of their participation in discussion and legislative voting over laws that do not apply to their people? Even now, the argument that Joe Clark or other members of the government cannot speak for aboriginal peoples is anomalous given the fact that aboriginal voters have had a part in electing these representatives.

Robert Groves (Native Council of Canada) broadened these themes. The essential constitutional question in his view is the need to define the community over which the constitution will apply. Modern societies consist of spaces within which social and market transactions occur, and the fundamental issue is not so much the rules governing these transactions as the extent and nature

of the community to which the rules apply. In this light, Quebec's problem is evident. It seeks recognition as a distinctive community, and the attempt to do so now reflects a fear that its society will be numerically overwhelmed and submerged within the larger Canadian community. Getting through the current constitutional crisis will require a definition of the constituent units of Canada, and this involves not only French Canada but also the aboriginal and other communities. Groves then turned to the problem of representation raised by Alan Cairns. Groves stated that demands for guaranteed representation had been made by native peoples in the past, but were no longer being advanced in the same way: representation in the existing political process designed for the larger community, guaranteed or not, might ameliorate under-representation of populations, but would not deal with representation of aboriginal governments or nations. Therefore such ideas as an Aboriginal Parliament or a House of First Nations is gaining more attention.

Turning to minority rights under the constitutional proposals, Marjorie Goodfellow (Townshippers' Association) spoke to the first of these which would modify access by Parliament and legislatures to the "notwithstanding clause," requiring a special majority of 60 percent rather than the current 50 percent plus one. Governments are usually in a position to pass legislation with support to spare. To permit any override of Charter rights is to put at risk those who most need Charter protection — members of minority communities, including official language minorities. Therefore, she urged that the "notwithstanding clause" be abolished. She explained that Quebec's anglophone community still felt strongly that its minority rights were at risk under the new proposals. To override rights by invoking the notwithstanding clause would henceforth require a 60 percent majority in the National Assembly, but this was not a sufficient guarantee of minority language rights in Quebec.

Next, Peter Leslie (Political Studies, Queen's) posed a direct question to Craig Scott. He wanted to know what were the advantages and disadvantages of enshrining in the constitution a social charter that would be justiciable. In particular, would courts come to usurp the role of legislatures in determining the allocation of public funds?

Last, Terrance Hunsley (School of Policy Studies, Queen's) raised several issues about how rights would be affected by any proposed social charter. First, he wondered whether a charter would confer new rights or act as a bulwark against the erosion of acquired rights. He asked about justiciability. And he requested that Craig Scott address the question of whether a social charter would help the Canadian courts enforce various international social rights covenants to which Canada is a signatory.

In response to all of these observations and queries, Craig Scott began by stating that the federal proposals, as they exist, contain no recognition of any new social rights, at the same time as they would unfetter market forces within

the strengthened economic union. Competitive market forces could produce new pressures on provincial governments to "ratchet down" their commitments to social programs, and some device would be needed to prevent this. The social charter would function in this capacity.

The role of the courts would be uncertain were a social charter in place. But justiciability would have several advantages, even were a social charter only to formally enshrine the rights to social programs which Canadians have already acquired. First, the right of recourse to the courts would allow individuals to claim before an impartial body that governments had not fulfilled their obligations. Judges could determine whether governments had failed, and would direct them to meet their responsibilities, and this procedure could be triggered by individuals who felt themselves to have been ignored by normal appeals to politicians and bureaucrats. Courts could also use the provisions of a social charter as an interpretive background in making decisions about redistributive programs. Here the social charter would be essential were property rights eventually to become inscribed in the Charter of Rights and Freedoms. Without an explicit declaration of social rights to counterbalance the new property right, Canada could be thrust back into a position like that of the United States in the 1920s, when the right to property provided grounds for striking down laws allowing for redistribution or for encroachments upon individuals' property undertaken to realize collective purposes.

Scott also addressed some objections to justiciability. The courts, he argued, would not take over the legislature's task of allocating public funds. But, he said, we must not hide from the fact that this approach *will* have financial implications and that it *will* place a special, if limited, constitutional priority on the allocation of resources in policy making. In particular, remedies in individual cases will have implications for legislative and regulatory schemes as the political process responds by seeking to generalize the remedy to others in similar circumstances of need.

In the end, with respect to basic minimum entitlements, Professor Scott suggested an interpretive clause be added to the existing charter of rights that would specifically mention particular social rights or refer to the rights contained in the social charter found elsewhere in the constitution. He proposed a clause such as:

(1) The following social rights [or, the social rights expressed in the Social Charter] shall actively inform interpretation of this *Charter* so as to secure for all their basic entitlements to be full members of, and participants in, society.

(2) In no instance shall anyone suffering social or economic disadvantage be deprived of other *Charter* rights and freedoms in the name of, or as a condition for, ensuring his or her social rights.

In his closing remarks, Reg Whitaker took up the problems of representation raised by Alan Cairns and others. He maintained that adequate representation of all constituent communities and interests is possible in the process of constitutional reform if it takes place through a constituent assembly. Similarly, representation of regional and aboriginal communities is possible within an elected House of the Federation, so long as this body is regarded as an intergovernmental one: in that case, representation — which, of course, commits communities to accept decisions — would not be representation within a particular order of government.

Charles Taylor agreed that representativeness of communities within some body is one way around the problems raised by the new view that equality requires difference recognition. He pointed out, however, that a single constituent assembly, whatever its makeup, would carry the implication that all the represented communities and groups constitute a single society.

Taylor spoke at greater length about how equal rights could be accommodated with the recognition of distinctive communities. The solution lies in appreciating that different rights have different degrees of importance (as is apparent in the existing charter). Rights to freedom of expression, for example, are more fundamental than rights to equalization. This appreciation allows for special status and for tailoring packages of rights to the preferences of various communities. The fundamental rights constitute a core which all within the broader community share, while those rights which are less important can vary across sub-societal communities.