Reconceiving Rights as Relationship
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RECONCEIVING RIGHTS AS RELATIONSHIP

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The author proposes a new understanding of rights as relationship and constitutionalism as a dialogue of democratic accountability. She takes the position that all rights and the concept of rights should be viewed in terms of relationship and that this view provides a better way of resolving rights problems. It is suggested that the focus of decisions regarding rights should be on the kind of relationship we want to foster and the different concepts and institutions that will contribute to that end. In the proposed model, protected rights would be derived from inquiries into what is necessary to create the relationships needed for a free and democratic society. Using this framework, the author argues against constitutionalizing property and concludes by discussing the Alternative Social Charter as an outline of a model of constitutionalism for democratic accountability.

L’auteure propose une nouvelle façon de concevoir les droits en terme de rapports, et le constitutionnalisme comme une forme de dialogue ou d’exercice de responsabilité démocratique. Selon elle, tous les droits et concepts de droit devraient être perçus en terme de rapports, cette perspective étant plus favorable à la résolution des problèmes juridiques. Ainsi, les décisions relatives aux droits devraient être axées sur le type de rapports qui veulent être promus et sur les différents concepts et institutions qui permettront de réaliser cet objectif. Dans le modèle proposé, l’identification des droits protégés découlerait de recherches visant à déterminer ce qu’il faut pour créer les rapports dignes d’une société libre et démocratique. Utilisant ce cadre de référence, l’auteure se prononce contre l’enchaînement du droit à la propriété et conclut par une discussion sur l’opportunité d’adopter une charte sociale parallèle en tant que modèle de constitutionnalisme visant à promouvoir la responsabilité démocratique.

I. Introduction

In adopting the Charter of Right and Freedoms, Canada chose to make "rights" a central and permanent part of its political discourse just when the meaning and legitimacy of judicial review and, more generally, of "rights talk," was increasingly contested among legal scholars. Of course, one might see these contests as an arcane scholarly preoccupation, since the invocation of rights can be heard in North America in every sphere

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from self-help groups to environmentalists and is a growing practice world wide. But I think there are problems with rights that we ought to take seriously. In this essay, I identify a set of problems with how we are to understand the meaning of "rights" and to institutionalize those understandings. The problems fall into two broad categories: justifying the constitutionalization of rights and the critiques of "rights talk" in general. In response to each problem, I will suggest how a central tenet of feminist theory, its focus on relationship, directs us toward solutions. My primary focus is on the constitutional sphere, for which I propose a conception of constitutionalism as a "dialogue of democratic accountability" that provides a better model than rights as "trumps."¹ I will not enter the debate about whether it was a good idea to adopt a charter at all, but I will suggest that the structure of the Canadian Charter lends itself to a constructive approach to rights as relationship. In closing, I will try to show how this framework helps us to better understand a set of specific constitutional problems.

II. Justifying Constitutional Rights

A. Rights as Collective Choices

Let us begin with the powerful American conception of constitutional rights so that we can see the need for an alternative paradigm. The notion that there are certain basic rights that no government, no matter how democratic, should be able to violate is a basic idea behind the U.S. Constitution and its institution of judicial review.² But the simple, compelling clarity of this idea is difficult to sustain in modern times. The

² As I have argued elsewhere, the Constitution of 1787 did not focus primarily on rights as limits in the sense we now understand as the purpose and legitimacy of judicial review. The Constitution of 1787 was designed to structure the institutions so as to ensure that the sort of men who knew how to govern, including how to respect rights, would be the ones in office. See J. Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy (Chicago: University of Chicago Press, 1990).
Framers of the U.S. Constitution did not worry much about whether there were such basic rights and what they were. The Framers were even sure that although there was no consensus on what constituted the violation of rights such as property, they knew what property rights really were and what kind of legislation would violate them. Their confidence was the foundation for their vision of constitutionalism. Today, however, we have before us 200 years of the vicissitudes of rights jurisprudence in the U.S.: for example, neither property nor equality look today like they did in 1787. It is hard to believe in timeless values with immutable content. We have disputes about rights at every level: whether natural rights are the source of our legal rights, what would count as basic among a list of rights, and whether there is any value in using the term "rights" at all. My own view is that it is useful to use the term, and in any case we are institutionally committed to doing so. But if we are to invoke rights to constrain democratic outcomes, we must do so in a way that is true to the essentially contested and shifting meaning of rights.

We need to confront the history of rights and acknowledge the depth of the changes that have taken place in both popular and legal understandings of rights. Consider, for example, our understanding of equality. It was not so long ago that great restrictions on both the legal rights and the actual opportunities for women were widely (though I am sure not unanimously) believed to be consistent with a basic commitment to equality for all. And the changes do not exist only at the level of big general terms like equality. Consider the changes in common law conceptions of contract between the mid-nineteenth century and today. At the popular level, we have come to expect constraints on individual contracts such as minimum wage legislation, and in the courts we continue to work out concepts of unjustifiable enrichment and unconscionability in ways that would have been hard to imagine at the turn of the century. These shifts are not just a matter of past history of conflicts, now long since settled. A workable conception of rights needs to take account of the depth of the ongoing disagreement in Canadian society about, for example, the meaning of equality and how it is to fit with our contemporary— and contested— understanding of the market economy and its legal foundations, property and contract.

