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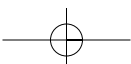
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# Can Economics Justify the Constitutional Guarantee of Freedom of Expression?

Ian B. Lee

[It] may be that rational choice theory simply cannot justify constitutional rights, and rational choice thinkers ought to criticize them rather than defend them.

—Eric Posner<sup>1</sup>

## Introduction

The purpose of this article is to explore the resources available within the economic analysis of law for rationalizing the constitutional right to freedom of expression. Despite the frequent use of certain economic metaphors in free speech discourse (most notably, the marketplace of ideas), there is a widely held view that law and economics is incapable of articulating a compelling understanding of the constitutional guarantee<sup>2</sup> and that, as a result, it has little if any relevance to an understanding of the freedom of expression. In this article, I attempt to show that, contrary to that belief, a persuasive justification for the constitutional guarantee of freedom of expression can be articulated in economic terms.

The structure of the article is as follows. In Part I, I review the existing literature analyzing the freedom of expression from the perspective of law and economics. Part II offers an affirmative economic account of the rationale for a constitutional guarantee of freedom of expression. Part III discusses the implications of the economic account for free speech doctrine under the *Canadian Charter of Rights and Freedoms*.<sup>3</sup>

## I. Review of the existing literature

In the law-and-economics literature on freedom of expression, three themes have had prominence: the marketplace of ideas; the public goods character of speech, especially political speech; and the notion that speech can cause negative externalities that justify restrictions on speech. I shall discuss each of these themes in turn. I hope to demonstrate that although the literature contains argumentative material pertinent to the design of a regulatory agenda for expression, it falls short of justifying the constitutional status of the free speech principle.

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The author thanks Heidi Libesman, Wayne Sumner and participants at the McGill-Queen's Junior Scholars' Conference for their comments, and Charlene Jones and Tim Barrett for research assistance.

1. Eric Posner, "Strategies of Constitutional Scholarship" (2001) 26 *Law & Soc. Inquiry* 529 at 544.
2. See, e.g., the epigraph to this article.
3. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

### *A Marketplace of ideas*

A standard rationale for the freedom of expression invokes the metaphor of the marketplace, asserting that an unregulated market for ideas is conducive to social progress and the ascertainment of truth. A recurring theme in free speech discourse, the market for ideas entered the law and economics literature through two influential articles by Ronald Coase.<sup>4</sup> In these articles, Coase criticized the asymmetry between the “intellectual community’s” optimistic view of the consequences of an unregulated market for ideas, and the same community’s pessimistic view of the consequences of unregulated markets for goods. According to Coase, in their analysis of the market for ideas, intellectuals tended to credit individuals with extreme rationality and to be sceptical of the government, whereas in their analysis of other markets intellectuals were sceptical of individual rationality and naively confident of government’s trustworthiness and competence. Coase argued that there was no good reason for this divergence, and that as a descriptive matter it could be explained only by intellectuals’ chauvinism for their own trade.<sup>5</sup>

The implication of Coase’s argument is that the market for ideas is an unpromising route to justifying the constitutional freedom of expression. Indeed, the economic literature has not embraced the free marketplace in ideas as a compelling rationale for the constitutional freedom of expression. The problem is that it is all very well to conceptualize the transmission and reception of ideas as a market, but why must the market be unregulated? Mainstream microeconomics endorses regulation as a remedy for any of a variety of market failures,<sup>6</sup> such as where an action causes externalities or there are significant transaction costs. To accept that the constitution should single out the market for ideas for special protection from regulation, we would need to believe that market failures are significantly less likely to be present when the commodity is ideas than when it is something else. There do not appear to be any grounds for such a belief.<sup>7</sup>

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4. Ronald H. Coase, “The Market for Goods and the Market for Ideas” (1974) 64 *Am. Econ. Rev.* 384; Ronald H. Coase, “Advertising and Free Speech” (1977) 6 *J. Legal Stud.* 1 [Coase, “Advertising”].
  5. Coase, “Advertising,” *ibid.* at 15 (“The market for ideas is the market in which the intellectual conducts his trade. The explanation of the paradox is self-interest and self-esteem. Self-esteem leads the intellectuals to magnify the importance of their own market. That others should be regulated seems natural, particularly as many of the intellectuals see themselves as doing the regulating. But self-interest combines with self-esteem to ensure that, while others are regulated, regulation should not apply to them.”).
  6. Coase himself, however, denied that he was advocating greater regulation of the market for ideas: *ibid.* at 7 (“Experience with regulation in the market for goods suggests not the desirability of regulation in the market for ideas but the dangers of introducing regulation, anywhere.”).
  7. Indeed, the next two sections discuss possible failures in the market for information and ideas. For a theoretical discussion of the conditions under which regulation of the market for ideas is desirable, see Albert Breton & Ronald Wintrobe, “Freedom of Speech Versus Regulation in Markets for Ideas” (1992) 17 *J. Econ. Behav. & Org.* 217 [Breton & Wintrobe]. Breton and Wintrobe argue that the case for *non*-regulation is strongest in the market for political ideas. That is also the argument of this article.

### ***B Information as a public good***

The main argument in the law-and-economics literature in support of the freedom of expression, far from invoking the virtues of an unregulated market for ideas, rests on a supposed market failure. Daniel Farber, Richard Posner, and Robert Cooter have argued that freedom of expression can be understood as a remedy for underproduction in the market for information arising because of the public goods character of information.<sup>8</sup>

Public goods confer a benefit upon individuals from whom producers cannot exact payment (external benefits).<sup>9</sup> Information and ideas are classic examples of public goods: the social benefit of information and ideas is not fully appropriable in market transactions. For instance, a news organization is not fully compensated for the social value created by its investment in developing a news story, since individuals can benefit from the information thereby produced even if they buy nothing from the news organization. An individual can pick up a discarded newspaper on the subway, ask a subscriber what was reported in the newspaper, read a summary of the story on a third party's blog, or wait until some other news organization publishes a story derived from the original report.

Information and ideas relevant to political debate and decision-making produce an additional type of non-appropriable social benefit. Not only can individuals obtain political information and ideas without paying for them; they can benefit from them even while remaining ignorant of them altogether. For instance, when a newspaper publishes a story containing information relevant to a question of public policy, the result is that citizens and officials who read the newspaper are better informed, and (presumably) make better decisions on the relevant public policy question. This is a beneficial consequence for all citizens, including those who, far from purchasing the information from its producer, do not even bother to acquire it from a secondary source, but simply remain ignorant.<sup>10</sup>

Thus, political information and ideas are, in the economics literature, described as "double public goods."<sup>11</sup> As with information and ideas generally, an individual can often acquire political information and ideas, without paying for them, from sources other than their producer. In addition, since the production of political information improves political decisions, an individual automatically benefits from the production of political information even if she does not acquire it at all.

Public goods are underproduced in a free market. Freedom of expression is said to be a remedy for this underproduction. The reasoning is straightforward.

8. Daniel Farber, "Free Speech Without Romance: Public Choice and the First Amendment" (1991) 105 *Harv. L. Rev.* 554 [Farber]; Richard Posner, "Free Speech in an Economic Perspective" (1986) 20 *Suffolk U. L. Rev.* 1 [Posner, "Economic Perspective"]; Robert Cooter, *The Strategic Constitution* (Princeton, NJ: Princeton University Press, 2000) [Cooter].

9. For a fuller discussion of public goods, see the text accompanying *infra* note 47.

10. James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962) [Buchanan & Tullock] at 38 ("Secure in the knowledge that regardless of his own action, social or collective decisions affecting him will be made, the individual is offered a greater opportunity ... to choose without having considered the alternatives carefully:").

11. Cooter, *supra* note 8 at 313; Farber, *supra* note 8 at 563.

Regulation of the production or distribution of a good increases the cost of the good; in this respect it is like a tax. Immunity from regulation is, therefore, akin to a subsidy. Freedom of expression is the immunity of the production and distribution of information and ideas from regulation; it is, therefore, a subsidy to that activity.

Among the merits claimed for the public goods account of freedom of expression is that it explains the greater protection granted to political speech, compared with other expressive activities, such as commercial advertising and pornography.<sup>12</sup> Political speech is especially at risk of being underproduced given that it is a double public good.<sup>13</sup>

### C Negative externalities

If the freedom of expression is said to be justified because of the positive externalities associated with information and ideas, the economic literature has also recognized that communicative activities can produce negative externalities, and that it may therefore be desirable to impose limitations on such activities.

A well-known example is Rasmussen's analysis of flag desecration, based on the facts in *Texas v. Johnson*.<sup>14</sup> Rasmussen supposed that burning the national flag produces psychic benefits for a small group of people ("desecrators") and imposes costs on a much larger group ("venerators"). The decision whether to permit or outlaw flag desecration is, in substance, a decision whether to allocate to desecrators a right to desecrate or to venerators the opposite right, i.e., the right not to have their flag desecrated. This decision should be based on whether desecrators value the right to desecrate more or less than venerators value the opposite right.

This question of free speech policy can usefully be analyzed in Coasean terms.<sup>15</sup> In the absence of transaction costs, efficiency is equally well served by the allocation of the relevant right to the desecrators or the venerators. If the desecrators derive more benefit from burning the flag than the venerators derive from their flag not being defiled, an exchange will take place: the venerators will consent to the desecration, in exchange for compensation, which the desecrators will willingly pay. However, transaction costs are not zero, and, consequently, the right should be allocated initially so as to facilitate the efficient re-allocation of the right by the parties if necessary.

Here, it becomes relevant that the desecrators are a small group. As a result, they face lower transaction costs than the venerators. Free-riding is an obstacle to collective action: individual venerators will be reluctant to expend resources on the purchase of a right that will benefit all venerators, preferring instead to do nothing and

12. Farber, *supra* note 8 at 562-63; Posner, "Economic Perspective," *supra* note 8 at 23.

13. See Richard Posner, *Frontiers of Legal Theory* (Cambridge, MA: Harvard University Press, 2001) at 74-75 [Posner, *Frontiers of Legal Theory*].

14. Eric Rasmussen, "The Economics of Desecration" (1998) 27 J. Legal Stud. 245 [Rasmussen]; *Texas v. Johnson*, 491 U.S. 397 (1989).

15. What follows differs somewhat from Rasmussen's argument. Rasmussen argues that desecration is presumptively inefficient, since it is often engaged in for the purpose of reducing other people's welfare, and that flags and other symbols are costly to produce, and like other costly goods, require property rights protection in order to be produced (Rasmussen, *ibid.* at 269).

free-ride on other venerators' contributions of resources. Desecrators are also confronted with the collective action problem, but because they are a smaller group, the incentives to free-ride are less severe than they are for the venerators. We accordingly have reason to believe that it would be easier for the desecrators to cooperate in the purchase of the right to desecrate the flag from the venerators, than for the venerators to cooperate in the purchase of the opposite right from the desecrators.<sup>16</sup> It may be, therefore, that the right should initially be allocated to the venerators, who can sell it to the desecrators if the latter value the right to burn the flag more than the benefit venerators derive from it not being burned. In other words, efficiency is served by laws that prevent flag desecration.

Rasmussen writes that “[w]hen a symbol is desecrated, the desecrator obtains benefits, while those who venerate the symbol incur costs. The economic approach asks whether the benefits exceed the costs.”<sup>17</sup> The general point is that expression should not “trump” other interests.<sup>18</sup> The regulation (or not) of expression is in substance an allocation of rights as between speakers and those affected by speech. The desirable allocation depends on what we know about the value of the relevant right to each group and about the structure of transaction costs in the market for the relevant rights.

#### ***D Observations***

The law-and-economics literature does not present a persuasive justification for the constitutional guarantee of freedom of expression. Economists do not believe that there is a stronger case for an unregulated market for ideas than there is for an unregulated market in anything else. They also recognize that a cost-benefit analysis will not always favour expression, since expression is not an unqualified good.

The main economic justification for singling out expression for special protection from regulation is that information and ideas are a public good (political expression doubly so). There are three problems with this justification. First, it assumes that the external benefits of speech outweigh its external costs. It is not clear why such an assumption is justified.<sup>19</sup>

Second, it does not adequately explain why immunizing expression from regulation is a desirable strategy for dealing with the underproduction of information and ideas.<sup>20</sup> Other actual or potential policy responses to the underproduction of

16. The venerators would still face the problem of holding out. A transaction can still occur—the lion's share of the gain will simply be appropriated by the holdouts. Admittedly, the need to bargain over the division of the gain would represent a transaction cost.

17. Rasmussen, *supra* note 14 at 269.

18. *Ibid.*

19. Cooter in fact resorts to the Miltonian assumption that market forces will weed out harmful ideas: *supra* note 8 at 324, 332.

20. The tension between free speech and both intellectual property and mandatory disclosure has not escaped the notice of commentators. See, e.g., Jed Rubenfeld, “The Freedom of Imagination: Copyright's Constitutionality” (2002) 112 Yale L.J. 1. More generally, I observe that freedom of expression is a rule of government non-intervention in the market for ideas and information. It is odd that a market imperfection is invoked as a reason for the government *not* intervening in the market.

information and ideas include direct subsidization, the creation of intellectual property rights, production by government, and mandatory disclosure.<sup>21</sup> It is not clear what advantage immunity from regulation has over these other policies, some of which are antithetical to free speech, as the latter is commonly understood.<sup>22</sup> Moreover, regulation does not seek to deter the regulated activity so much as to shape the way in which it is carried out. As a result, immunizing an activity from regulation may encourage people to engage in it, but only at the cost of depriving society of influence over the way in which the activity is carried out. Freedom of expression seems a blunt instrument, in other words, for achieving goals that could also be achieved by other means.

Finally, it is not clear why the free speech principle must be constitutional. Assuming that a reason militating against the regulation of speech is that it would discourage the production of an already underproduced good, it is not clear why this reason should give rise to a constitutional constraint against governmental action rather than simply entering into the government's policy calculus. Where a good is underproduced in the market, the economist typically advises public policymakers to do something to encourage its production. It has not been adequately explained why, in the case of expression, matters should be taken out of the usual policymakers' hands.<sup>23</sup>

## II. Freedom of expression from first (economic) principles

The existing literature supplies arguments for and against the regulation of expression, but it falls short of justifying the constitutional status of the free speech principle. However, we would be mistaken to conclude that economic analysis has nothing to say about why constitutional protection of free speech might be warranted. In this part, I offer an economic justification of the constitutional right to freedom of expression.

