ON THE NEUTRALITY OF CHARTER REASONING

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1. THE CENTRAL PROBLEM *

Judicial review under a charter or bill of rights ¹ is not an easy practice to justify in a liberal democracy, particularly one marked by the «fact of reasonable pluralism» ². It appears to be an unavoidable feature of modern, liberal democracies that reasonable people of good will and integrity, faced with what John Rawls calls «the burdens of judgment», will continue to disagree fundamentally about moral and political matters, even after what looks like an exhaustive, good faith investigation of all relevant reasons and arguments ³. Even if there is a truth of the matter with respect to the important questions of political morality that concern us in liberal democracies, to a very large extent, it seems, that truth is epistemically inaccessible to us. And if it's epistemically inaccessible to us, we have no way of discovering which, among the various reasonable answers offered to the questions posed, are correct or most justified ⁴. No way of telling who has it right, or

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¹ Henceforth I will refer to this practice as «charter review». Charter review comes in a wide variety of forms, but for purposes of this paper, I will assume a form such as one finds in Canada and the United States. In these systems judges are empowered to strike down official government acts, most notably acts of congress or parliament if, in the best judgment of the court, such acts violate rights of political morality to which their charter and bill of rights (respectively) make reference. I have in mind rights to such things as «due process», «freedom of expression», «equality», «equal protection» and «fundamental justice».

² J. Rawls, Political Liberalism (New York: Columbia University Press, 1996), 36. How one distinguishes reasonable from unreasonable views is, of course, an important, difficult and highly contentious issue. It's also one that I will leave unexplored in this paper.

³ Ibid., 54-58.

⁴ In saying that truths of political morality seem epistemically inaccessible to us, I do not mean to deny that many people believe that they know the truth. Neither do I wish to deny that many people have perfectly respectable justifications for their claims, nor that some of those
whose answer is best—or even better. This is particularly so when
we reach the level of comprehensive moral and religious doctrines,
where deep differences emerge between Kantians and utilitarians,
Christians and Muslims, and between theists and atheists. Despite
this predicament we more often than not need to settle on a set of an-
swers, some «way of formulating [our] plans, of putting [our] ends in
an order of priority and of making [our] decisions accordingly» ⁵. One
of the claimed virtues of the ordinary, majoritarian procedures one
typically finds in established democracies is that they facilitate shared
settlements, and do so in a manner that is prima facie fair to all who
have a stake in the relevant matter. One person, one vote ensures, it
is said, that each participant in the process participates on an equal
footing and has an equal chance of having her admittedly controver-
sial answer carry the day ⁶. It also ensures that the answer chosen
can be legitimately described as «our decision», not the decision of
whatever faction happens to have had enough power or influence to
win the day. Democracy, it is said, allows all of us to take ownership
of the laws that regulate our lives and restrict our liberties, even those
with which we fundamentally disagree. In short, it respects our au-
tonomy.

But things seem very different when charter review enters the pic-
ture. It adds a new element to our decision-making processes, one that

⁵ Ibid., 212.

⁶ Whether reality matches theory in this respect is, of course, highly debatable. For instance,
when corporations and other organizations with deep pockets are able freely to contribute to
electoral campaigns, political power can become concentrated in ways that seriously threaten
the notion that one person—one vote embodies equal political power—. Various attempts, in the
United States, to correct for this kind of power imbalance, via campaign financing regulations,
were recently declared unconstitutional by the US Supreme Court. See Citizens United vs. FEC
seems seriously to disrupt the path to ownership and legitimacy I just
described. This is because charter review arguably takes away citizens’
power of decision and authorizes judges to make controversial moral
and political decisions instead. According to some of its most ardent
critics, charter review enables judges to impose their own partisan
moral views on the rest of us, citizen and legislator alike, whether or
not we agree with those views, and whether or not we’ve had a fair op-
portunity to influence, let alone contribute to, the decisions the judges
end up imposing. Given the facts of reasonable pluralism, many of
us will, of course, inevitably disagree —and profoundly so— with the
moral bases upon which the judges’ decisions are made. Sometimes,
of course, that disagreement will be clearly ill-founded, perhaps even
unreasonable. It is yet another unavoidable feature of modern, liberal
democracies that the moral and political views of ordinary citizens and
their elected representatives are sometimes uninformed, irrational, or
unduly motivated by factors like fear, unmitigated partisanship, selfishness or sheer prejudice. In at least some such instances, especially
when someone’s fundamental moral rights are being threatened by a
democratic process gone astray —a plausible case can be made that
allowing judicial decisions to help settle matters might not be such a
bad thing to have, even within a liberal democracy—. Perhaps judges
are able, in such circumstances, to save us from ourselves, to make
the decisions that we would have made had we not been subject to
the various improper influences we seem unable fully to avoid or sup-
press. Perhaps, that is, charter review can serve to enhance, not reduce
or eliminate, our moral autonomy. But quite often our disagreements
cannot be so readily dismissed. On the contrary, they seem perfect-
ly reasonable. But if that’s true, then how can one possibly meet the
burden of justifying a practice like charter review in such cases? How
can we possibly take ownership of the decisions reached through such
a process, and of the significant legal consequences that often follow
from them?
In previous work, I have tried to meet the rather hefty burden of answering these questions. I argued for a conception of charter review under which the principal role of a judge is not to adjudicate on the basis of his or her own convictions in regard to issues of political morality such as equality, fundamental justice and the right to life, liberty and security of the person, but to hold the community to its own fundamental moral commitments on such matters. These commitments, I argued, are expressed or represented in what I called «the community's constitutional morality» (CCM). As I conceive it, CCM is not the personal morality of any particular person or institution, e. g. the Catholic Church, the Republican Party, or a judge who helps decide a constitutional case. Nor is it the morality decreed by God, inherent in the fabric of the universe, or residing in Plato's world of forms. Rather, it is a kind of community-based, positive morality consisting of the fundamental moral norms and convictions to which the community has actually committed itself and which have, in one way or another, acquired some kind of formal legal recognition. It is the political morality actually embedded in (or endorsed or expressed by) a community's legal practices in much the same way as particularized principles of corrective justice are, if Jules Coleman is correct, embedded in (or endorsed or expressed by) the tort law of Anglo-American legal systems. So construed, CCM is