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Once we acknowledge the mutability of basic values, the problem of protecting them from democratic abuse is transformed. We do not have to abandon the basic insight that democracy can threaten individual rights, but we need to reconsider all of those terms: democracy, individual rights, and the nature of the tension between them. First we must see that the problem of defending individual rights is inseparable from the problem of defining them. Even if there are deep, immutable truths underlying the shifting perceptions of the terms that capture those truths, the ongoing problem of defining the terms remains. And then the relation to democracy becomes more complex, for the definition of rights, as well as the potentially threatening legislation, is the product of shifting collective choice.3

We find that the neat characterization of constitutionalism as balancing a tension between democracy and individual rights is not adequate for the actual problem. As a society that gives voice and effect to its collective choices and values through government institutions, both the courts and the legislatures4 must be seen as expressing those choices and values. Courts have traditionally expressed those shifting collective choices in terms of rights, but we must recognize rights to be just that: terms for capturing and giving effect to what judges perceive to be the values and choices that "society" has embedded in the "law." (Here I am being deliberately vague as to how values come to be seen to be basic to the legal system, and which components of "society" end up affecting the choice of values.) Consider, for example, the choices between the right to use one's property as one wishes and the competing values of the right to quiet enjoyment. Judges make those choices, whether they think of the choice as dictated by the basic values of the common law, or as reflecting the choices already made by "society at large" as expressed through custom and common acceptance, or as choices guided by the best interest of all. Other examples are judicial decisions about the conflicts that arise over the importance of environmental health, or the "rights" of tenants to heat and safety.

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3 This paragraph is drawn from *ibid.* c. 6.
4 To leave aside the complexities of cabinet and administrative bodies.

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My first point, then, in seeing the hidden complexity of "rights vs. democracy" is that rights are as much collective choices as laws passed by the legislature. And if rights no longer look so distinct from democratic outcomes, democracy also blurs into rights, for, of course, democracy is not merely a matter of collective choice, but the expression of "rights" to an equal voice in the determination of those collective choices.

The problem of constitutionalism thus can no longer simply be protecting rights from democracy. The more complex problem can be posed in various ways, with either rights or collective choice on both sides of the "balance": why should some rights (such as freedom of conscience) limit other rights, namely the rights to have collective choices made democratically? Or, why do we think that some collective choices, that is those we constitutionalize as rights, should limit other collective choices, that is the outcomes of ordinary democratic processes? Since the idea of a "limit" is itself problematic, I think a more helpful way to put it is this: we need a new way of understanding the source and content of the values against which we measure democratic outcomes. Later, I will offer an example of how a conception of rights as relationship helps in this process,

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5 One workshop participant suggested that this formulation rested on a mistake: confusing the question of limits on democracy with the process of determining or enforcing those limits. To the participant, the content of the rights that should serve as limits is given by a theory of rights, derived. I assume, from human nature or the nature of agency or freedom. My point, however, is that we cannot rely on such theoretically derived conceptions to justify limits on democracy. At the least, as I noted in the text above, the legal meaning of such rights must be determined, and the legitimacy of the process of that determination is inseparable from the legitimacy of treating rights as limits. And, in my terms, that process will inevitably be a collective determination and thus choice. More broadly, the historical shifts in meaning and the diversity of constitutionalized rights in different democracies make it difficult to believe that we can rely on a transcendent, universal, immutable source for the content of rights.

In B.A. Ackerman, *We, the People: Foundations* (Cambridge: Harvard University Press, 1991), Bruce Ackerman also has a compelling argument that the American Constitution is structured in a way that treats "the people" as the source of the meaning of rights rather than transcendent meaning. Here he contrasts the American Constitution with the German Constitution. In this regard, the Canadian Constitution is like the American.

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by looking at the question of why property should not be constitutionalized. First, however, I want to look more closely at some of the prevalent objections to constitutional rights as violations of democratic principles.

B. Beyond the "Pure Democracy" Critique

The pure democracy critique is primarily aimed at rights as judicially enforced limits on democratic outcomes (rather than "rights talk" more generally, which might include common law rights or statutory rights). The argument comes in two forms. One rejects any judicial oversight of democratic bodies. The underlying claim can be that, in principle, there are no rights claims that can legitimately stand against democratic outcomes, or that there is no justifiable way of enforcing such claims, or that, in practice, the best way of ensuring rights in the long run is through democratic procedures, not through efforts to circumvent them. The more common form of the argument acknowledges that even if democracy is accepted as the sole or supreme value of a political system, there may be times when the courts can play a useful role in making sure the procedural conditions of democracy are met. John Hart Ely in the U.S. and to some extent Patrick Monahan in Canada defend judicial review in these terms, and each claims that the Constitution in his country authorizes judicial review primarily or exclusively for democracy enhancing purposes.

My view is that democracy has never been the sole or even primary value of either the U.S. or Canada, and it could never be the sole basis for a good society. There have been and always will be other values that are not derivative from democracy. Autonomy is one. The development of our spiritual nature is another, captured by notions of freedom of

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7 Monahan draws on Ely, but thinks Ely is wrong descriptively about the U.S. P. Monahan, Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada (Toronto: Carswell/Methuen, 1987).
conscience and religion. And of course these values can be threatened by democratic majorities wielding the power of the state. If one accepts that there are values we cherish for reasons other than their relevance to the functioning of democracy and that these values may need protection from democratic outcomes, then neither form of the pure democracy critique of rights is persuasive. However, as I have already suggested, the conventional formulations of rights as limits to democracy are not adequate. Fortunately, I think it is possible to do a better job of capturing the multiple values we care about. If we look more deeply at a value like autonomy, we can begin to see that the value itself is best understood in terms of relationship, and once we see that, we can begin to rethink what it means conceptually and institutionally for autonomy to serve as a measure of democratic outcomes.