I shall begin by explaining what is distinctive about an economic theory of constitutional rights, as opposed to non-economic approaches to the justification of constitutional rights (Sections A and B). I then illustrate the economic approach by applying it to the freedom of expression (Sections C and D).

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21. See Farber, *supra* note 8 at 568.

22. This point is also made by Jean-Michel Josselin & Alain Marciano, "Freedom of Speech in a Constitutional Political Economy Perspective" (2002) 29 J. Econ. Stud. 324 at 328 [Josselin & Marciano].

23. Farber, *supra* note 8, argues that speech is disadvantaged in the political process because information benefits the dispersed public, whereas speech-suppressing regulation benefits special interest groups that organize more easily. It is not clear that this assertion is founded, and I note that Rasmussen makes precisely the opposite empirical assumption: he asserts that the defenders of expression have an advantage in the political process because there are so many intellectuals among them: Rasmussen, *supra* note 14 at 251-52. In any event, Farber's argument proves too much since it can be made for all regulation and all public goods. When a commodity is a public good, then those who are benefited by production of the commodity are bound to be more dispersed than any group that is successful in mobilizing to obtain a regulation limiting its production. If Farber's argument is sound, it would imply that we should impose constitutional constraints against regulation of the production of all public goods.

### *A Consequentialism*

We may distinguish between consequentialist and non-consequentialist theories of constitutional rights.<sup>24</sup> An economic perspective is a consequentialist perspective.

According to a non-consequentialist understanding of constitutional rights, the framers of a constitution are engaged in a project of recognizing and immunizing from invasion by the state a sphere of individual freedom respect for which is a condition of legitimate political action. To highlight its special value, adherents of a non-consequentialist conception of rights may describe this sphere of freedom in terms of the individual's "final worth,"<sup>25</sup> "inviolability"<sup>26</sup> or "human dignity,"<sup>27</sup> or they may simply refer to the rights as "basic and fundamental."<sup>28</sup> The rights may also be referred to as "inalienable,"<sup>29</sup> which implies in this context that they do not owe their existence to the state and that they are not surrendered by virtue of any real or hypothetical social contract.<sup>30</sup>

A non-consequentialist view holds that, in principle, officials<sup>31</sup> commit a wrong, as a matter of political morality, if in the exercise of their power they intrude into the zone of individual freedom. Thus, a properly designed constitution would place such acts beyond their authority. Rights conceived in non-consequentialist terms need not be absolute or unlimited. Many self-described non-consequentialists acknowledge that rights may have to yield in an emergency ("the constitution is not a suicide pact"<sup>32</sup>), or that their scope is intrinsically limited by a requirement that their exercise be compatible with the equal rights of others.<sup>33</sup> Trade-offs such as these are usually understood to be implied by the moral scheme that gives rise to the rights. What is not countenanced is the overriding of rights by considerations of general policy.

Consequentialist theorists, by contrast, reject the notion that rights are in principle untouchable. In public decision-making, what matters is whether a particular decision produces desirable consequences, all things considered. No particular set of interests is sacrosanct.<sup>34</sup> In formulating constitutional law, the framers' goal is to facilitate

24. See Josselin & Marciano, *supra* note 22 at 324-25.

25. Alan Brudner, *Constitutional Goods* (Oxford: Oxford University Press, 2004) at 13.

26. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 3.

27. See, e.g., Article 1 of the German Federal Constitution, declaring that "human dignity shall be inviolable."

28. *Griswold v. Connecticut*, 381 U.S. 479 (1965) Douglas J.

29. *Declaration of Independence* (U.S., 1776); *Declaration of the Rights of Man* (France, 1789) (setting forth the "natural, unalienable, and sacred rights of man"); *Declaration of Human Rights*, GA res. 217A (III), UN Doc A/810 (1948) at 71 (preamble referring to the "inherent dignity and of the equal and inalienable rights of all members of the human family").

30. In this sense, "inalienable" does not mean non-waivable.

31. In this paragraph, "official" refers to anyone exercising public power, including legislators and judges.

32. Familiar paraphrase of Jackson J.'s dissenting opinion in *Terminiello v. Chicago*, 337 U.S. 1 at para. 37 (1949) ("if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

33. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 29.

34. As will be discussed shortly, this is not to say that constitutional drafters might not be justified in establishing a rule requiring decision-makers to act *as if* a particular set of interests were inviolable. Consequentialism would apply at the level of constitutional design: the desirability of

the making of subconstitutional decisions that produce desirable consequences and to reduce the incidence of undesirable subconstitutional decisions.

From a consequentialist perspective, the constitutionalization of rights may be justified in at least two distinct ways. First, the value of rights can be understood instrumentally: constitutional rights may be valuable insofar as they produce beneficial (net) consequences. For instance, rights designed to enhance the accountability of governors to the governed might be constitutionalized (for example, rules fixing a maximum length of time between elections<sup>35</sup>) because such rights result in governmental decisions that more faithfully advance the interests of the governed.

Another instrumental understanding of constitutional rights might emphasize their unifying function. Like flags, anthems, and other national icons, a constitution can help to nourish a sense of national community which may assist in overcoming collective action problems that arise in political and social life. Constitutions and other symbols may be especially valuable in large, diverse societies, in which elements conducive to cooperation in small, relatively homogeneous societies are absent.<sup>36</sup> To be successful, one would presume that a constitution must articulate values at a sufficiently high level of generality that they are (as nearly as possible) universally held by the members of the polity.<sup>37</sup>

Second, contrary to a widely-held belief, consequentialism is also compatible with a certain non-instrumental understanding of rights. It is possible for a consequentialist to imagine individual rights as having intrinsic value rather than being valuable for some other benefit they make possible. The consequentialist need only insist that the value of rights is not infinite and can be outweighed by other considerations in the calculation of the overall consequences of a particular decision. The constitutionalization of rights, on this view, reflects the framers' judgment, on behalf of all individuals, that the rights are especially valuable (if not infinitely valuable) and a direction to officials to treat them as such in making their decisions.<sup>38</sup> As we shall see in Part III, below, this is how I interpret the attitude taken

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the would be based on its beneficial and harmful consequences. Consequentialist drafters contemplating the inclusion of a rule making certain interests inviolable should not do so because they believe that the interests are intrinsically inviolable, but rather should weigh the consequences of designating them as such.

35. Section 4(1) of the *Charter*.

36. See Jürgen Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe" (1992) 12 *Praxis Int'l I* (developing concept of "constitutional patriotism" as a substitute for ethnic nationalism in the unification of diverse societies).

37. There is also a possible preference-shifting function of constitutional rights. Non-unanimously-held values might be included in a constitution so as to encourage their broader adoption. It may be partly for this reason that some sought the recognition of the "Christian heritage" of Europe within the ill-fated Constitutional Treaty. In other words, the unifying function depends on values being widely shared, whereas the preference-shifting function is about using the constitution to make certain values more widely shared than they would otherwise be.

38. The value of rights may be subjective (individuals attach great value to them) or objective (regardless of whether individuals value them, they are valuable). See Joseph Raz, "Free Expression and Personal Identification" (1991) 11 *Oxford J. Legal Stud.* 303 (discussing the value of freedom of expression beyond the "rather small" value most people attach to their right to free expression). Regarding the notion that constitutional bills of rights direct judges to treat rights as especially valuable, see Denise Meyerson, "Why Courts Should Not Balance Rights Against the Public Interest" (2007) 31 *Melb. U. L. Rev.* 801 at 811 (judges should "assign a greater weight to rights and a lesser weight to the public interest than they would ordinarily think they deserve.").

by the Supreme Court of Canada toward the freedom of expression.

### *B Constitutional design in an economic perspective*

My article's title indicates that it relates to economics, rather than consequentialism in general. Economics provides a distinctive methodology for the analysis of the consequences of constitutional rules. Although economics is a vast and heterogeneous discipline, I shall treat two notions as emblematic of economic methodology for present purposes.

The first is the rationality assumption. Economics is centrally concerned with the modeling of individual choice under constraints, and economic models of choice typically proceed on the assumption that individuals "rationally" pursue their objectives (as the epigraph to this article implies). Although some critics of rational choice theory have denounced *homo economicus* as an unrealistically amoral and unemotional automaton, there is, in fact, room within economics to adopt flexible definitions of rationality encompassing altruistic or principled decision-making<sup>39</sup> and to accommodate seemingly non-rational behavior in light of real-world limitations on human cognitive capacity and willpower.<sup>40</sup>

Second, normative economic analysis typically relies on a definition of the social good in terms of the welfare of individuals.<sup>41</sup> Moreover, the standard economic view takes individual welfare to be a subjective, rather than an objective concept. Subjectivity means that criteria extrinsic to the individual (such as values adhered to by a policy analyst) do not count in the calculation of that individual's welfare.<sup>42</sup> Traditionally, normative economics has defined an individual's welfare as that which is maximized by her choices (the concept of "revealed preference").<sup>43</sup>

In this section, I shall describe the constitutional design enterprise as it appears through the lens of economics. This description involves addressing three questions: (1) What are the purposes of government? (2) What are the costs of government?

39. Amartya Sen, "Rational Fools: A Critique of the Behavioral Foundations of Economic Theory" (1977) 6 *Phil. & Pub. Aff.* 317 [Sen]; consider also Buchanan & Tullock, *supra* note 10 at 3-4 (articulating assumption underlying economic model of politics that individuals may be "egoist or altruist or any combination thereof").

40. See Herbert Simon, "A Behavioral Model of Rational Choice" (1955) 64 *Quart. J. Econ.* 99; Christine Jolls, Cass Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 *Stan. L. Rev.* 1471.

41. See Philippe Mongin, "A Concept of Progress for Normative Economics" (2006) 22 *Econ. Philos.* 19 at 37-38, 45 (welfare economists assume that "[s]ocial welfare in any circumstances is entirely determined by the data of individual welfare given these circumstances" at 45).

42. See D. Hausman & M.S. McPherson, *Economic Analysis and Moral Philosophy* (Cambridge: Cambridge University Press, 1996) at 81 (discussing the distinction between objective and subjective theories of welfare).

43. The revealed preference assumption is not an essential feature of a subjective and individualistic conception of welfare. It is possible to have a subjective conception of individual welfare and to recognize that other subjective data in addition to the observation of an individual's choices may provide information about her welfare: Ian Lee, "Implications of Sen's Concept of Commitment for the Economic Understanding of the Corporation" (2008) 21 *Can. J. L. & Jur.* 97. An example of subjective non-choice data about welfare includes information obtained from conversations with the individual about her welfare.

(3) What are the functions of constitutional constraints, such as constitutional rights?

*1 The purposes of government*

Government is an institution with a purpose. Its purpose is to solve the problems that would arise for individuals in its absence. In this section, I shall consider problems of three types: transaction costs, distributive suboptimality, and poor choices.

(a) To avoid transaction costs

In exploring the problems of “non-government,” an obvious starting point is Hobbes’ description of the alternative to government as a “war of all against all,” in which life would be “solitary, poor, nasty, brutish, and short.”<sup>44</sup> An economist might reformulate the Hobbesian justification for government in terms of transaction costs.<sup>45</sup> The word “transaction” is simply a label for mutually beneficial social interaction. Such interaction would be difficult and, in many cases, prohibitively costly.

Some might be tempted to dismiss as hyperbolic the picture painted by Hobbes of isolated individuals living in perpetual fear of violent death; it is reasonable to suppose that individuals in the state of nature would find ways to reduce the risk. They might limit their interactions to a small group of other individuals with whom repeated previous interactions have cultivated mutual trust. This would be a more extreme version of some contemporary city dwellers’ reluctance to venture into unfamiliar neighbourhoods. Alternatively, individuals might expend resources on self-protective measures, for example by hiring bodyguards, although they would of course need to find a way to protect themselves from the guards. The point is that social interaction would be much more difficult than it is in governed societies, and that these difficulties would mean that people would interact less, and with fewer people.

Security against the forcible taking of possessions, and against violence more generally, facilitates interaction. Aside from any intrinsic enjoyment individuals experience from being in one another’s company, economists recognize that security makes it possible for individuals to trade with one another—to exchange with a willing counterparty that which they want less for that which they want more. This is no small benefit, as is well known since Adam Smith remarked that “man has almost constant occasion for the help of his brethren,”<sup>46</sup> and exchange is how he obtains this help.

44. Thomas Hobbes, *Leviathan* (1651) ch. XIII. The causes of this war, according to Hobbes, would be competition for resources and the desire for glory.

45. See, e.g., Buchanan & Tullock, *supra* note 10 at ch. 5. Buchanan and Tullock describe an “organization” as a way of avoiding the external costs associated with uncoordinated individual action. Organization can be “voluntary” or “governmental.” Governmental action is warranted where its costs are less than the external costs that would be incurred in the absence of organization, and are also less than the costs of voluntary organization. In other words, government arises where cooperative interaction would be socially beneficial and where governmental interaction would economize on the costs of voluntary organization, i.e., on transaction costs.

46. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), vol. 1, ch. 2 [Smith].

A transaction costs understanding of the function of government goes beyond establishing law and order and enabling interaction. Governments also have a role in providing other goods that, because of coordination problems, they can provide more successfully than could individuals interacting in the market.

Public goods are a conventionally recognized category of such goods. Public goods are goods which confer a benefit on individuals who cannot be made to pay for them (external benefits). We have seen that information is a public good. Education is another classic example: it is partly a public good since, in addition to its obvious benefit for children and their parents, from whom tuition can be collected, education also benefits other members of society, through reduced crime and increased civic engagement.<sup>47</sup> The latter are external benefits because they cannot feasibly be recovered by producers of education through transactions. Left to the market, education would be provided up to the point at which the incremental cost of providing more education would just exceed the incremental benefit to the child receiving it and to his or her parents. This would be too little education, since the incremental social benefit of education exceeds its incremental benefit to its direct recipient.

What is needed is a way for the producers of education to be compensated not only for the benefit enjoyed by purchasers of education but also for the external benefits of education. This is where government comes in: through taxation and public schools, the government effectively compels non-parents to help pay for the production of education.

Some would suggest that the maintenance of law and order and the provision of public goods exhaustively describe the proper function of government,<sup>48</sup> but a transaction costs understanding in fact supports a more general role for government: the government has a role wherever and to the extent that the costs associated with unregulated interaction among individuals exceed the costs of governmental decision-making.<sup>49</sup>

The avoidance of transaction costs is an orthodox economic explanation of the necessity and role of governments.<sup>50</sup> However, it is also possible to articulate in

47. W.C. Riddell, "The Social Benefits of Education: New Evidence on an Old Question" in F. Iacobucci & C. Tuohy, eds., *Taking Public Universities Seriously* (Toronto, ON: University of Toronto Press, 2004).