First let me contrast my conception of autonomy with the kind of vision that I think underlies the American conception of rights as limits. (I also think that this conception has deep roots in Anglo-American liberalism, more broadly.) There the idea is that rights are barriers that protect the individual from intrusion by other individuals or by the state. Rights define boundaries others cannot cross and it is those boundaries, enforced by the law, that ensure individual freedom and autonomy. This image of rights fits well with the idea that the essence of autonomy is

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8 Of course it is possible to work back from democracy, asking what all the preconditions are for democratic participation, and from that process generate a very wide range of values, including autonomy. But I think such a process distorts our understanding of the genuine diversity of values that in fact are necessary for an optimal society or for the possibility of pursuing a full and good life. It has always struck me as particularly implausible to believe that the value of freedom of religion could be derived from even the most all encompassing conception of the conditions for democracy. Here I think the distortion involved in such derivation is obvious.

9 Unless one wants to make the strong claim that even though in principle it would be legitimate to protect those values, there is no institutional mechanism of doing so that could be legitimate.

10 I have developed this conception in more detail in J. Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities" (1989) 1 Yale Journal of Law and Feminism 7.

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independence, which thus requires protection and separation from others. My argument is that this is a deeply misguided view of autonomy. What makes autonomy possible is not separation, but relationship.

This approach shifts the focus from protection against others to structuring relationships so that they foster autonomy. Some of the most basic presuppositions about autonomy shift: dependence is no longer the antithesis of autonomy but a precondition in the relationships — between parent and child, student and teacher, state and citizen — which provide the security, education, nurturing, and support that make the development of autonomy possible. Further, autonomy is not a static quality that is simply achieved one day. It is a capacity that requires ongoing relationships that help it flourish; it can wither or thrive throughout one's adult life. Interdependence becomes the central fact of political life, not an issue to be shunted to the periphery in the basic question of how to ensure individual autonomy in the inevitable face of collective power. The human interactions to be governed are not seen primarily in terms of the clashing of rights and interests, but in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy. The whole conception of the relation between the individual and the collective shifts: we recognize that the collective is a source of autonomy as well as a threat to it.

The constitutional protection of autonomy is then no longer an effort to carve out a sphere into which the collective cannot intrude, but a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined.\(^{11}\) The first thing to note in this reformulation is that it becomes clear that the relation between autonomy and democracy is not simply one of threat and tension — just as the relation between autonomy and the collective is not simply a matter of threat. Autonomy means literally self-governance and thus requires the capacity to participate in collective as well as individual governance. In addition, the long standing argument in favour of

\(^{11}\) Note that the sources of collective power might include large scale corporations, but here I will just focus on the government.

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democracy is that it is the best way of organizing collective power so that it will foster the well-being, which must include the autonomy, of all. So autonomy demands democracy, as both a component and a means — even though democracy can threaten autonomy. (And, of course, the ideals of democracy require autonomous citizens so that each expresses her own rather than another’s judgements, values and interests.)

With this relationship-focused starting point, how do we move beyond "rights as limits to democratic outcomes"? We shift our focus from limits, barriers and boundaries to a dialogue of democratic accountability — which does not make the mistake of treating democracy as the sole value. We require two things for this dialogue. We need a mechanism, an institutionalized process, of articulating basic values — particularly those that are not derivative from democracy — which is itself consistent with democracy, and we need ways of continually asking whether our institutions of democratic decision-making are generating outcomes consistent with those values, or, to stick with the autonomy example, of asking whether those outcomes foster the structures of social relations that make the development of autonomy possible. This mechanism for holding governments accountable to basic values should take the form of institutional dialogue that reflects and respects the democratic source and shifting content of those values. (Of course, judicial review has for a long time in the U.S. and recently in Canada been the primary vehicle for the articulation of values against which democratic outcomes can be measured. I will return at the end to a proposal for such a mechanism that is significantly different from judicial review.)

The example of autonomy as relation already helps solve one of the puzzles of justifying rights as limits: how to justify their supremacy over democracy when rights themselves are shifting values. First we no longer have, and thus need no longer justify, simple supremacy, but a more complex structure of democratic accountability to basic values. Second, the shifting quality of those basic values makes more sense when our focus is on the structure of relations that fosters those values. It is not at all surprising that what it takes to foster autonomy, or what is likely to undermine it, in an industrialized corporate economy with an active regulatory-welfare state is quite different from the relationships that would

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have had those effects in mid-nineteenth century Canada. These may be
different still in Eastern Europe or South Africa. A focus on relationship
automatically turns our attention to context, and makes sense of the
commonly held beliefs that there are some basic human values and that
how we articulate and foster those values varies tremendously over time
and place.

In this vision, rights do not "trump" democratic outcomes, and so they
and the institutions that protect them do not have to bear a weight of
justification that is impossible to muster. Rather when we begin with a
focus on the relationships that constitute and make possible the basic
values, which we use rights language to capture, then we have a better
understanding not only of rights, but of how they relate to another set of
values, for which we use the short hand "democracy." The mechanisms
for institutionalizing both sets of values must aim at maintaining an
ongoing dialogue that recognizes the ways democracy and autonomy are
both linked together as values requiring each other and potentially in
conflict with one another.