48. E.g., James Gwartney et al., "The Scope of Government and the Wealth of Nations" (1998) 18 *Cato J.* 163 at 165 (asserting that the "core functions" of government are "(1) activities that protect persons and their property from plunder, and (2) provision of a limited set of goods that for various reasons markets may find it difficult to provide"). Arguably, category two absorbs category one, as law and order is a public good: Dennis C. Mueller, *Constitutional Democracy* (Oxford: Oxford University Press, 1996) [Mueller] at 53.

49. For instance, as Coase famously showed, the internalization of negative externalities—another commonly recognized function of government—reduces to a question of transaction costs: Ronald Coase, "The Problem of Social Cost" (1960) 3 *J. L. & Econ.* 1. The proposition in the accompanying text may be compared with Coase's finding, in "The Nature of the Firm" (1937) 4 *Economica* 386 [Coase, "The Nature of the Firm"], that firms arise where the transaction costs associated with the market exceed the costs associated with centralized resource allocation by an entrepreneur (*fiat*), and that the scope of the firm is determined by the trade-off between transaction costs and governance costs.

50. See, e.g., Mueller *supra* note 48.

economic terms at least two other rationales for government. To these rationales I shall now turn.

(b) To redistribute wealth

A transfer of resources is accretive to aggregate welfare if the transfer increases the welfare of the recipient more than it reduces the welfare of the former owner. It is an economic cliché that voluntary bilateral transfers (exchanges) increase the welfare of both parties and therefore increase aggregate welfare. However, in equilibrium, there are by definition no mutually beneficial potential exchanges, at least once transaction costs are taken into account: in equilibrium, we are, by definition, at the Pareto frontier.<sup>51</sup> However, a non-consensual transfer might still increase aggregate welfare, if the winner's gain outweighs the loser's loss.

Non-consensual transfers may be initiated by governments.<sup>52</sup> Redistributive taxation is an obvious case. Taxes may be understood, not only as mandatory contributions to the production of public goods (the justification for government offered in the previous section), but also as a component of a mandatory scheme for the redistribution of resources from the more wealthy to the less wealthy. In order to be redistributive in the sense here intended, the system should be structured so that the wealthier an individual is, the greater her net contribution (the more one pays in taxes compared to what one consumes in public goods).

The proposition that redistributive taxation increases aggregate welfare is subject to two qualifications.<sup>53</sup> The first concerns the justification for the assertion that the welfare loss to the net taxpayer is exceeded by the welfare gain to the net recipient. It might be thought that it would be sufficient to rely on the uncontroversial assumption that individuals experience declining marginal utility of resources: it is an axiom of economics that a person derives less utility from the  $N+1^{\text{st}}$  unit of a given good than from the  $N^{\text{th}}$  unit of the same good. However, declining marginal utility is a proposition about *each* individual's utility function, and not a proposition about the comparative welfare of two or more individuals.<sup>54</sup> In order to compare the welfare effect of a given transfer on the affected individuals, one needs an objective conception of welfare.<sup>55</sup> Despite some economists' claims to the contrary,<sup>56</sup> the objective conception of welfare upon which distributive claims depend co-exists

51. G. Calabresi, "The Pointlessness of Pareto: Carrying Coase Further" (1991) 100 Yale L.J. 1211.

52. Non-consensual transfers initiated by an individual are called "theft."

53. Discussion of a third possible qualification, namely rent-seeking costs, is deferred until the next section. See the text accompanying *infra* notes 70-79.

54. Herbert Hovenkamp, "The Mind and Heart of Progressive Legal Thought," (University of Iowa Presidential Lectures, delivered at the University of Iowa, 1995), online: University of Iowa Presidential Lectures <http://sdrc.lib.uiowa.edu/preslectures/hovenkamp95>.

55. An example would be the capabilities approach advocated by Amartya Sen, e.g., in *On Economic Inequality* (Oxford: Oxford University Press, 1997). In a recent paper, Louis Kaplow, although objecting to Sen's approach, does not argue against objective conceptions of "well-being": Louis Kaplow, "Primary Goods, Capabilities, ... or Well-Being?" (2007) Harvard Law and Economics Discussion Paper No. 602, online: Social Science Research Network <http://ssrn.com/abstract=1031302> at 22. Indeed, cost-benefit analysis would be impossible without an objective conception of well-being.

56. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (Cambridge, MA: Harvard University Press, 2002) at 25, 28-32.

awkwardly with the subjective conception of welfare that otherwise prevails in normative economics.

The second qualification concerns the incentive effects of redistributive taxation. Redistributive taxation may adversely affect private incentives to create wealth. If the would-be taxpayer, instead of investing time and effort in the creation of an  $N+1^{\text{st}}$  unit of wealth which she will not get to keep in any event, decides to consume leisure, there will be a net reduction in aggregate welfare: the would-be recipient will receive nothing, and the would-be taxpayer will consume leisure when she would have preferred to have an  $N+1^{\text{st}}$  unit of wealth. As a result, interpersonal resource transfers should be understood to increase social welfare where the welfare gain to the transferee exceeds the welfare loss to the transferor *and* the net gain is not outweighed by adverse incentive effects.

(c) To protect individuals from their own poor choices

A third possible function of government, even more controversial from the perspective of economics, is to protect individuals from themselves (as opposed to from each another). That is, governments may contribute to individual welfare by preventing individuals from making choices that reduce their own welfare.

This possible function of government is controversial in light of the conventional economic definition of an individual's welfare as that which is maximized by the individual's choices. The notion that an individual's welfare may be increased by restricting her choices obviously cannot co-exist with a definition of an individual's welfare as that which is maximized by her choices.

However, some economists, most notably Amartya Sen, have argued that it may be desirable to set aside the conventional definition in favour of an alternative conception of welfare in which an individual's observed choices are treated as data about an individual's welfare rather than as the very definition of her welfare.<sup>57</sup> Other relevant evidence about an individual's welfare may be obtained through communication with the individual, including communication about the criteria according to which the individual evaluates, after the fact, her own behavior (her "metapreferences"). Government may be understood as a mechanism whereby individuals' options are constrained, based on information about their meta-preferences, in order to narrow the gap between their choices and their welfare.

In conceptualizing welfare-increasing constraints upon choice, it is common to draw an analogy to Ulysses' act of instructing his crew to bind his hands to the mast.<sup>58</sup> Ulysses' strategy was intended to deprive himself, later on, of a choice (steering his ship onto the rocks in response to the Sirens' call) that would reduce his welfare. This analogy is not unproblematic in thinking about the constraints imposed by government, for it is debatable whether government is better understood as an instance of individuals tying their own hands, or of some people tying other people's hands.<sup>59</sup> Individuals do not require governments to replicate Ulysses' strategy.

57. Sen, *supra* note 39.

58. Jon Elster, *Ulysses and the Sirens* (Cambridge: Cambridge University Press, 1984) [Elster, *Ulysses and the Sirens*].

59. For a similar reason, Elster came to reject his previously-expressed view that constitutions should be understood as a pre-commitment device for polities. In reality, he argued, they were ways for

Nevertheless, if one accepts that paternalism may sometimes increase the welfare of the person whose choices are limited—for instance, that even if Ulysses had chosen not to tie his hands, the intervention of a third party to prevent him from steering his ship onto the rocks would have increased his welfare—then it follows that a possible role for government is to increase our welfare by limiting our choices. To provide a concrete example, it may be that when governments use coercive means to discourage smoking, they are not only protecting non-smokers from second-hand smoke and taxpayers from the public health burden of smoking-related diseases; perhaps they are also protecting current and potential smokers—people who might otherwise reduce their own welfare by taking up smoking, or by not quitting.

## 2 *The costs of government*

I have focused so far on the disadvantages of unregulated interaction and, correspondingly, on the benefits of government. Although I have deferred until now consideration of the costs of government, it is important not to overlook them entirely: no prudent person decides between A and B by considering only the merits of A and demerits of B. More importantly for purposes of this article, I will suggest that an important function of a constitution, from an economic perspective, is to mitigate the costs associated with government and thereby to maximize its value for the governed. Before I can make that argument, I need to explain the costs that are being mitigated.<sup>60</sup>

Economists conceptualize the costs of government in terms of three types of cost: information costs, agency costs and rent-seeking costs. Let me briefly describe each type of cost.

### (a) Information costs

Information is indispensable for rational decision-making. Constraints upon the information possessed by marketplace participants are recognized as a transaction cost.<sup>61</sup> Similarly, constraints upon the information possessed by governmental decision-makers are a cost of government.

It is readily conceivable that governmental decision-makers might have an informational advantage over individuals in relation to some matters. For instance, the officials working within the U.S. Food and Drug Administration may be in a better

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some people to constrain other people. See Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment and Constraints* (Cambridge: Cambridge University Press, 2000) [Elster, *Ulysses Unbound*].

60. For discussion of the respective costs of private and governmental decision-making, see Michael Trebilcock & Edward Iacobucci, "Privatization and Accountability" (2003) 116 Harv. L. Rev. 1422 [Trebilcock & Iacobucci].

61. In the case of marketplace participants, economists typically take for granted that individuals know what they want (this is implied by the assumption that individuals pursue their objectives), and understand informational constraints as preventing individuals from knowing with certainty how a particular decision will affect the attainment of their objectives. In concrete terms, this can take the form of a consumer's uncertainty as to the characteristics of a product that he or she is contemplating purchasing, or of the price and suitability of alternatives to that product. See George J. Stigler, "The Economics of Information" (1961) 69 J. Pol. Econ. 213; George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84 Q. J. Econ. 488.

position than a consumer to know whether a given medication is safe.<sup>62</sup> On the other hand, governmental decision-makers may be at a substantial disadvantage in relation to information about individuals' circumstances and interests. An individual ordinarily possesses this information about himself or herself whereas the governmental decision-maker must acquire it at a cost, for example, by carrying out a census or commissioning opinion research. Moreover, to the extent that the means of acquiring the information involve communication rather than the observation of revealed preferences, the information may also be distorted by respondents' strategic behaviour.<sup>63</sup>

In short, the error and research costs entailed by having recourse to external assessments of individual interests and circumstances, rather than relying on revealed preferences, are a cost of government.

(b) Agency costs

Government establishes an agency relationship between the governors and the governed. When Jensen and Meckling introduced the concept of agency costs,<sup>64</sup> they focused on the relationship between the managers and owners of a firm. However, as Jensen and Meckling themselves recognized, an agency relationship can exist in a variety of other situations,<sup>65</sup> and in general terms it can be understood as a relationship in which one person (an "agent") is empowered to act on behalf of another (a "principal").<sup>66</sup> The relationship between citizens and officials fits this definition, with citizens as the principals and officials as their agents.

The point of the agency concept is to highlight that the behaviour of the agent, whom the economist assumes to be a rational individual, will at times diverge from the pursuit of the principal's interests. The literature on agency costs<sup>67</sup> in the corporate context anticipates two basic types of failing: lapses in loyalty (diversion), and lapses in diligence (shirking). In addition, principals will incur costs in an attempt to prevent shirking and diversion (monitoring costs), and candidates for the role of agent will expend resources in an effort to inspire justified confidence that they will not engage in diversion or shirking (bonding costs).

Each of these types of agency cost has its analogue in the governmental context, and must be reckoned as a cost of government. Consider first diversion. Leaving aside the obvious examples of abuse of trust, misuse of government property and nepotism, an official in the national government might support a policy that reduces

62. Thus, informational deficiencies are a paradigmatic illustration of the type of transaction costs that, on an economic account, may be invoked as a justification for governmental intervention.

63. This influential view among economists is associated especially with Paul A. Samuelson, "The Pure Theory of Public Expenditure" (1954) 36 *Rev. Econ. & Statistics* 387 at 388-89 ("It is in the selfish interest of each person to give false signals to pretend to have less interest in a given collective activity than he really has.").

64. Michael C. Jensen & William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 *J. Finan. Econ.* 305 [Jensen & Meckling].

65. *Ibid.* at 309.

66. *Ibid.* at 308.

67. See, e.g., Armen A. Alchian & Harold Demsetz, "Production, Information Costs, and Economic Organization" (1972) 62 *Am. Econ. Rev.* 777; Jensen & Meckling, *supra* note 64; Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard University Press, 1991) at 9-11 [Easterbrook & Fischel].

the national welfare but which is congenial to the parochial interests of a smaller group with which the official feels an affinity, or whose electoral support will be pivotal in the official's riding.

Next let us consider shirking. Shirking occurs because the agent bears the costs of her effort but the principal enjoys the benefit. Thus, in the absence of some mechanism for aligning the agent's interests with those of the principal, an economically rational agent can be expected to invest little if any effort in carrying out her responsibilities. In the private sector, agents may be motivated by a combination of positive incentives (e.g., performance-based compensation), negative incentives (e.g., fear of the market for corporate control) and organizational commitment.<sup>68</sup> In the governmental context, positive and negative incentives are attenuated somewhat<sup>69</sup> and more reliance is, therefore, placed on commitment.

Finally, principals incur monitoring costs in an effort to prevent shirking and diversion, and officials incur bonding costs. The Auditor General function is a costly monitoring device (appropriately provided by government since monitoring is a public good), and the custom whereby elected officials transfer their private investments into a blind trust to avoid the appearance of conflicts of interest is an example of a bonding device.

#### (c) Rent-seeking costs

A related type of cost arises as a result of the rent-seeking activities of citizens. Governments are in a position to confer benefits on groups of citizens at the expense of other citizens ("rents"), and rational citizens may be expected to engage in activities with a view to obtaining such benefits.

Economists first applied the concept of rent-seeking to the political activities of industries,<sup>70</sup> which seek rents in the form of direct subsidies as well as regulatory protection from competition from imports, substitutes and new entrants. Rent-seeking was modeled as a market, in which officials supply regulatory benefits to industries in exchange for two forms of compensation: money (e.g., campaign contributions) and electoral support (e.g., the mobilization of voters in support of the elected official or the favoured measure).<sup>71</sup> Both forms of compensation were valued by officials because they furthered the latter's presumed overriding interest in remaining in office.

The concept of rent-seeking is not, of course, limited to the solicitation of favours for industry. Virtually all governmental policies benefit some people and impose costs on others,<sup>72</sup> and economists expect citizens to try to obtain the enactment of

68. Regarding the significance of commitment, see George A. Akerlof & Rachel E. Kranton, "Identity and the Economics of Organizations" (2005) 19 *J. Econ. Perspect.* 9-32.

69. See Trebilcock & Iacobucci, *supra* note 60 at 1426-29 (discussing the difficulties encountered by the state in incentivizing its employees).

70. See, e.g., George Stigler, *The Citizen and the State: Essays on Regulation* (Chicago, IL: University of Chicago Press, 1975) [Stigler]; Anne O. Krueger, "The Political Economy of the Rent Seeking Society" (1974) 64 *Am. Econ. Rev.* 291; Gordon Tullock, "The Welfare Costs of the Tariffs, Monopolies and Theft" (1967) 5 *Western Econ. J.* 224 [Tullock].

71. Stigler, *ibid.* at 126-27.

72. D.G. Hartle, "The Theory of 'Rent-Seeking': Some Reflections" (1983) 16 *Can. J. Econ.* 539 at 540 (noting "the underlying distributive purpose of many and perhaps most public policies, whether or not stated or admitted.").

policies beneficial to them and to try to prevent the enactment of policies harmful to them.<sup>73</sup>

There are two ways in which rent-seeking represents a cost of government. First, many theorists believe that rent-seeking often results in the adoption of welfare-reducing governmental decisions. Suppose, for instance, that the existing producers in an industry succeed in obtaining the enactment of legislation limiting competition. Reduced competition is a transfer of wealth from consumers to producers, but it also results in a social loss because the non-competitive equilibrium price exceeds marginal cost. That is, in a non-competitive industry, there are always some consumers who would be willing to pay more for another unit of the relevant commodity than it would cost to produce it, but who do not purchase it because the unit is priced above its cost.<sup>74</sup> These forgone transactions are a social loss.

Second, rent-seeking consumes resources. A windfall transfer is a “large ... prize dangling before” industries and interest groups,<sup>75</sup> and the latter can be expected to expend commensurate resources in an effort to obtain it, or to defend against the rent-seeking efforts of rivals. Given that rent-seeking creates no social wealth, the amount expended is a deadweight social loss.<sup>76</sup>

Economists often draw an analogy between rent-seeking and theft.<sup>77</sup> The two costs of rent-seeking can thus be analogized to two costs of theft. In the first place, the thief values the stolen items less than its rightful owner; economists suppose that, if it were otherwise, the thief would instead have purchased them from their owner.<sup>78</sup> In the second place, the activity and its prevention entail resource costs for thieves and owners: the cost of burglary tools, for thieves, and the cost of locks and alarm systems, for owners.<sup>79</sup> Similarly, the successful rent-seeker obtains a policy that may benefit her less than the costs it imposes on other citizens, and the struggle out of which the policy emerges consumes extensive resources the magnitude of which bears no relationship to the social benefit, if any, of the policy.

73. The larger the group, however, the more difficult it is for the group to mobilize to try to obtain the benefit, since members of the group have an incentive to free ride on one another's efforts: Mancur Olson, *The Logic of Collective Action* (Cambridge: Harvard University Press, 1971).

74. Under non-competitive conditions, producers maximize their profits at a price higher than their marginal cost, even if it means selling fewer units than they would if they set the price at, or just above, their marginal cost.

75. Gordon Tullock, “The Fundamentals of Rent-Seeking” (1998) 1:2 *The Locke Luminary* 2, online: [http://www.thelockeinstitute.org/journals/luminary\\_v1\\_n2\\_p2.html](http://www.thelockeinstitute.org/journals/luminary_v1_n2_p2.html).

76. Larry Ribstein, “Corporate Political Speech” (1992) 49 *Wash. & Lee L. Rev.* 109 at 153.

77. Tullock, *supra* note 70; Richard A. Posner, “The social costs of monopoly and regulation” (1975) 83 *J. Pol. Econ.* 807. Moreover, theft is often treated as a case of rent-seeking, for example by T. Cowen & A. Tabarrok, “The Opportunity Costs of Rent-Seeking” (1999) 17 *J. Pub. Fin. & Pub. Choice* 121 [Cowen & Tabarrok].

78. See Richard A. Posner, *Economic Analysis of Law*, 6th ed. (New York: Aspen Publishers, 2003) at 205, note 3.

79. Cowen & Tabarrok, *supra* note 77; Posner, *ibid.* at 205 (the owner and thief's respective investments in “trying respectively to prevent and accomplish the transfer of the good [are] wasted from a social standpoint; this waste is the economic objection to theft”).

### 3 *The purpose of constitutional constraints*

We have seen that government facilitates interaction and thereby makes a contribution to social welfare, but that it also entails costs. Constitutional rules, which establish and constrain governments, can be viewed as serving two functions: (1) defining the scope of government so as to ensure that the powers of government extend only to those decisions with respect to which collective decision-making is superior to individual decision-making, and (2) mitigating the costs of government.

First, constitutions define the scope of government. That is, they establish the boundary between collective decision-making and private decision-making. Ideally, this boundary should be located at the point where the incremental cost of attributing a larger sphere of decision-making to the government would outweigh the incremental benefit.<sup>80</sup>

This is, for instance, a conventional economic understanding of federalism: the allocation of powers between central and local governments involves a trade-off between the transaction cost economies offered by large decision-making units and the reduced opportunities for rent-seeking when the unit of decision-making is small.<sup>81</sup>

It is similarly possible to conceive constitutional rights as roping off a sphere of individual autonomy from governmental regulation, on the theory that the costs of collective decision-making outweigh its benefits. This might be for either or both of the following reasons: (1) the decisions within that sphere are characterized by only modest externalities, or else interpersonal transactions with respect to such decisions can be concluded at low cost, and there is therefore little to be gained by collectivizing the decisions, or (2) the information relevant to such decisions is within the possession of the individuals concerned and would be difficult for government officials to collect and interpret.

Aside from delimiting the proper boundaries of government, a second function of constitutional rules could be to reduce the costs of government. Consequentialists commonly offer three explanations as to how constitutional rights might reduce the costs of government. Each of them is readily articulated in economic terms. First, rights may serve to reduce the agency costs of government by preventing incumbents from limiting political competition. Second, rights may serve to prevent majority coalitions from reducing social welfare by imposing excessive costs upon non-members of the coalition. In other words, rights may serve as a bulwark against a form of rent-seeking. Third, rights may serve as a pre-commitment device against short-sighted collective decision-making. In other words, rights might protect social welfare against one of the pitfalls of decision-making under conditions of imperfect information.

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80. Compare Coase, "Nature of the Firm," *supra* note 49 (describing scope of firms in terms of a division of decision-making between firm and marketplace, based on relative magnitude of governance and transaction costs).

81. See, e.g., Mueller, *supra* note 48 at 77-78. In the Canadian context, Jean Leclair has criticized what may be called a "functional" understanding of federalism: see Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2002-03) 28 *Queen's L.J.* 411.

In the next section, I shall elaborate on each of these explanations and assess their capacity to justify the constitutional guarantee of free speech.

### *C The justification of the freedom of expression*

I have suggested the following as possible economic functions of constitutional rights:

- They exclude from the domain of collective decision-making matters with respect to which the costs of collective decision-making outweigh the costs of unregulated interaction;
- They reduce agency costs by preventing incumbents from limiting political competition;
- They prevent legislative majorities from imposing excessive costs on minorities and thereby reducing social welfare; and
- They are a pre-commitment device against short-sighted collective decision-making.

In this section, I shall consider to what extent each of these possible rationalizations is capable of justifying the constitutional guarantee of free speech.

For readers impatient to know where my argument leads, I conclude that the freedom of expression is most easily justified as a device for the mitigation of agency costs. I do not believe that the freedom of expression is well understood as a safeguard against majoritarian cost externalization or collective myopia, or as describing a matter lying outside the optimal domain of collective decision-making.

#### *1 The domain of collective decision-making*

One possible understanding of constitutional rights is that they define a sphere of individual autonomy, excluding from the domain of collective decision-making matters with respect to which there are few negative externalities whereas the information costs of collective decision-making are prohibitive. Is this a good way of understanding the freedom of expression?

An affirmative answer depends on our accepting at least one of the following propositions:

- That the exercise of free speech does not cause significant negative externalities;
- That, even if speech can cause negative externalities, the costs of bargaining between speakers and harmed listeners are especially low; or
- That the information costs of collective decision-making in relation to expressive activities are prohibitively high.

I am not persuaded of the validity of any of these three propositions. In the first place, it is an untenable proposition that, as a general rule, expressive activities are incapable of causing significant negative externalities.<sup>82</sup> Commercial advertising

<sup>82</sup>. See also Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) [Schauer, *Free Speech*] at 11 (the freedom of speech “protects certain conduct not because it is self-regarding, but *despite* the fact that it is other-regarding” [emphasis in original]).

imposes costs on an advertiser's rivals, at the very least, and may also harm consumers if it is misleading or manipulative. Political expression can also cause harm: for instance, to use Rasmussen's example, flag desecration imposes costs on individuals who venerate the flag. Moreover, to the extent that political expression is directed towards and actually increases the likelihood of the adoption of a particular public policy, it imposes costs on the individuals who will be adversely affected by the policy. For instance, political advocacy in favour of an agricultural price support policy imposes costs on the consumers of agricultural products. Artistic expression, too, can cause harm, for example where it causes offence or "moral distress."<sup>83</sup> Even if we may take it for granted that artistic expression does not usually offend its willing consumers, we must recognize that it may at least harm individuals who, like the "prude" of Amartya Sen's fable,<sup>84</sup> experience disutility from the mere awareness of its consumption by others.

There is, moreover, no reason to suppose that the costs of bargaining are lower in relation to expressive activities than in relation to other activities that impose external costs. On the contrary, a single expressive activity can impose costs on many individuals. In such circumstances, a collective action problem can be expected to arise whereby the individuals harmed have an incentive to free-ride on the efforts of others to purchase the speaker's silence.<sup>85</sup> There is no reason to believe that such problems are less likely to arise in the case of unregulated expressive activities than in connection with other types of unregulated interaction.

In relation to informational costs, I have sympathy with the view that the value of expressive activities to speakers and willing listeners may be difficult to quantify or even describe, and therefore difficult for officials to incorporate into collective decision-making. However, officials may well have advantages with respect to other information relevant to the social costs and benefits of expressive activity. Does pornography contribute to increased rates of sexual violence? Are the premises of hate propaganda factually incorrect? It is not inconceivable that officials may be better informed than the producers and consumers of expression with respect to questions such as these.<sup>86</sup>

For these reasons, absent unusual circumstances in particular societies,<sup>87</sup> I doubt

83. In not excluding from the cost-benefit calculus the offence caused by expressive activities, the economic approach to free speech differs from the conventional liberal approach. See L. W. Sumner, *The Hateful and the Obscene* (Toronto, ON: University of Toronto Press, 2004) [Sumner, *Hateful*] at 45-47 (arguing that "moral distress" cannot be recognized as a harm without inviting "intolerable ... intrusiveness into individuals' personal lives").

84. Amartya Sen, "The Impossibility of a Paretian Liberal" (1970) 78 *J. Pol. Econ.* 152.

85. Rasmussen, *supra* note 14 at 248.

86. Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton, NJ: Princeton University Press, 2007) (arguing that citizens systematically hold wrong opinions on public policy matters because the private cost of being wrong on such matters is low). See also Buchanan & Tullock, *supra* note 10.

87. When I refer to "unusual circumstances," I have in mind societies where the fear of agency costs is so great that constitutional framers may rationally decide simply to rule out, categorically, certain types of governmental restriction on political expression. In practice, constitutional guarantees of free speech never take this form. Even the U.S. First Amendment, viewed by some as an absolute prohibition, is in fact formulated as a limitation on the powers of a single institution at one level of government ("Congress shall make no law ..."). To the extent that a given constitutional right merely withdraws decision-making power from the ordinary political branches, rather than

that the constitutional guarantee of free speech is well-explained as an element of the ideal boundary of collective decision-making.

## 2 Agency costs

The citizen has few sources of assurance that officials will act diligently and loyally in the public interest and resist the temptation to divert public resources and engage in shirking.<sup>88</sup> One of these sources of assurance is political competition<sup>89</sup>: officials will act diligently and loyally if they believe that there is a likelihood that they will be replaced if they fail to do so.<sup>90</sup> Political competition is a function of the ease of entry on the supply side of the market for officials' labour, and the ability of voters to overcome the collective action problem which hinders the ability of the electorate to defend "its" interests in that market.

Incumbents may be tempted to try to limit political competition, for example by limiting the right of citizens to run for office or by suppressing criticism of the government. The latter makes it more difficult for challengers to communicate with voters, and for voters to communicate with one another, about the shortcomings of the incumbent government relative to its alternatives. A constitution reduces agency costs if it prevents governments from doing these things, and one way in which it may do so is by conferring constitutional rights on the citizens. In Canada, for example, the right of any citizen to run for office is constitutionally guaranteed.<sup>91</sup> The freedom of association<sup>92</sup> prevents governments from obstructing the emergence and maintenance of groups that might be vehicles for the mobilization of individuals in support of alternative policies or even alternative governors. Similarly, a purpose of the freedom of expression is to withhold from governments the power to suppress speech critical of them.

It might be thought that the agency costs rationale for freedom of expression justifies constitutional protection for only a very limited category of expression (criticisms of the government and offers of services by alternative governors), but this is not the case. Citizens also require information of a more general nature to evaluate the performance of incumbents and the potential performance of challengers. In particular, information is necessary for the formation of opinions on public policy matters, against which the incumbents' and challengers' respective

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withdrawing a category of decisions from the public domain entirely, it is not consistent with the theory that the function of the right is to define a matter that lies outside the optimal domain of collective decision-making.

88. As previously noted (text accompanying note 69), much reliance is placed on officials' internal motivations for loyal and diligent behaviour (pre-disposition and commitment) since external motivations operate less strongly.

89. See Cooter, *supra* note 8 at 312; Richard A. Posner, *Law, Pragmatism and Democracy* (Cambridge, MA: Harvard University Press, 2003) at 193 (describing "competitive democracy").

90. A "rational" official chooses a level of diligent and loyal behavior  $x$  that maximizes  $U(x)=f(PBC(x)(1-D(x)))$ , where  $PBC(x)$  is the private benefits of control achievable at level  $x$ , and  $D(x)$  is the probability that, at level  $x$ , the official's lack of diligence and loyalty will be detected and result in her replacement by voters.