It will probably have already become apparent to many of you that the
Canadian Charter is much better suited to implementing such a dialogue
than the American system of judicial review, for which, at least formally,
"rights as trumps" is an accurate metaphor. The Charter's "override"
provision in s. 33 may be seen as an effort to create a dialogue about the
meaning of rights that would take place in public debate, the legislature,
and the courts. Section 1 invites a dialogue internal to the courts, or to
any body considering the constitutionality of a law, by opening the Charter
with an assertion that rights are not to be seen as absolute. Legislatures

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12 Section 33, the so-called override provision or notwithstanding clause, allows
legislatures to expressly state that a piece of legislation shall operate
notwithstanding provisions in s. 2 (fundamental freedoms of conscience,
expression, assembly and association) or ss. 7-15 ("legal rights" and "equality
rights."). Such legislation has effect for 5 years and may then be reenacted.

13 Section 1 reads: "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."

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are to be held accountable to the basic rights outlined in the *Charter*, but that accountability must be determined in light of the (implicitly shifting) needs of a free and democratic society.

Perhaps some readers have had occasion to try to explain s. 1 and s. 33 to incredulous Americans—who usually conclude that Canadians simply still do not *really* have constitutional rights. The American vision of rights as trump-like limits is so central to their understanding of constitutionalism that they have a hard time imagining that "rights" could mean anything else. This it true despite the fact that the increasingly obvious problems with this notion drive American scholars to produce thousands of pages each year in efforts to explain and defend it. Rights as trumps is a catchy phrase and an apparently graspable, even appealing, concept, but it cannot capture the complex relations between the multiple values we actually care about. I think "dialogue of democratic accountability," though not quite as pithy, is truer both to the best aspirations of constitutionalism and to the structure of the *Charter*.

III. Critiques of "Rights Talk"

Let me turn now to some of the critiques of "rights talk" in general: 1) "rights" are undesirably individualistic; 2) rights obfuscate the real political issues; 3) rights serve to alienate and distance people from one another. I will not be trying to present these critiques in detail, but merely to sketch them to show how a focus on relationship helps construct a response.

I will begin with the claim that rights talk is hopelessly individualistic, which my argument above has already begun to address. Of course, I am not going to try here to summarize the ongoing communitarian versus liberal individualism debate—which, in any case, is only one form of the critique of individualism.14 Let me simply note the core of the critique that I find persuasive (and have participated in myself) and then suggest how rights as relationship helps to meet it. The charge that *Charter* rights

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14 An excellent critique and historical account not widely known among legal and political science academics is C. Keller, *From a Broken Web: Separation, Sexism and Self* (Boston: Beacon Press, 1986).

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express individualistic values will be familiar to many — for example in arguments about why they should not apply to the collective decisions of First Nations. There are good reasons to believe that the Charter draws on a powerful legacy of liberal political thought in which rights are associated with a highly individualistic conception of humanity ("mankind" historically, and there are persuasive arguments that link this gender specificity with individualism\textsuperscript{15} — but I cannot go into that here). Indeed, the "rights bearing individual" may be said to be the basic subject of liberal political thought. Now, to compress many long, complicated, and different arguments into a sentence or two, what is wrong with this individualism is that it fails to account for the ways in which our essential humanity is neither possible nor comprehensible without the network of relationships of which it is a part. It is not just that people live in groups and have to interact with each other — after all liberal rights theory is all about specifying the entitlements of people when they come in conflict with one another. The anti-individualism theorists claim that we are literally constituted by the relationships of which we are a part.\textsuperscript{16} Virtually all these theories also recognize some significant degree of choice and control over how these relationships shape us. But even our capacity to exercise this choice can and should be understood as shaped by our relationships — hence my argument about the centrality of relationship for autonomy. Most conventional liberal rights theories, by contrast, do not make relationship central to their understanding of the human subject. Mediating conflict is the focus, not mutual self-creation and sustenance. The selves to be protected by rights are seen as essentially separate and not creatures whose interests, needs, and capacities routinely intertwine. Thus one of the reasons women have always fit so poorly into the framework of liberal theory is that it becomes obviously

\textsuperscript{15} Ibid.

\textsuperscript{16} For example, C. Taylor, Philosophy and the Human Sciences (Cambridge: Cambridge University Press, 1985), particularly c. 7, "Atomism"; C. Keller, ibid.; M.J. Sandel, Liberalism and the Limits of Justice (Cambridge: Cambridge University Press, 1982); I.M. Young, "Impartiality and the Civic Public" and S. Benhabib, "The Generalized and the Concrete Other" in S. Benhabib & D. Cornell, eds., Feminism as Critique (Minneapolis: University of Minnesota Press, 1987).

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awkward to think of women’s relation to their children as essentially one of competing interests to be mediated by rights. So, it is not that I think the concerns about the individualism associated with rights are unjustified. Rather, it is my hope that the notion of rights can be rescued from its historical association with individualistic theory and practice. Human beings are both essentially individual and essentially social creatures. The liberal tradition has been not so much wrong as seriously and dangerously one-sided in its emphasis.