91. *Charter*, s. 3.

92. *Charter*, s. 2(d).

platforms can be judged. This type of information is, of course, what constitutional lawyers call “political speech.”<sup>93</sup> Restrictions on the provision and acquisition of political expression operate as transaction costs in the market for the officials’ services, and accordingly reduce political competition.

This is an economic version of a familiar philosophical argument for the freedom of expression. The latter is summarized by Schauer, as follows:

First, freedom of speech is crucial in providing the sovereign electorate with the information it needs to exercise its sovereign power, and to engage in the deliberative process requisite to the intelligent use of that power. Second, freedom to criticize makes possible holding governmental officials, as public servants, properly accountable to their masters, the population at large.<sup>94</sup>

It is not difficult to find, elsewhere in the world or in history, examples of governmental suppression of political competition, or of competitors’ attempts to communicate with citizens. There is evidence that preventing such suppression was a concern of the framers of the First Amendment.<sup>95</sup>

In Canada, the influence of the agency costs justification in constitutional free speech discourse pre-dates the *Charter* itself. In *Re Alberta Statutes*,<sup>96</sup> in 1938, the Supreme Court invalidated a provincial law that required newspapers to publish governmental replies to reports that, in the government’s view, contained misinformation about a particular policy of the government. One of the constitutional infirmities of the statute, according to Duff C.J., was that it impaired the functioning of Canadian parliamentary institutions, which:

... derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence

93. E.g., Schauer, *Free Speech*, *supra* note 82 at 35 (“speech relating to public affairs, and [especially] criticism of governmental officials and policies.”).

94. *Ibid.* at 36. Some articulations of this argument rest on a concept of democracy as popular self-government (“government by the people”). Schauer’s formulation, in the accompanying quotation, is a case in point. See also Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper, 1948). It is worth noting a conceptual difference between the agency costs argument articulated here and the conventional philosophical argument. The agency costs argument abandons the fiction that the citizens are self-governing. Rather, they are under government. Viewing representative democracy as the political equivalent of the “separation of ownership and control” in widely-held corporations, the agency theorist asks what constitutional mechanisms exist to protect the citizens’ interests despite the impairment of their autonomy that comes from submitting to government.

95. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998) at 21. Amar goes further, and argues that the Bill of Rights as a whole “was centrally concerned with controlling the ‘agency costs’ [of] representative government” (*ibid.* at xiii). See also Ronald A. Cass, “The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory” (1987) 34 *UCLA L. Rev.* 1405 at 1449. Daniel Farber questions the sufficiency of conflict of interest as a reason for protecting political speech. Farber notes, “[w]e do not necessarily disallow legislation whenever politicians have a conflict of interest, such as that in cases involving political gerrymandering and public funding for campaign expenses.” (Farber, *supra* note 8 at 564.) This objection would have greater force if the constitutional rule amounted to a categorical prohibition of restrictions on political speech. However, it does not have much bite against a rule that, like s. 2(b) of the *Charter*, explicitly stops short of enacting such a prohibition and, instead, merely withholds from the government the power to restrict speech without a judicial verification that the restriction is reasonable.

96. [1938] S.C.R. 100.

and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.<sup>97</sup>

Cannon J. was even more explicit as to the government's conflict of interest in relation to the regulation of political information:

The pith and substance of the bill is to regulate the press of Alberta from the viewpoint of public policy by preventing the public from being misled or deceived as to any policy or activity of the Social Credit Government and by reducing any opposition to silence or bring upon it ridicule and public contempt. . . . [N]o political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest.<sup>98</sup>

The above passages were quoted with approval by Rand J., in *Saumur v Quebec*,<sup>99</sup> in which the Supreme Court invalidated a municipal by-law purporting to subject the distribution of newspapers and handbills in city streets to the prior authorization of the chief of police, to be granted or withheld in the latter's unfettered discretion. It was not constitutionally tolerable, Rand J. said, that the "province, while permitting all others, could forbid [the dissemination of] a newspaper or any writing of a particular colour."<sup>100</sup>

The translation of these concerns into economic terms yields the proposition that the drafters of a constitution might increase the value of government by making incumbent officials incompetent to impose restrictions on political expression without independent, i.e., judicial review. Freedom of political expression is not absolute, but governments should not have a free hand in regulating the information flows upon which the mechanisms of their own accountability depend.

### 3 Majoritarian externalization

Collective, representative decision-making faces obstacles in the form of agency costs (governor self-interest), information costs (the decision-maker lacks information about the population's interests) and rent-seeking (the ability of organized minorities to wield disproportionate political influence). Even if these dangers are avoided, and a collective decision furthers the interests of a majority of the population, it might still be socially counterproductive if the benefit of the decision for the majority is outweighed by the costs it entails for the minority. Constitutional rights might have a role in preventing this type of decision, the economist's version of the tyranny of the majority.

97. *Ibid.* at 133.

98. *Ibid.* at 145-46.

99. [1953] 2 S.C.R. 299.

100. *Ibid.* at 332.

Public choice theorists conceptualize democratic decision-making in terms of coalition-forming. A basic objective of institutional design is to ensure that outcomes represent a compromise acceptable to a satisfactory coalition of interests. In fixing the size of the required coalition, there is a trade-off between the coalition's ability to impose costs on citizens outside the coalition, on the one hand, and decision-making costs, on the other hand. The larger the majority required for a decision, the more difficult it is for one group of citizens to advance its own interests at the expense of others (since any decision must produce more winners and fewer losers), but the more difficult it may be to reach a decision at all (since more participants have a veto over the decision).<sup>101</sup> Supermajority or multiple-majority rules (e.g., bicameralism) are indicated when in a given community there is more reason to fear externalization than stagnation.<sup>102</sup>

Within this account of democracy, there are two ways of conceptualizing constitutional rights. First, constitutional rights can be understood as instituting a supermajority rule for certain types of decision.<sup>103</sup> The effect of entrenching a right within the constitution is to substitute the decision rule applying to constitutional amendments (typically the requirement of a supermajority) for that applying to ordinary legislation. In effect, entrenchment increases the size of the coalition required to make the decision. Some economists believe that the point of increasing the size of the required coalition is to ensure that it will necessarily include at least some of the individuals whose rights are at issue. If that is the case, then a constitutional amendment could only be made upon the payment to (at least some members of) the minority group of compensation sufficient to secure their assent.

Alternatively, constitutional rights may be viewed as imposing a requirement that the benefit of the measure to the majority exceed the cost of the measure to the minority. In economic jargon, this is a requirement of Kaldor-Hicks efficiency, and it could take the legal form of a proportionality test. The political representatives of the majority coalition cannot be the judge of the relative magnitude of the benefit to the majority and the harm to the minority. The majority's conflict of interest supplies the rationale for independent review, for example by the judicial branch.<sup>104</sup>

Canada's constitution contains several rights that are readily understood as affording protection to minorities against majoritarian externalization, especially:

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- 101.** This is obviously a simplification. The description of the trade-off would be slightly less oversimplified if it were also noted that another advantage of increasing the size of the required coalition is that the possibility of voting cycles decreases as required majority increases. As well, under a first-past-the-post electoral system, as is employed in Canada, a political party can acquire a majority of the seats in the elected house despite receiving only a plurality of votes.
- 102.** This is one way of understanding the perennial debate within the European Union surrounding the voting rule in the Council. On the one hand, it is understood that higher qualified majority thresholds increase the risk of legislative paralysis; on the other hand, some Member State governments are willing to accept paralysis rather than permit decisions affecting their interests to be made over their objections. See J. Zemanek, "Voting Rights in the Councils: A Compromise, No Revolution" (2005) 1 Eur. J. Const. L. 62.
- 103.** This is Mueller's conceptualization of constitutional rights: see *supra* note 48 at 211.
- 104.** The latter version is more consistent with the practice of rights protection in Canada. The government is permitted to infringe the freedom of expression provided that the harm entailed by the infringement is outweighed by a sufficiently important public benefit that cannot adequately be achieved by less infringing means.

- the denominational school rights entrenched in s. 93 of the *Constitution Act, 1867*,
- the minority language education rights guaranteed in s. 23 of the *Canadian Charter of Rights and Freedoms*, and
- the constitutional protection afforded to aboriginal rights under s. 91(24) of the *Constitution Act, 1867* and s. 35 of the *Constitution Act, 1982*.

Section 93 protects the religious educational interests of the Protestant or Catholic minority in each province from interference by provincial laws and decisions.<sup>105</sup> The idea is to withhold from the political representatives of the provincial majority the power to weigh the majority's interests against those of the minority.

Section 23 of the *Charter* deprives provinces of the ability to offer public instruction only in the provincial majority language. A uniform language of public instruction would be convenient for the majority but would conduce to the assimilation of the minority, especially in the case of francophone minorities outside Quebec. Sec. 23 does not confer an unqualified right. Even aside from the possibility of constitutional amendment, the right as framed applies only where "the number of children ... is sufficient to warrant" public minority language education.<sup>106</sup> The requirement of "sufficient" numbers implies a cost-benefit test,<sup>107</sup> but it is an independent judiciary, rather than the provincial legislature, that is to determine whether the minority population is so low that the benefit that population would enjoy from the provision of instruction in its own language is outweighed by the burden on the public treasury.

Finally, provisions of both the *Constitution Act, 1867* and the *Constitution Act, 1982* may be understood as performing a similar function in relation to the interests of the aboriginal peoples of Canada. Section 91(24) of the *Constitution Act, 1867* allocates exclusive legislative power in relation to aboriginal peoples to the federal Parliament. The framers of the 1867 Act thereby rendered aboriginal rights in principle immune to provincial legislation,<sup>108</sup> ensuring that national, rather than provincial officials would be responsible for the weighing of the costs and benefits of local policies adversely affecting aboriginal rights.

Section 35 of the *Constitution Act, 1982*, which binds both national and provincial governments, "recognize[s] and affirm[s]" the rights of Canada's aboriginal peoples. As the Supreme Court has observed, "[r]ights that are recognized and affirmed" are not absolute.<sup>109</sup> Rather, the Constitution tolerates their infringement to the extent necessary for the pursuit of compelling and substantial collective objectives, including the "avoidance of harm to the general populace," and provided that,

**105.** Rights held by the minority in 1867 can be modified only by a constitutional amendment, a procedure that requires resolutions of the Senate and House of Commons, and until 1982 also required a legislative act of the U.K. Parliament. Provincial impairment of rights acquired subsequently to 1982 is subject to a right of appeal to the Governor in Council.

**106.** *Charter*, s. 23(3)(a).

**107.** See, e.g., *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at paras. 47-51 (describing s. 23(3) in terms of a "sliding scale of requirements, ... depending on the numbers of students").

**108.** *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at para. 178; *Simon v. R.*, [1985] 2 S.C.R. 387 at paras. 50-51. But see *infra* note 111, regarding the effect of s. 88 of the *Indian Act*.

**109.** *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 62 [Sparrow].

among other requirements, there has been as little infringement of the rights as possible and compensation of the aboriginal peoples in the event of expropriation of their rights.<sup>110</sup> As interpreted by the Supreme Court, s. 35 appears to embody a cost-benefit analysis: infringement of an aboriginal right is permissible when the right is outweighed by a social harm, provided that the right is infringed as little as possible and that the rights-holders are compensated. Importantly, s. 35 entrusts neither the federal nor provincial political branches with the power to make the determination. There is a new “impartial” guardian of the rights of aboriginal peoples: the judiciary.<sup>111</sup>

Can the freedom of expression be justified as a bulwark against majoritarian externalization? It is not clear that it can. Externalization is a constant threat (and reality) in political decision-making. Why should constitutional drafters settle upon a different trade-off between externalization and stagnation in the case of “fundamental rights,” such as the freedom of expression, than in respect of other types of decision? In the case of s. 93 of the *Constitution Act, 1867*, s. 23 of the *Charter* and 35 of the *Constitution Act, 1982*, the relevant provisions can be understood as elements of a political compact between identifiable sub-communities. But what accounts for the inclusion of the freedom of expression and other fundamental freedoms?

This is a difficult question to answer; indeed, many economists seem resigned to the impossibility of drawing a principled distinction between fundamental rights and other interests.<sup>112</sup> One possible basis for a distinction is suggested by Dennis Mueller. According to Mueller, the types of collective decision to which constitutional rights relate are characterized by an asymmetric expected distribution of costs and benefits.<sup>113</sup> By “asymmetric,” Mueller means that the framers anticipate that collective decisions limiting certain kinds of activity will tend to impose a large cost on a small number of people, and to achieve a small benefit for a large number of people. Classic examples involve minority religious practices and non-mainstream artistic expression; in each case the activity has great value for its practitioners but may cause offence to some non-practitioners. The number of people offended by the activity, and benefited by prohibiting it, may be large enough to form a winning coalition, but the magnitude of the harm to each person negatively

110. *Ibid.* at paras. 71, 82.

111. The confidence of aboriginal peoples in the federal political branches as a reliable guardian of their interests was shaken by, among other events, the enactment of s. 88 of the *Indian Act* in 1951 (R.S. 1985, c. I-5.) and the issuance of the *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa, ON: Queen's Printer, 1969) [the “White Paper”]. Section 88 confers legislative force, with respect to aboriginal people, upon all provincial laws of general application, subject only to the provisions of any aboriginal treaty. In essence, s. 88 authorizes provinces to infringe (non-treaty) aboriginal rights, despite s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No.5. In its White Paper, the federal government announced the intention to phase out treaty rights as well. Although the White Paper was eventually revoked, it is understandable that s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11., included in part in an effort to obtain the support of the aboriginal political leadership for the repatriation project, binds the federal government as well as the provinces.

112. See, e.g., Rasmussen, *supra* note 14 at 380 (denying that speakers' interests are intrinsically “privileged”).

113. Mueller, *supra* note 48 at 214.

affected may be large enough that the prohibition is, on balance, destructive of social welfare. The constitution thus requires the consent of some or all of the latter group, or at least a showing to the satisfaction of an independent arbiter that the decision is, on balance, beneficial to the community as a whole.