What I have tried to do elsewhere and just alluded to here, is to take the concept of autonomy and identify its core elements — which of course are connected to our sense of ourselves as distinct individuals — and to see how these elements themselves are best understood as developing in the context of relationship. Here I have used autonomy as an example of a value that is not derivative from democracy and to which democratic decision making should be held accountable. Now I want to suggest that all rights, the very concept of rights, is best understood in terms of relationship. Again, I will be quickly condensing a much longer argument so that we can move on to see how this conception of rights meets the critiques and helps us with concrete problems.

In brief, what rights in fact do and have always done is construct relationships — of power, of responsibility, of trust, of obligation. This is as true of the law of property and contract as it is of areas like family law in which the law obviously structures relationships. For example, as lawyers know, property rights are not primarily about things, but about people’s relation to each other as they affect and are affected by things.¹⁷ The rights that the law enforces stipulate limits on what we can do with things depending on how our action affects others (for example, nuisance), when we can withhold access to things from others and how we can use that power to withhold to get them to do what we want (we are now into the realm of contract), and what responsibilities we have with respect to

¹⁷ For a discussion of property rights from a relational perspective see J. Singer, "The Reliance Interest in Property" (1987-88) 40 Stanford Law Review 577. My conversations with Joe Singer were also helpful in the early stages of working on this essay.

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others' well being (for example, tort law and landlord-tenant law). The law also defines fiduciary relationships. It defines particular relationships of trust and the responsibilities they entail. In the realm of contract, the law takes account of relationships of unequal bargaining power, and it defines certain parameters of employment and of landlord-tenant relationships. In deciding on the importance to give instances of reliance, judges must make choices about the patterns of responsibility and trust the law will foster.

I run through this list only to make it easier to think about my claim that in defining and enforcing rights, the law routinely structures and sometimes self-consciously takes account of relationship. What I propose is that this reality of relationship in rights becomes the central focus of the concept itself, and thus of all discussion of what should be treated as rights, how they should be enforced, and how they should be interpreted. It is really a matter of bringing to the foreground of our attention what has always been the background reality. My claim is that we will do a better job of making all these difficult decisions involving rights if we focus on the kind of relationships that we actually want to foster and how different concepts and institutions will best contribute to that fostering. I hope my closing examples will give a better sense of this.

My point here is that once rights are conceptualized in terms of the relationships they structure, the problem of individualism is at least radically transformed. There will almost certainly still be people who want the kind of relationships of power and limited responsibility that the individualistic liberal rights tradition promotes and justifies. But at least the debate will take place in terms of why we think some patterns of human relationships are better than others and what sort of "rights" will foster them.

Suppose we have some initial agreement about what we think optimal human autonomy would look like. We could then proceed beyond conclusory claims that autonomy requires individual rights to a close look at what really fosters the human capacity for autonomy and in what ways the relationships involved can be promoted and protected by legally enforced "rights." For example, I have looked at how administrative law
can be understood as protecting rights in this sense and how we can structure our provision of public services so that they foster autonomy-enhancing relationships. I think all of the traditionally cherished individual rights such as freedom of conscience, of speech, of "life, liberty and security of the person" can most constructively be understood in these terms. It is extremely unlikely that any of them would, under this form of analysis, appear unnecessary. They would thus not disappear. They would not be swamped or overturned by the claims of community. Indeed in constitutional terms their function would still be to stand as an independent measure of the legitimacy of collective decisions (though the determination of that legitimacy would be a process of dialogue, not a one shot, trump-like decision.) However, the specific meaning of each right would probably be transformed as people deliberated on the patterns of relationship that they wanted to characterize their society.

Rights debated in terms of relationship seem to me to overcome most of the problems of individualism without destroying what is valuable in that tradition. Of course, when dealing with such an old and powerful tradition, one has to be ever on guard against the conventional meanings of long standing terms insinuating themselves back into the conversation. But since I think we do not have the option to simply drop the term "rights," and because I think it can be used constructively, that vigilance is the price we will have to pay.

Finally, I will just offer brief suggestions about how this approach can meet the diverse body of criticism (often associated with critical legal studies) that I have lumped into my second category of objection to "rights talk" as obfuscating. One of the most important parts of this set of critiques is the objection that when "rights" are central to political debate, they misdirect political energies because they obscure rather than clarify what is at issue, what people are really after. As with the objection of individualism, this critique points to serious problems, but those problems are transformed when we understand rights as structuring relationship.

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I think it is in fact the case that many rights claims, such as "it's my property" have a conclusory quality. They are meant to end, not to open up debate. As is probably clear by now, I am sympathetic to the idea that whether the issue is a plant-closing, or an environmentally hazardous development project, or a person who wants to rent a room in her home only to people with whom she feels comfortable, simply invoking property rights does not help, and in some circumstances can hurt — by treating as settled what should be debated. That is only the case, however, if the meaning of property rights is taken as self-evident, or if the right questions are not asked in determining their meaning.

If we approach property rights as one of the most important vehicles for structuring relations of power in our society and as a means of expressing the relations of responsibility we want to encourage, we will start off the debate in a useful way. For example, if we ask whether ownership of a factory should entail some responsibility to those it employs and how to balance that responsibility with the freedom to use one’s property as one wishes (a balance analogous to that in traditional nuisance law), then we can intelligently pursue the inevitable process of defining and redefining property. We can ask what relationships of power, responsibility, trust, and commitment we want the terms of ownership of productive property to foster, and we can also ask whether those relationships will foster the autonomy, creativity, or initiative that we value. By contrast, to say that owners can shut down a plant whenever and however they want because it is their property, is either to assert a tautology (property means the owner has this power) or an historical claim (property has in the past had this meaning). The historical claim does, of course, have special relevance in law, but it can only be the beginning not the end of the inquiry into what property should mean. The focus on relationship will help to give proper weight and context to the historical claims and to expose the tautological ones.

One common form of the allegation of obfuscation is the objection that rights are "reified." They appear as fixed entities, whose meaning is simply taken as a given. This thing-like quality of rights prevents the recognition of the ways in which rights are collective choices which require evaluation. Descriptively, I think this is a valid concern about the
dominant traditions of rights. But, as is no doubt already clear, I do not think it is inevitable. I think that if we always remember that what rights do is structure relationships, and that we interpret them in that light, and make decisions about what ought to be called rights in that light, then we will not only loosen up the existing reification, but our new conceptions of rights as relationship are not as likely to once again harden into reified images that dispel rather than invite inquiry.

Finally, there is the important critique that rights are alienating and distancing, that they express and create barriers between people.19 Rights have this distancing effect in part because, as they function in our current discourse, they help us avoid seeing some of the relationships of which we are in fact a part. For example, when we see homeless people on the street, we do not think about the fact that it is in part our regime of property rights that renders them homeless. We do not bring to consciousness what we in fact take for granted: our sense of our property rights in our homes permits us to exclude the homeless persons. Indeed, our sense that we have not done anything wrong, that we have not violated the homeless persons’ rights, helps us to distance ourselves from their plight. The dominant conception of rights helps us to feel that we are not responsible.

If we come to focus on the relationships that our rights structure, we will see the connection between our power to exclude and the homeless persons’ plight. We might still decide to maintain that right of exclusion, but the decision would be made in full consciousness of the pattern of relationships it helps to shape. And I think we are likely to experience our responsibilities differently as we recognize that our "private rights" always have social consequences.20

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20 This seems an appropriate place for a note of response to the allegation that my theory of "rights as relationship" is consequentialist, and that I must therefore enter into the debate over deontological vs. consequentialist theories of rights. A series of questions and the Legal Theory workshop at Columbia helped me to
Thus my response to the critique of distancing is that rights conceived as relationship will not foster the same distancing that our current conception does. Rights could, however, still serve the protective function that thoughtful advocates of rights-based distance, like Patricia Williams, are concerned about. Not only does my vision of rights as relationship have equal respect at its core, but optimal structures of human relations will always provide both choice about entering relationships and space for the choice to withdraw.

These, then, are the outlines of my responses to the critiques of "rights-talk" as individualistic, obfuscating, and alienating. Before going on to my constitutional examples, let me reiterate what is novel and what is not about my approach. It is important to my argument to claim that thinking about rights as relationship offers a new and better way of resolving a set of problems about rights. But part of what I think makes the argument compelling is that it is not in fact a radical departure from what is currently entailed in legal decision making, including judicial decision-making. As my earlier examples were intended to show, the novelty lies only in bringing into focus what has always been in the background.

see why this debate is peripheral to my concerns here. The division between consequentialist and deontological theories is premised on the possibility of a useful conception of human beings whose nature can be understood in abstraction from any of the relations of which they are a part. Once one rejects this premise, the sharp distinction between rights defined on the basis of human nature vs. rights defined in terms of the desirability of the relationships they foster simply dissolves. Since there is no free standing human nature comprehensible in abstraction from all relationship from which one could derive a theory of rights, the focus on relationship does not constitute a failure to respect the essential claims of humanness. The focus on relationship is a focus on the nature of humanness, not a willingness to sacrifice it to the collective.


There are still some unresolved problems here. We need to figure out both the scope for withdrawal that is optimal and the ways of structuring choice about entering relationships. These are complicated problems once one starts from a framework that treats relationships as primary and in some ways given rather than chosen.

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It is important to recognize the existing role of relationship in rights in order to see that what I am proposing can happen immediately, without the radical restructuring of our legal system. It is also important to meet the objection that what I am calling for dangerously expands—or creates—a policy-making role for judges. My argument is that recognizing rights as relationship only brings to consciousness, and thus open to considered reflection and debate, what already exists. Here I join a growing chorus of voices that urge that judges will do a better job if they are self-conscious about what they are doing, even if that new self-consciousness seems very demanding.23

IV. Applying "Rights as Relationship"

I turn now finally to my sketches of how my approach helps with some specific problems. I begin with the question of whether property belongs in the Charter. This question has the virtue of making more concrete the abstract question I began with of how we are to understand the idea of constitutionalizing rights. Once we acknowledge that constitutional rights are collective choices, we not only make the simple "democracy vs. rights" formulation untenable, we make it a great deal more difficult (or we make it more obvious why it is difficult) to explain why some things we call rights (like freedom of speech or conscience) should be constitutionalized in my dialogue of democratic accountability and others, like property, should not.


The strongest argument that I have heard against this position has come from some of my students, in particular black students. The argument is that even if judges are always engaged in what they would call policy making, if they were conscious of it, they should remain unconscious because that constrains them more. Contrary to my claim that we can move forward in the direction I advocate in the absence of radical reform, they say given the current composition of the judiciary, they want the judges to feel as constrained as possible about innovation. They seem to suggest that we should wait until we have a vastly more representative judiciary before we advocate a shift in their understanding of their job.