The problem with this answer is that it requires us to assume that burdens on religion and expression are very welfare-reducing and the resulting benefit to the majority is trivial. Although in many cases the assumption is no doubt valid, one may question whether the generalization is justified. Commentators commonly assume that “offence” is a small welfare loss, but it is not clear how this assumption is compatible with adopting a subjective conception of individual welfare.<sup>114</sup> Similarly, it appears to me that while some restrictions on expression or on religious practice are substantial, others may be less so.<sup>115</sup>

#### 4 Pre-commitment

Finally, it is possible to view constitutional rights as a pre-commitment device akin whereby a people protects itself against its own worst tendencies. Jon Elster famously analogized the adoption of a constitution to Ulysses’ act of tying himself to the mast.<sup>116</sup>

Criminal process guarantees are often thought of as pre-commitment devices. Suppose that individuals, by and large:

- abhor the wrongful punishment of the factually innocent,
- believe that a trial with certain procedural features (e.g., disclosure of evidence, exclusion of evidence obtained through law enforcement coercion) is a reliable means of determining factual guilt or innocence,
- know that it can sometimes appear, at the moment that a suspect is apprehended, that the evidence against the suspect is overwhelming and, if the crime was heinous enough, that they will be tempted to dispense with a trial and proceed directly to punishment, and
- know that in a certain number of cases, the suspect will turn out in retrospect to have been factually innocent.

Such individuals (or their representatives) might well incorporate criminal process guarantees into a constitution, as a way of binding their hands against the Siren’s song of summary justice.

114. Rather, it may reflect the tolerant outlook of the commentator.

115. See, e.g., the Supreme Court’s divided judgment in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551. The Court held that a prohibition against erecting structures of any kind on an apartment balcony infringed the appellants’ freedom of religion by preventing them from constructing a *sukkah* on their balconies in observance of the Jewish festival of Sukkot. Given that the building’s management had offered, as an accommodation, to permit the construction of a “communal *sukkah*” in the garden of the building, four members of the Court believed the burden on freedom of religion was a mere “inconvenience” (para. 162, per Bastarache J.) whereas five members believed it to be a substantial interference with religious observance (para. 77, per Iacobucci J.).

116. Elster, *Ulysses Unbound*, *supra* note 59 at 104; Elster *Ulysses and the Sirens*, *supra* note 58 at 36-40. See also Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh: Edinburgh University Press, 2004) at 31.

Superficially, this seems to have promise as a theory of the freedom of expression. Freedom of expression might be thought of as a metapreference, that is, as a principle by which we evaluate our own behaviour. Metapreferences motivate us, but we sometimes trade them away too readily in exchange for immediate gratification, to our later chagrin. Freedom of expression seems to have this structure. It motivates us, but we sometimes trade it away cheaply, for example, where we support the suppression of a heretical truth in order to avoid the discomfort associated with cognitive dissonance. Knowing in advance that we have this tendency, and that we or our descendants will come to regret our not living up to our principles, our predecessors bind our hands to the mast, so to speak, by drafting a constitution limiting our ability to deviate from our principles.

This is an intuitively attractive way of thinking about constitutional rights,<sup>117</sup> but it depends on treating multiple generations as a single agent with homogeneous metapreferences. This seems a questionable assumption, without which the imposition by the founders of their metapreferences on the present generation is not self-evidently justifiable.<sup>118</sup>

Constitutionalizing free speech comes at a cost. A restriction on the power of legislatures to limit socially harmful speech, on the ground that a future generation might find the speech illuminating and the harm illusory, results *ex hypothesi* in the incurrence of social harm by each generation that lives under the constraint. Indeed, some harm will be caused by speech about which, with the passage of time, it becomes apparent that the present generation's skepticism was entirely warranted and that no regret would have been experienced had the speech been suppressed. The position that legislatures should be constrained in their ability to suppress socially harmful speech thus can only be justified if one is prepared to make an assumption analogous to that underlying the "reasonable doubt" standard in criminal law, namely that in relation to the identification and suppression of socially harmful speech, false positives are worse than false negatives. The justification for such an assumption in relation to speech, if there is one, lies outside economics.<sup>119</sup> However, without it, it is difficult to accede to the argument that the constitutional guarantee of free speech is well-justified as a way of tying our own hands, as opposed to constraining governments.

117. Compare Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1986) at 24-26 ("When the pressure for immediate results is strong enough and emotions ride high enough, [legislators] will ordinarily prefer to act on expediency rather than take the long view. ... [Courts can] appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry. ...").

118. See Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115 *Yale L.J.* 1346 at 1393-94.

119. Posner makes the related suggestion that the toleration of offence may be an important mechanism of "social progress," as the feeling of offence "may be the beginning of doubt and may lead eventually to salutary change": Posner, *Frontiers of Legal Theory*, *supra* note 13 at 78. To the extent that Posner's argument relies on concepts of "progress" and of when change is "salutary" (that is to say, when the congeniality of the change to a future generation outweighs the distress it causes to the present generation), it depends on value judgments alien to economics. It is also unclear why the present generation and its political representatives are incapable of weighing the distress caused by speech against the possibility that a future generation might judge our distress to have been unfounded.

### ***D Conclusion***

In this part of the article, I have examined several possible economic justifications for constitutional rights. I have suggested that some constitutional constraints might be explained on the basis:

- that they exclude from the domain of collective decision-making matters with respect to which the costs of collective decision-making outweigh the costs of unregulated interaction; or
- that they prevent legislative majorities from imposing excessive costs on minorities and thereby reducing social welfare; or
- that they are a pre-commitment device against short-sighted collective decision-making.

However, I do not believe that, as economic explanations, any of these justifications are satisfactory in relation to the freedom of expression. Rather, the most compelling economic rationale for the guarantee of free speech is that it prevents incumbents from limiting political competition except under the supervision of an independent judiciary. In short, a constitutional guarantee of free speech operates to mitigate the agency costs of government.

### **III. Implications**

If courts were to adopt an economic perspective on the constitutional guarantee of the freedom of expression, doctrine under s. 2(b) of the *Canadian Charter of Rights and Freedoms* would look very different. This part of the article is divided into three sections. I begin by describing the prevailing judicial approach to s. 2(b) (Section A); I next articulate the general criticisms that can be levelled against the prevailing approach, from an economic perspective (Section B). Finally, to make matters more concrete, I explain how four familiar problems in free speech jurisprudence appear through the lens of economics (Section C).

#### ***A The prevailing approach to s. 2(b) of the Charter***

The structure of the *Charter* and, in particular, the formulation of its s. 1 invite a two-stage approach to judicial review. Section 1 provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

A court determining whether a particular law<sup>120</sup> is inconsistent with the *Charter* first inquires whether the law *prima facie* infringes a right or freedom set out in ss. 2 through 23. If there is a *prima facie* infringement, the court next analyzes the

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**120.** The *Charter* applies to both governmental and legislative acts: s. 32(1). For convenience, I use the term “law” to describe any such act.

question whether the law is a “reasonable limit” on rights. Only if law infringes a *Charter* right, and is not a reasonable limit upon the right, is the law inconsistent with the *Charter* and does s. 52 of the *Constitution Act, 1982* direct the court to treat the law as being of “no force or effect.”

Three propositions about s. 2(b),<sup>121</sup> derived from the Supreme Court’s decision in *Irwin Toy v. Quebec*<sup>122</sup> and now well established, serve as the basic framework of analysis in freedom of expression cases:

- “Expression” means any activity that conveys or attempts to convey meaning and does not take the form of an act of violence;
- A law prima facie infringes s. 2(b) if its purpose is to prevent or inhibit the conveyance of meaning in general, or of particular meanings; and
- Alternatively, a law prima facie infringes s. 2(b) if its effect is to prevent or inhibit the conveyance of meaning and the expressive activity “relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.”

In several early cases, government lawyers argued that particular types of expression should not be included within the coverage of s. 2(b): commercial expression in 1988 because it “pertains to the economic realm” rather than the political realm,<sup>123</sup> hate propaganda in 1990 because it is repugnant to “*Charter* values” and also analogous to violence,<sup>124</sup> and pornography in 1992 because it is “purely physical.”<sup>125</sup> The Supreme Court rejected each of these attempts to articulate internal limits to the scope of s. 2(b). Commercial speech, the Court asserted, is “deserving of constitutional protection because it serves individual and societal values in a free and democratic society”.<sup>126</sup> Hate speech is protected because it conveys meaning and is not violent in form; any balancing of competing social values should occur at the s. 1 stage.<sup>127</sup> Pornography is included because, although the acts depicted are physical, the depiction itself is communicative.<sup>128</sup>

A law imposes a “reasonable limit” under s. 1 if it advances a legitimate and important public objective in a manner that limits the right as little as possible without unduly compromising the attainment of the objective, and does not infringe the right to an extent that is disproportionate to the contribution the law makes towards attaining the objective.<sup>129</sup> In the application of such concepts as “unduly”

**121.** Section 2(b) reads as follows: “Everyone has ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” In what follows, I am concerned only with the freedom of expression.

**122.** [1989] 1 S.C.R. 927 [*Irwin Toy*].

**123.** Argument described and rejected in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at para. 51 [*Ford*], citing *Re Klein and Law Society of Upper Canada* (1985) 16 D.L.R. (4th) 489 (Div. Ct.).

**124.** Argument described and rejected in *R. v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*].

**125.** Argument accepted by the Manitoba Court of Appeal in *R. v. Butler* (1990) 60 C.C.C. (3d) 219, [1991] 1 W.W.R. 97, but rejected by the Supreme Court in *R. v. Butler*, [1992] 1 S.C.R. 452 [*Butler* (S.C.C.)].

**126.** *Ford*, *supra* note 123 at para. 59.

**127.** *Keegstra*, *supra* note 124 at paras. 37-44.

**128.** *Butler* (S.C.C.), *supra* note 125 at para. 74.

**129.** More specifically, the *Oakes* framework requires that the law pursue an objective that relates to “concerns that are pressing and substantial in a free and democratic society”; the restriction

and “disproportionate,” it is possible, of course, for a court to be more or less demanding. In freedom of expression cases, the Supreme Court has very often adopted a “deferential” approach to the scrutiny of laws infringing s. 2(b).<sup>130</sup> At times the latter approach has rested on a distinction between expressive activities lying at the “core” of the free speech guarantee and activities lying at the guarantee’s periphery and therefore not entitled to as much weight in the s. 1 analysis.<sup>131</sup> This distinction has been of particular importance in justifying restrictions on commercial advertising, the economic nature of which courts have often, if not invariably, treated as a marker of its “lesser value.”<sup>132</sup> Even where particular activities could be said to lie at the core of the guarantee, as in the case of political speech, the Supreme Court has sometimes deferred to legislative judgments on democratic grounds, emphasizing the “right of Parliament” to strike balances between free speech and other important values.<sup>133</sup>

A persuasive case can even be made for the view that deference to the political branches is the Supreme Court’s standard approach under s. 1. Sujit Choudhry has made this argument, pointing to the inevitable uncertainties surrounding the interpretation of the social science evidence that underlies policy decisions.<sup>134</sup> Choudhry suggests that the Court’s response, except in a handful of anomalous decisions, has been to require only that there be some evidence supportive of the conclusion that there is a “reasonable basis” for the legislature’s judgment. Provided that there is such a basis, the Court will not second-guess the legislature’s choice. Wayne Sumner has also come to this conclusion, noting that the weighing of costs and benefits implied by the Court’s interpretation of s. 1 is duplicative of the process the political branches presumably followed when they enacted the measure in the first place.<sup>135</sup> As a result, the Court has been willing to “[give] the legislature the very generous benefit of the doubt” in reviewing laws that infringe the freedom of expression.<sup>136</sup>

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of rights must be “rationally connected” with the objective, which is to say that it must advance the objective and not be unfair or arbitrary; the law must “minimally impair” the right, which is to say that less impairing measures would not achieve the objective as well; and the deleterious effect of the law on rights must not be out of proportion to the contribution of the law towards the achievement of the objective: *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*]. For a recent retrospective on the judicial application of the *Oakes* framework, see Sujit Choudhry, “So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the *Canadian Charter’s* Section 1” (2006) 34 S.Ct.L.Rev. (2d) 501 [Choudhry].

130. This is a generalization. Exceptions include *R. v. Zundel*, [1992] 2 S.C.R. 731, and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

131. *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199 [*RJR-MacDonald*] (see the reasons of La Forest J. and Iacobucci J.); *Keegstra*, *supra* note 124; *Butler* (S.C.C.), *supra* note 125; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123.

132. For example, *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 [*Rocket*] (restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)); *RJR-MacDonald*, *ibid.*

133. *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33 [*Harper*] at para. 87 (regulation of election spending).

134. Choudhry, *supra* note 129 at 525.

135. Sumner, *Hateful*, *supra* note 83 at 85.

136. *Ibid.*

### *B Criticism of the prevailing approach*

From an economic perspective, the prevailing judicial approach in s. 2(b) cases leaves much to be desired. In the first place, it dwells upon questions—Does the regulated activity communicate meaning? Does it have value?—that are irrelevant to the question whether the unsupervised power to regulate the activity should be withdrawn from the ordinary political branches of government. In the second place, the deferential approach under s. 1, necessitated as a practical matter by the extremely low threshold for showing an infringement of s. 2(b), is at odds with the *raison d'être* of judicial review.

#### *1 Infringement*

The upshot of the *Irwin Toy* test for infringement under s. 2(b) is that communicative acts (that is, acts “conveying meaning”) may be directly regulated only under the supervision of the judicial branch.<sup>137</sup> From an economic perspective, this appears to be much too broad: the reasons for withholding powers from the political branches do not pertain to the regulation of communication in general, but rather to a narrower category of regulation, namely, restrictions on the provision and acquisition of information useful for the formation of opinions on public policy matters.<sup>138</sup>

As many commentators have observed, the set of communicative acts encompasses virtually all human interaction. Communication is admittedly not synonymous with interaction. Rather, communication is a form of interaction, or a means of interaction. Nevertheless, the transmission of meaning by one individual and its reception by another individual are involved in nearly all interactions between individuals. Even many non-verbal interactions involve communication (e.g., physical intimidation); a transmission of goods is either accompanied by or implies a communication about the nature of the act (loan, sale, gift, bailment, etc.).

While there are interactions that do not involve communication (an unannounced battery or dispossession, for example), these seem to be exceptions in everyday life. Much more frequently, interactions consist of the unilateral or reciprocal transmission of signals that each expects the other to receive, interpret and take into account in acting. They consist, in other words, of communication. Given that one of the principal functions of government is to regulate interaction, we should be skeptical of the proposition that governments should be deprived of the power to regulate communicative acts.<sup>139</sup>

<sup>137</sup> The adverb “directly” reflects the fact that, under *Irwin Toy*, a law that does not have its purpose to prevent the conveyance of a message will infringe s. 2(b) by reason of its incidental effect on communication only if the latter activity “relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing”: *Irwin Toy*, *supra* note 122 at para. 54.