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My idea of constitutionalism is to make democracy accountable to basic values, to have mechanisms of ongoing dialogue about whether the collective choices people make through their democratic assemblies are consistent with their deepest values. Now there is a certain irony to this idea of "deepest values" as what constitutionalism protects. When we choose to constitutionalize a value, to treat it as a constitutional right, we are in effect saying both that there is a deeply shared consensus about the importance of that value and that we think that value is at risk, that the same people who value it are likely to violate it through their ordinary political processes. Now, in fact, I think this ironic duality makes sense. There are lots of values like that. Once we recognize the duality, we know that it is not a sufficient argument against constitutionalizing a right either to say that it is contested so it does not belong in a Charter of Rights and Freedoms or to say that it is so well accepted that it does not need to be in the Charter. Of course, those are both arguments one might make about property.

I think that in Canada, and probably more generally in constitutional democracies, the fundamental premise of constitutional rights is equality. Constitutional rights define the entitlements that all members of society must have, the basic shared terms that will make it possible not just to flourish as individuals, but to relate to each other on equal terms. (Which is not to say that the values we protect constitutionally — autonomy, privacy, liberty, security — are themselves identical to or derivative from equality.) Now this sounds at first perilously close to the basic notion of liberal theory: that people are to be conceived of as rights-bearing individuals, who are equal precisely in their role as rights-bearers, abstracted from any of the concrete particulars, such as gender, age, class, abilities, which render them unequal. This conception has been devastatingly criticized by feminist scholars such as Iris Young. My notion is subtly, but I think crucially, different. The question of equality (to be captured in constitutional rights) is the meaning of equal moral worth given the reality that in almost every conceivable concrete way we

24 See I.M. Young, "Impartiality and the Civic Public" in S. Benhabib & D. Cornell, eds., supra note 16 at 56.
are not equal, but vastly different, and vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about equal rights, but to ask how we can structure relations of equality among people with many different concrete inequalities.

The law will in large part determine (or give effect to choices about) which differences matter and in what ways: which will be the source of advantage, power, privilege and which the source of disadvantage, powerlessness, and subordination. One might say that whatever the patterns of privilege and disadvantage the ordinary political and legal processes may generate, the purpose of equal constitutional rights is to structure relations so that people treat each other with a basic respect, acknowledge and foster each other’s dignity, even as they acknowledge and respect differences. Constitutional rights define indicia of respect and requirements for dignity—including rights of participation. Constitutional rights define basic ways we must treat each other as equals as we make our collective choices.

Property fits very awkwardly here. It is, at least in the sorts of market economies we are familiar with, the primary source of inequality. Of course, formally, everyone who has property has the same rights with respect to it. Nevertheless, property is the primary vehicle for the allocation of power from state to citizen, and in market economies, the presumption has been that that power must and should be distributed unequally—for purposes of efficiency and prosperity and, on some arguments, merit as well. The result, of course, is an ongoing tension between the inequality of power generated by property through the market and the claims of equal rights. We see this, for example, in debates over free speech and access to the media, in campaign spending debates, and as I will note shortly, in arguments for a social charter.

All of this suggests to me that debates over the meaning of property, of the kinds of power that should be allocated to individuals and the limits on that power (as in my earlier examples of landlord-tenant law, environmental regulation, and minimum wage law) should be part of the ongoing vigorous debate of the most popularly accessible bodies, the legislative assemblies.

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There is another, more straightforward, argument against constitutionalizing property: property is really a second order value, it is a means to the higher values we do treat as constitutional rights — life, liberty and security of the person. It does not really belong up there, treated as a comparable value. This is one more reason why, in the end, property should be held accountable to equality, not vice versa—as would inevitably happen if property were constitutionalized.

We already have in the Charter the values we really care about. So much of ordinary governmental decision-making has an impact on property that it becomes extremely awkward and artificial to determine which of these impacts ought to be described as a violation of property rights.25

What we really want to know is when the impact amounts to an infringement of one of the basic values that is in the Charter—most likely liberty or security. For example, arbitrary or punitive confiscations, or confiscations without compensation, would surely be deemed to be an infringement on security of the person not in accordance with fundamental justice. We cannot in fact feel secure or free among our fellow citizens, nor can we feel as though we can count on being treated as an equal, worthy of equal respect, if we feel that we may at any time be capriciously deprived of our material possessions. That kind of insecurity would destroy relations of trust, confidence and equality necessary for a free and democratic society.

This leads me directly into my second example. If property is not in the Charter, how do we determine when impacts on property or economic

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25 Some of the proponents of adding property to the Charter seem to have odd ideas about just what that would accomplish. In the debate in the Ontario legislature, a whole series of sad stories were related in which people's property was confiscated, and compensated (sometimes at values thought not to reflect the full cost of relocating a home or small business) for various public works projects (some of which never even came to fruition). There was not a single story that I thought would have been prevented by the "takings" clause in the U.S. Constitution (even under the most recent approach). Surely eminent domain would continue to be treated as a legitimate power of the legislature.

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interests amount to violations of liberty or security of the person. Of course, in the space remaining, I will do no more than indicate the ways I think a focus on relationship will help.

Take, for example, the British Columbia doctors’ case, Wilson v. Medical Services Commission.\(^{26}\) In an attempt to make sure that all areas of the province were adequately provided with medical care, the province decided to restrict the number of doctors to whom it would provide billing numbers in popular areas like Vancouver. In effect, doctors could not practice wherever they wished. Does this amount to an infringement of liberty? Suppose we begin by looking at the network of relationships in which these doctors are embedded—public funding for medical school, for hospitals, for their salaries (hence the problem in the first place). We should then consider more broadly the interdependencies we already formally recognize in a wide variety of schemes that limit access to jobs ranging from chicken farming to taxi driving. Of course, constraints on one’s livelihood are serious constraints and come close to our understanding of liberty. But we cannot view any case, like the doctors, in isolation. The relationships in society will be different depending on how much scope for individual choice we allow, and how much we constrain that choice by notions of mutual responsibility. In any given case we have to ask whether the alleged infringement is designed to foster or enforce social responsibility in ways consistent with other forms of social responsibility in Canada. Or is the infringement unnecessary, arbitrary or gratuitous? Of course, consistency with other policies might not itself be sufficient. We could ask if the network of mutual responsibility seems to be drawing such a tight net that we cannot imagine those relationships being conducive to individual autonomy — (having recognized, of course, that autonomy is not a matter of independence, but of interdependent relationships that foster it). I will not go into any more detail here, beyond saying that I think in this example, as in others, the difference a focus on relationship makes is not stark, but subtle. Many of


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the questions sound familiar and can be generated by other frameworks, but I think the emphasis will be different. Our attention will be drawn to different matters, and the overall result will be better.

Finally, a brief note on what could easily be the subject of another essay—the Alternative Social Charter put forward by a coalition of anti-poverty groups during the recent round of constitutional negotiations. There are two basic connections with my theme. First, the ASC is an effort to carry through a vision of what it would take for all members of Canadian society to be full, equal participants, to be truly treated with equal respect and dignity. I think the ASC grows out of an awareness of the ways the relations of disadvantage in Canada currently preclude that full equality. Conventional rights theory can blind one to the impact of disadvantage. Rights as relationship brings it to the forefront of our attention.

Perhaps most importantly for my purposes here, the ASC comes with an extremely attractive form of my dialogue of democratic accountability: a tribunal that is an alternative to the courts as a mechanism for maintaining this dialogue. The tribunal would hear selected complaints alleging infringements "that are systemic or that have systemic impact on

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28 One might say that because the rights of health care, food, clothing, and child care are, like property, second order values, that is means to the end of achieving equality and the other basic values outlined in the Charter, it is appropriate for the Social Charter to be a separate document rather than integrated into the Charter. There was some disagreement on this among those proposing this form of the Social Charter. In the proposed form, it was/is a separate document, with a provision that the Charter be interpreted in ways consistent with the Social Charter. I think health care and food are primary values, although traditional rights discourse has treated them quite differently from liberty or equality—presumably in part because they are more readily seen as "positive" rights rather than negative liberties. It might seem that health care and the other social rights of the ASC are less susceptible of a relational approach. But the meaning of equality needs to be interpreted in light of such social rights and vice versa, all of which requires relational analysis.
vulnerable or disadvantaged groups and their members." It would have wide authority to review federal and provincial legislation, regulation, and policies and order the government to take appropriate measures or ask government to report back with measures taken or proposed. However, the order "shall not come into effect until the House of Commons or the relevant legislature has sat for at least five weeks, during which time the decision may be overridden by a simple majority vote of that legislature or parliament."30

This is an imaginative effort to meet the concerns about courts having the power to enforce rights which would often involve the commitment of public funds. This proposal (unlike the one included in the Beaudoin-Dobbie report from the all-party committee of Parliament31) would provide an important enforcement mechanism, while giving the final word to the primary forum for democratic decision-making, the legislatures. It seems a promising mechanism for initiating an ongoing dialogue that would make democratic decision-making accountable to the basic values of equality.

The mechanism itself would be highly democratic. The proposal calls for the tribunal to be appointed by the (reformed) Senate, with one third of the members from each of the following sectors: the federal government; provincial and territorial governments; and non-governmental organizations representing vulnerable and disadvantaged groups. Moreover, the Tribunal was structured to provide an ongoing dialogue with the adjudicators, the government. The ASC thus provides an institutional structure that recognizes rights as entailing an ongoing process of definition. It creates a democratic mechanism for that process, without simply giving democracy priority over rights. At the same time, it provides a means of ensuring that democratic decisions are accountable to basic values without treating rights as trumps. In short, the ASC provides us with an outline of a workable model of constitutionalism as a dialogue

29 Section 10(1) ASC.
30 Ibid.
31 The Charlottetown accord left unspecified the enforcement mechanisms for the "Social and Economic Union."

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of democratic accountability, where the rights to be protected derive from an inquiry into what it would take to create the relationships necessary for a free and democratic society.

V. Conclusion

When we understand the constitutionalization of rights as a means of setting up a dialogue of democratic accountability, we redefine the kinds of justification necessary for constitutional constraints on democratic decision-making. Perhaps even more importantly for the world outside of academia, we provide a conceptual framework that will help us to design and assess workable mechanisms for constitutionalizing rights in modern democracies. This conception of constitutionalism both requires and fosters a new understanding of rights—rights as structuring relationships. This approach to rights, in turn, helps to overcome the most serious problems with the dominant conceptions of our liberal tradition. When we understand rights as relationships and constitutionalism as a dialogue of democratic accountability, we can not only move beyond long standing problems, but we can create a conceptual and institutional structure that will facilitate inquiry into the new problems that will inevitably emerge.