<sup>138</sup> Admittedly, the implementation of this principle entails a delicate line-drawing exercise, in particular as to (a) whether indirect as well as direct restrictions should be covered, and (b) what information is relevant to the formation of opinions on public policy matters.

<sup>139</sup> As Schauer observes, “[w]ere every such instance of communication control to be required to satisfy the ‘demonstrably justified’ standard, s. 2(b) would evolve into the master rule for testing

The better view appears to be that the communicative character of an act is irrelevant to its suitability as a subject of regulation. It follows that the regulation of the transmission of meanings is not even presumptively an inappropriate policy. There should be no onus on the political branches to justify such regulations to the judicial branch.

Courts and commentators have sometimes explained the constitutional protection accorded to communicative acts by reference to the “value” of communication and, in particular, its contribution to the exercise by individuals of their autonomy.<sup>140</sup> The latter is why even commercial advertising is said to be “deserving of constitutional protection.” But the fact that an activity is valuable is beside the point. Many activities and commodities have social and individual value (economists know this as well as anyone), and the fact that something is greatly valued by one, a few or many individuals is not a reason for involving judges in its regulation. Similarly, it is far from clear why, in relation to the regulation of autonomy-enhancing goods, judicial oversight must be part of the institutional equation. Education and access to the necessities of life also contribute to individuals’ autonomy. Yet, few would suggest that, because of the importance of these goods for individual autonomy, judges should supervise the decisions made by the political branches of government with respect to their regulation and provision.

## 2 Justification

From the perspective of economics, a plausible purpose of constitutional rights is to withdraw from ordinary political institutions the power to make certain types of decision without judicial oversight, for instance where officials stand in a conflict of interest. In relation to such decisions, it falls to a court to determine whether the law is justified. Constitutional entrenchment of the freedom of expression does not signify that that freedom is absolute. In relation to a limitation of political speech, a court can accept that there are often good reasons to regulate political speech (rules of order, for example). Constitutionalization simply serves to ensure that governments do not have a free hand in crafting these regulations.

It follows from the purpose of constitutional rights that in determining whether a law is justified, there should be no question of deference to the judgment of the political branches. For reasons of *expertise*, it is appropriate and may be desirable for judges to make use of information and opinions generated by the bureaucracy. However, there is no *democratic* reason to defer to the legislature’s judgment. In fact, the opposite is true. The protection of the interests of the citizens against cooptation by the governors, or by a subset of the population, is the very reason for

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the constitutionality of virtually all legislation and virtually all administrative regulation”: Frederick Schauer, “Expression and Its Consequences” (2007) 57 U.T.L.J. 705 at 712 [Schauer, “Consequences”]. See also Schauer, *Free Speech*, *supra* note 82 at 100-01, providing examples of communicative acts that “have nothing to do with what the concept of free speech is all about.”

140. For example, L.W. Sumner, “Freedom of Commercial Expression [book review]” (2005) 35 Can. J. Phil. 623 at 634; Robert J. Sharpe, “Commercial Expression and the *Charter*” (1987) 37 U.T.L.J. 229 at 237.

judicial review. If judges defer in such circumstances to the political judgment of elected representatives, it defeats the purpose of judicial review.

### *C The economic approach: a sketch of its application in four cases*

An economic perspective on the freedom of expression would result in s. 2(b) of the *Charter* receiving a considerably narrower scope, but in any infringements receiving more searching scrutiny under s. 1, than under the prevailing approach. In this section, I propose to illustrate the difference between the economic approach and the prevailing approach with specific reference to four free speech controversies, namely those relating to the regulation of commercial advertising, the regulation of pornography, the regulation of hate speech, and the regulation of third-party election advertising.

A detailed economic analysis of the free speech issues arising in each context is beyond the scope of this article. However, in order to assess the possible contributions of the economic approach, it is useful to have an idea of the ways in which an economic analysis of familiar free speech issues would likely differ from the conventional analysis.

#### *1 Commercial expression*

The prevailing treatment of commercial expression under s. 2(b) of the *Charter* may be summarized in four propositions:

- commercial expression is an activity within the scope of s. 2(b) because it “conveys a meaning”;<sup>141</sup>
- it is “deserving” of s. 2(b) protection in large part because of its value to consumers and, in particular, its contribution to their autonomy;<sup>142</sup> and
- consequently, the regulation of commercial expression infringes s. 2(b); but
- because of the economic character of the speakers’ interest, the latter carries “weak value,” and as a result, infringements may be easier to justify under s. 1 of the *Charter*, at least cases where a strong listeners’ interest is absent.<sup>143</sup>

By contrast, the economic approach to free speech outlined in this article counsels against according constitutional protection to commercial expression on the basis of its communicative nature. Rather, the regulation of commercial expression should be a policy matter for the ordinary political branches of government.

Granted, commercial expression “conveys a meaning.” That is, it is a communicative act. However, as I suggested above, the communicative character of an activity is not a sufficient reason to deprive the political branches of government of the power to regulate the activity.

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141. *Irwin Toy*, *supra* note 122 at paras. 56-57.

142. *Ford*, *supra* note 123 at para. 54.

143. *Rocket*, *supra* note 132 at para. 33. See also the reasons of La Forest and Iacobucci JJ. in *RJR-MacDonald*, *supra* note 131 at paras. 75, 189.

Virtually all commercial acts are communicative.<sup>144</sup> Any commercial enterprise—from a sole proprietorship to a large corporate group—is a transactional nexus.<sup>145</sup> Its activity can be described in terms of the solicitation, negotiation and performance of contracts among the suppliers of factors of production (including investors, lenders and employees) and the consumers of its output. All of these activities are communicative; the solicitation and negotiation of contracts is an act of communication; the performance of a contract typically involves communication. A freedom of commercial expression is, therefore, virtually indistinguishable from a freedom of commerce.

When commentators envisage a freedom of commercial expression, what they typically have in mind is advertising rather than contractual relations. The main normative argument for the conferral of constitutional protection on commercial advertising sounds in the autonomy of the hearers of the information.

I want to distinguish between two possible such arguments. First, it is possible to argue that the limitation of advertising freedom invades an inviolable sphere of personal autonomy of the potential hearers. This is a deontological argument, and therefore not an economic argument. In any event, it is a difficult argument to make. One version of the argument holds that governments may regulate choice, but should not “manipulate ostensibly free choice by cutting off the flow of information.”<sup>146</sup> In other words, governments may freely regulate transactions, but the regulation of advertising is presumptively illegitimate. However, why this should be so is not clear. Governmental action can help to process information so that it is more useful to individuals (disclosure standards); it can encourage the production of information where it might not otherwise be produced (mandatory disclosure). It is not clear, in other words, that the regulation of information flows necessarily does a disservice to the users of information, or that it is unacceptably paternalistic for governments to attempt to influence our choices.

A second, consequentialist argument might rely on the assertion that the limitation of commercial expression comes at a cost in terms of the autonomy of the potential hearers. Even assuming that the assertion is valid, all governmental acts necessarily limit the autonomy of some individuals, typically in the name of some social benefit, such as the protection of other individuals. The contribution that commercial expression and, indeed, commercial liberty more generally make to individual autonomy is not an argument for a judicial role in balancing autonomy against other social values. It is simply a consideration to be taken into account by the usual policy makers.

Economic theory, therefore, opposes the constitutionalization of commercial expression.<sup>147</sup> I emphasize that this opposition does not rest on any notion that

144. Schauer, “Consequences,” *supra* note 139 at 714 (“[a]most all commercial activity ... involves communication ...”).

145. Corporate law theorists refer to the corporation as a “nexus of contracts”: e.g., Easterbrook & Fischel, *supra* note 67 at 12.

146. Burt Neuborne, “The First Amendment and Government Regulation of Capital Markets” (1989) 55 *Brook. L. Rev.* 5 at 37.

147. See Posner, *Frontiers of Legal Theory*, *supra* note 13 at 85 (“It is doubtful that commercial speech should get any greater constitutional protection than commercial activity generally.”).

commercial expression is of “lesser value,” or on the disparagement of the commercial motives of advertisers as compared with the informational interests of consumers. It is common to frame questions concerning the scope of s. 2(b) in terms of whether particular activities are “deserving” of protection, but such formulations may distort the inquiry. Constitutional design is not about identifying “high value” or “deserving” activities and entrusting the responsibility of making trade-offs between these and other social values in the hands of special regulators called “judges.”

## 2 Obscenity

In Canada’s leading obscenity decision, the intermediate appellate court held that obscenity was not within the coverage of s. 2(b) of the *Charter* because it was “purely physical,” and operated to stimulate the senses rather than to engage the mind.<sup>148</sup> The Supreme Court in *Butler* unanimously, and summarily, rejected this argument, holding that the effect of obscenity on its viewers could only be described as the “convey[ance of a] meaning,” and that any activity conveying a meaning qualifies as “expression.”<sup>149</sup>

In assessing the justification of the Criminal Code prohibition against obscenity, the Court observed that the law could not be upheld if its purpose were to “advance a particular conception of morality.”<sup>150</sup> Such an objective would be illegitimate in a free and democratic society. On the other hand, the prohibition could be upheld as a means of protecting women, and society more generally, from undesirable social consequences, namely the increased prevalence of misogynistic social attitudes, discriminatory behaviour or even violence against women. Compared with this aim, the Court judged that obscenity held relatively meager value, especially given that its production was driven by economics rather than any elevated desire to “celebrat[e] human sexuality.”<sup>151</sup>

There are at least two differences between the way in which the Supreme Court has dealt with obscenity and the way in which the issue would be approached from an economic perspective. First and most importantly, if the interpretation of s. 2(b) were approached from the economic perspective described here, the analysis would not have reached the s. 1 stage.<sup>152</sup> Pornography is a commodity.<sup>153</sup> The power of governments to regulate other commodities is not constitutionally conditioned upon a judicial determination that the product causes social harm. The fact that the commodity takes the form of printed words or images, or of moving images (that, in

148. *Butler* (S.C.C.), *supra* note 125; Schauer, *Free Speech*, *supra* note 82 at 181-84.

149. *Ibid.* at paras. 66, 74.

150. *Ibid.* at para. 81. This is a difference between the economic approach and, for example, the consequentialism of John Stuart Mill. See Sumner, *Hateful*, *supra* note 83 at 50-51.

151. *Butler* (S.C.C.), *supra* note 125 at para. 101.

152. As a legal matter, the outcome recommended here was not available to the Supreme Court in *Butler*. The Court was, of course, bound to follow its own holding in *Irwin Toy* that any activity “conveying a meaning” was “expression,” and that any law regulating such an activity infringed s. 2(b) and was required to meet the standard of justification under s. 1.

153. See Sumner, *Hateful*, *supra* note 83 at 127 (describing pornography as “both a product . . . and a system of production”); Farber, *supra* note 8 at 565 (comparing pornography to “an ordinary consumer good”).

the language of the Supreme Court, it “conveys a meaning”), is immaterial. The question whether pornography should be regulated would be a matter for the ordinary political branches.

Second, in deciding whether to regulate pornography, the political branches would not be required to exclude from their reckoning of costs and benefits the moral displeasure experienced by some citizens at the consumption of pornographic material by others. On the contrary, two notable practitioners of law and economics recently argued that an important reason why it is appropriate for policy makers to take “justice” into account is that citizens have “tastes for fairness.”<sup>154</sup> In other words, each of us derives well-being from other citizens’ compliance with our moral norms. Evidently, from an economic perspective, there is nothing problematic in principle about legal moralism.

That is not to say that economists have much sympathy with laws that seek to enforce a “particular conception of morality.” However, the fact that a conception of morality is “particular” is more problematic than the fact that it is a conception of “morality.” Moral revulsion is a detriment to individual welfare. If the production of a commodity causes offence to individuals other than its producer and consumer, that is a negative externality. The economist’s skepticism about such laws is based on a suspicion that they result from lobbying by a well-organized group of “values voters” to obtain rents at the expense of a tolerant but unmobilized majority, and that the detriment to the latter is greater in magnitude than any moral satisfaction enjoyed by the former. However, it is also possible that a law grounded in morality in fact advances social welfare, especially where the moral standards in question are very widely held in society, such that apparently private conduct violating those standards in reality causes substantial negative externalities.

The *Butler* decision distinguishes between two types of legal moralism: an impermissible sort, based on a “particular conception of morality” and a permissible sort, grounded in a “fundamental conception of morality ... having its basis in *Charter* values.”<sup>155</sup> For the Court, what is important about the latter type of moralism is that “*Charter* values” occupy a position in the normative hierarchy of norms equal to that of the freedom of expression itself. By contrast, for the cost-benefit analyst, the salient difference between a “particular conception of morality” and the *Charter*-based morality which the Court finds latent within the “community standard of tolerance” is that the latter is widely shared.

### 3 *Hate propaganda*

Should the freedom of expression include the right to disseminate messages the purpose of which is to expose members of an identifiable group to hatred and vilification? When the Supreme Court has been confronted with restrictions on hate propaganda, its disposition of the free speech issues has rested on propositions including these:

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154. Kaplow & Shavell, *supra* note 56 at 21.

155. *Butler* (S.C.C.), *supra* note 125 at paras. 80-82.

- hate propaganda is covered by s. 2(b) because it “convey[s] a meaning”<sup>156</sup>; and
- in determining the value of hate propaganda for s. 1 purposes, it is significant that hate propaganda is “political” expression and therefore close to the “heart” of s. 2(b);<sup>157</sup> but
- the political character of the speech is offset by the fact that the policy advocated is at odds with “*Charter* values,” including non-discrimination and the equal human dignity of all members of Canadian society.<sup>158</sup>

The Supreme Court has upheld Criminal Code prohibitions against the willful promotion of hatred, on the theory that “[the sending of] a strong message of condemnation [of hate propaganda] will occasionally require use of the criminal law.”<sup>159</sup> The Court has also upheld legislation empowering an administrative agency to issue cease-and-desist orders against individuals who repeatedly communicate messages “likely to expose” members of identifiable groups to “contempt or hatred.”<sup>160</sup>

Laws against hate propaganda, unlike laws regulating commercial advertising or pornography, are directed at information or ideas communicated for the purpose of influencing opinion on matters of public policy. Laws against hate propaganda are directed, in other words, at “political expression.” This is significant because, from an economic perspective, an important rationale for the freedom of expression is to place under judicial supervision the power of governments to regulate political information flows.

Hate propaganda laws, therefore, engage s. 2(b). This is not, however, because hate propaganda “convey[s] a meaning,”<sup>161</sup> or because laws against hate propaganda “prohibit the expression of certain meanings,”<sup>162</sup> but because criminalizing the advocacy of particular policies, or authorizing an agency to suppress such advocacy, is the type of law that a government should not be free to enact without independent, i.e., judicial review.

To say that restrictions against hate propaganda engage the freedom of expression is not to say that they are, or should be unconstitutional. In assessing the legislation, judges should measure the propensity of the law to entrench the incumbent governors, and the other positive and negative social consequences of the legislation. It would be relevant to ask, as the majority and dissenting judges did in *Keegstra*, whether the legislative suppression of hate propaganda is, or is not, an effective means of preventing group-based vilification, and whether a lighter regulatory touch would produce the same, or better results. It would also be relevant to weigh the benefits of suppression, which include the harm, psychic and otherwise, which hate propaganda visits upon the members of the vilified group, against the loss of well-being suffered by the purveyors of hate speech if they are prevented from disseminating their message.

156. *Keegstra*, *supra* note 124 at para. 35. See also *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at para. 29 *Taylor*.

157. *Keegstra*, *supra* note 124 at para. 95. See also *Taylor*, *ibid.* at para. 73.

158. *Keegstra*, *ibid.* See also *Taylor*, *ibid.* at para. 74.

159. *Keegstra*, *ibid.* at para. 136.

160. *Taylor*, *supra* note 156.

161. *Keegstra*, *supra* note 124 at para. 35.

162. *Keegstra*, *ibid.* at para. 157.

The identification of the costs and benefits of suppressing hate propaganda is an empirical exercise,<sup>163</sup> the weighing of costs and benefits is an exercise in political judgment. Judges may reasonably conclude that laws against hate speech have no potential to reduce the accountability of governors, and therefore do not aggravate agency costs. They may also reasonably lend credence to the assessment of experts, including those working within government departments and agencies, of the social consequences of tolerating, versus suppressing, hate propaganda. In so doing, judges are not “deferring to the legislature.” Courts ought to exercise independent political judgment, but in doing so, they may rely, to the extent they deem appropriate, upon the opinions of experts.<sup>164</sup>

#### *4 Third-party election advertising*

The *Canada Elections Act* prohibits any person or entity, other than a candidate or a registered political party, from making advertising expenditures during a federal election campaign in excess of \$150,000 in aggregate nationwide, or \$3,000 in aggregate in any one electoral district.<sup>165</sup> The Supreme Court upheld these limits in *Harper v. Canada*.<sup>166</sup> The Court reasoned that Parliament was engaged in balancing an individual’s interest in making advertising expenditures against the countervailing interest in ensuring that candidates and parties were not drowned out by deep-pocketed third parties. Where the balance should be struck—for example, how high the spending limits should be—was a “political choice, the details of which are better left to Parliament.” Consequently, the Supreme Court adopted “a deferential approach” to assessing the spending limits under s. 1.<sup>167</sup> The Court concluded that, even though “one [could] conceive of less impairing limits,”<sup>168</sup> the spending limits enacted by Parliament should nevertheless be upheld.

From an economic perspective, two objections may be raised against the approach taken by the Supreme Court in *Harper*. First, a law regulating advertising expenditures during an election campaign is precisely the type of law the political branches should not be at liberty to enact without judicial supervision. The notion that the regulation of such expenditures is a “political choice” for the legislature

163. Sumner engages in a careful analysis of these costs and benefits in Sumner, *Hateful*, *supra* note 83.

164. An analogy may be made to corporate governance. Corporate directors are held to have discharged their oversight responsibility if they rely in good faith upon the opinions of experts: e.g., *Canada Business Corporations Act*, R.S. 1985, c. C-44, s. 123(5). This is not deference to authority (experts hold no legal mandate or mandate from the shareholders) but reliance on expertise.

165. *Canada Elections Act*, S.C. 2000, s.9, s. 350(1).

166. *Harper*, *supra* note 133.

167. *Harper*, *ibid.* at para. 88. Even the dissenting judges “accord[ed] Parliament a healthy measure of deference” (para. 39). See also para. 111, in which the majority quotes with approval from the dissent in the Court of Appeal: “[t]he Court should not substitute judicial opinion for legislative choice in the face of a genuine and reasonable attempt to balance the fundamental value of freedom of expression against the need for fairness in the electoral process.” More recently, in *R. v. Bryan*, [2007] S.C.J. No. 12, the Court repeated at para. 9 that “courts ought to take a natural attitude of deference toward Parliament when dealing with election laws” (para. 9).

168. *Harper*, *supra* note 133 at para. 118.

is antithetical to the principle underlying judicial review. For this same reason, a “deferential approach” is not appropriate.<sup>169</sup>

Second, the Supreme Court painted an incomplete picture of the values at stake. Perhaps because lawyers are accustomed to treating s. 1 analysis as a contest between individual and societal interests, the Court treated the case as presenting a trade-off between the interests of deep-pocketed individuals (and corporations) with the means to spend more than \$150,000 on electoral advertising, on the one hand, and “electoral fairness,” on the other hand.<sup>170</sup> Given this characterization of the choice, it is little wonder that the Court endorsed the legislature’s preference for the latter. However, it is not necessarily the case that only the wealthy have an interest in higher expenditure limits.

Third-party political advertising is a source of information. Citizens require information in order to discharge their political responsibilities (e.g., cast an informed vote). As has often been explained by economists of politics, citizens rationally have little incentive to acquire political information. It is a source of wonderment to economists that citizens even turn out to vote in significant numbers.<sup>171</sup> It is, in any event, unrealistic to expect citizens to expend much, if any effort to search for and process information about public policy. It needs to be delivered to them, ideally on a silver platter and in an easily digestible form.

The packaging of political information and ideas and their delivery to citizens in an accessible form are socially valuable undertakings. The conversion of a dense policy brief into a full-page newspaper advertisement, or even into a television commercial, facilitates the acquisition of political information by voters. To be sure, advertisers have a vested interest. But surely the idea that private incentives are sometimes useful in the production of social goods is neither novel nor implausible: “it is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.”<sup>172</sup>

The spending limits in the *Canada Elections Act* are very low, especially in comparison with the Government of Canada’s annual advertising expenditures of more than \$40-million.<sup>173</sup> Indeed, the federal government routinely spends several multiples of \$150,000 on a single advertising campaign.<sup>174</sup> In 2004, a single full-page newspaper advertisement in Canada cost \$425,000, well in excess of the limit.<sup>175</sup>

It becomes apparent that the limits are problematically low when it is considered that they apply not only to individuals, but also to corporations and other collective

169. For a similar view, see Y. Dawood, “Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context” (2006) 4 Int’l. J. Con. Law 269 at 292.

170. See, e.g., *Harper*, *supra* note 133 at para. 111.

171. See Posner, “Economic Perspective,” *supra* note 8 at 23 (“economists don’t understand why people vote”).

172. Smith, *supra* note 46 at vol. I, p. 13.

173. Federal government expenditures on advertising were as follows: \$111-million in 2002-2003; \$69.8-million in 2003-2004; \$49.5-million in 2004-2005; and \$41.3 million in 2005-2006. (Public Works and Government Services Canada, *Sustained Commitment: Annual Report on Government of Canada Advertising Activities 2005-06*, online: Government Advertising, <http://www.tpsgc-pwgsc.gc.ca/adv/files/raar05-06-e.pdf> at 6).

174. *Ibid.* at 7.

175. *Harper*, *supra* note 133 at para. 4.

speakers. The judges in the majority in *Harper* apparently assumed that the pooling of financial resources was a threat to political competition—they worried that “persons or groups . . . acting in concert” might be able to “flood the electoral discourse with their message.”<sup>176</sup> However, as conduits for the interests of individuals, organizations also help to overcome individuals’ natural disincentive to act collectively. A law which attaches the same expenditure limits to groups as to individuals in effect penalizes collective political action. It may therefore impede, rather than contributing to, political competition.

This is not to say that there is no case to be made for expenditure limits. I do not deny the possibility that disparities of economic resources might distort the reception of political ideas by the public and therein lies a reason for constraining them.<sup>177</sup> I also take no issue with the concern that unlimited donations and expenditures might corrupt the political process by creating an “arms race” in which, in order to be successful, campaigns become more and more costly. This in turn may create a situation where candidates become dependent upon financial contributions and supportive third-party expenditures, a dependence that translates into special-interest legislation favourable to donors, once a candidate becomes a legislator.<sup>178</sup>

The important point is that, even if we leave aside the protection of the interests of wealthy speakers for their own sake, and consider the structure of the political marketplace only from the point of view of the citizens at large, private spending funds the production and transmission of political information which the citizens require. For this reason, although the absence of any spending limits, or limits which are too high, may be detrimental to political competition, the same is true of spending limits which are too low. The Court does not appear to have given any significant weight to the latter consideration.

It has long been known that a risk associated with the Supreme Court’s extremely liberal interpretation of s. 2(b) was that the Court would find it necessary to adopt an excessively lenient approach to the justification of laws under s. 1. This fear is borne out by *Harper*, in which the Court explicitly defers to Parliament’s political judgment in a sphere—the regulation of political contests—where the very purpose of constitutional review is to substitute judicial decision-making for decision-making by the incumbent governors. In addition, by focusing on the speakers’ interest, rather than on the institutional function of speech in a democracy, the Court has overlooked the social interest in facilitating political speech by groups of individuals.

176. *Ibid.* at para. 72.

177. *Ibid.* That said, Kathleen Sullivan has problematized this ground for limiting political spending, arguing that

the concept of ‘distortion’ assumes a baseline of “undistorted” voter views and preferences. But whether any such thing exists exogenously to political campaigns is unclear. Popular attitudes about public policy do not exist in nature, but are formed largely in response to cues from political candidates and party leaders.

Kathleen M. Sullivan, “Political Money and Freedom of Speech” (1997) 30 U.C. Davis L. Rev. 663 at 677.

178. *McConnell v. FEC*, 540 U.S. 93 at 153 (2003) (discussing the “danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.”).

## Conclusion

In this article, I have sought to falsify the hypothesis that economics is incapable of supplying a rationale for the constitutional guarantee of freedom of expression. I have argued that, from an economic perspective, the guarantee may be understood as a device for the facilitation of political competition and the mitigation of the agency costs of government.

My argument has been a theoretical one. I have not argued that a constitutional guarantee of free speech is optimal in all societies, or even in any given society. I have also not taken a position on how the definition of “political expression” should be operationalized (What exactly is information relevant to the formation of opinion on public policy matters?), or on what the scope of the guarantee should be (Should it apply only to direct restrictions, or also to incidental restrictions?). Nor have I investigated the costs of judicial review—judges no doubt face informational, agency and rent-seeking costs of their own. The overall desirability, optimal design and ideal scope of a free speech guarantee in any given society would depend upon empirical questions beyond the scope of this article, especially as concerns the relative magnitude of judicial decision-making costs and the costs of unsupervised decision-making power by the ordinary political branches in that society.

In addition to articulating an affirmative economic justification for the free speech guarantee, I considered and rejected, or at least problematized, several other possible economic understandings of the guarantee. In particular, I took issue with the familiar arguments that free speech is tantamount to a subsidy to the production of a public good,<sup>179</sup> that it protects political minorities from the imposition of costs upon them by political majorities,<sup>180</sup> and that it is a pre-commitment device against majoritarian myopia.<sup>181</sup> A theory of the constitutional free speech guarantee must account for the structure and the content of the guarantee: why a constitutional constraint upon governments (structure), and why a freedom of expression (content)? The problem with the public goods account is that it fails to explain why a subsidy to expressive activities should take the form of a constitutional constraint upon governments. By contrast, while the minority protection and pre-commitment accounts can rationalize the structure of constitutional guarantees in general, an adequate explanation is lacking as to why communicative acts, in particular, should be placed beyond the reach of political majorities.

My article also criticized the established judicial approach to s. 2(b) of the *Charter*. This criticism might seem surprising a priori, given the Supreme Court’s overt use of cost-benefit analysis in evaluating whether speech-limiting laws are justified under s. 1 of the *Charter*. However, the understanding of free speech implicit in the Court’s interpretation of s. 2(b), namely that any regulation of communicative activities is presumptively problematic, is not one which economic analysis can endorse.

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179. See Section I-D, above.

180. See Section II-C-3, above.

181. See Section II-C-4, above.

In emphasizing the role of the freedom of expression in mitigating the agency costs of government, my article has offered an unromantic<sup>182</sup> theory of the constitutional guarantee. In particular, the importance of expression to individual self-fulfillment and its contribution to the exercise of individual autonomy have gone all but unmentioned, except as ingredients of the Supreme Court's approach, which this article has criticized. Yet, this is not because economists underappreciate autonomy. To the contrary, two hallmarks of the economic approach, as distinguished from consequentialism more generally, are its focus on individuals' choices, and its understanding of an individual's welfare as a subjective concept, about which the best information comes from the individual himself or herself—the observation of an individual's choices is typically considered more revealing of what contributes to his or her welfare than, for example, values ascribed to the individual by a policy analyst.

Nevertheless, economics provides no support for the notion that the fact that an act is undertaken by a person in the exercise of her "autonomy" is a licence for that person to set back another individual's welfare. This applies to expressive acts as it does to all other acts that produce external consequences. Nor is the fact that a particular commodity (say, information or ideas) is an ingredient of autonomy a sufficient reason for placing the regulation of its production and consumption under the control of judges. There might be good reasons to require each of us to suffer the negative consequences of other individuals' self-fulfillment,<sup>183</sup> or to place the information marketplace as a whole (and not only that part which relates to the political marketplace) under judicial protection. However, any such reasons do not appear to sound in economics; they require other frameworks of analysis and evaluation.<sup>184</sup>

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182. See Farber, *supra* note 8 ("free speech without romance").

183. I am conscious of the fact that such a claim may be essential to an account of, for instance, artistic freedom.

184. My investigation of the possibilities of an economic approach to the free speech guarantee should not be understood as denying the existence or soundness of other approaches, including those based on a deontological theory of rights.