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8 On this see, ibid. See also «Constitutional Morality and Bills of Rights» in G. Huscroft (ed.), Expounding the Constitution: Essays in Constitutional Theory (Cambridge: Cambridge University Press, 2008), 77, from which the following characterization of CCM is drawn.

9 I have deliberately framed my characterization of CCM in such a way as to remain neutral among rival theories about the nature of law. I am particularly interested in remaining neutral as between inclusive positivism, as defended by, e. g., Hart, Coleman, Kramer and Waluchow, and exclusive positivism as defended by, e. g., Raz, Green, Giudice, Marmor and Gardner. An inclusive positivist is prepared to say that the norms of CCM can actually be part of the law. A defender of the exclusive version, on the other hand, would likely insist on situating those norms outside the law, as norms of positive morality upon which judges may (or must) draw when deciding whether to introduce changes into the law, as when they decide whether to change the

10 An example of the kind of thing I have in mind here is the responsibility of a Prime Minister not to exercise his or her prerogative powers for purely partisan political reasons.
rights and the legislative history and jurisprudence that combine to flesh out the local, concrete understandings or Thomistic «determinations» of those principles for that particular community.\textsuperscript{11}

With this conception of constitutional morality in hand, I set out to defend charter review against many of its most ardent critics, particularly those, like Jeremy Waldron, who view the practice as fundamentally at odds with democratic principle. Put simply, my thesis was that CCM, owing to its social origin, is a source of moral norms upon which judges can draw in charter review without compromising democratic legitimacy. A key premise in my defense of this thesis is the claim that charter review includes (though is by no means limited to) the task of ensuring that acts of parliament or congress do not, in ways that could not have been reasonably foreseen by legislators, and which they would have wished to avoid had they had the opportunity to do so, infringe the fundamental moral norms of CCM. If this is the role a judge plays in a particular instance of charter review, then democratic legitimacy is not compromised. The judge is, in effect, helping to implement, and render effective, the democratic will. Furthermore, many of the critics’ other concerns can be successfully parried as well. For example, one prominent complaint is that charter review foolishly asks judges to serve as philosopher kings and queens, asks them to discover Platonic moral truth in respect of matters of justice and equality and to enforce their understanding or interpretation of that elusive truth against the acts and erroneous interpretations of our democratically elected legislators. Given the fact of reasonable pluralism, together with the fact that judges, no less so than the rest of us, suffer the burdens of judgment in matters moral, having them perform such a task asks judges to accom-

plish the impossible. Not only that, it transforms the judicial task into something completely different from the role judges have traditionally been thought to serve —by most everyone except, perhaps, proponents of the various forms of critical legal theory and other similarly minded sceptics—. It is to give up even the pretense of supposing that, in charter cases, the role of the judge is to engage—or at the very least make a good faith attempt to engage—in the impartial, neutral application of binding legal standards, (largely) set elsewhere—that is, to play the role she is supposed to play in everyday, run of the mill legal cases. It is instead to ask judges to decide on the basis of what ends up being their own (possibly purely partisan) moral opinions about an ever elusive Platonic morality. And no matter the high regard in which we hold our judges, such a practice simply cannot be tolerated in a liberal democracy. But if I am right that judges in exercising charter review are not seeking—and inevitably failing—to apply Platonic moral truth, but are instead seeking to hold the democratic community to its own constitutionally grounded moral commitments; and if, in addition to this, I am correct in thinking that that set of commitments can often be discovered through a kind of morally neutral, impartial reasoning, then the sting of this powerful argument can be largely avoided. We can re-

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12 Considerable philosophical controversy exists regarding the meaning and import of the terms «impartial» and «neutral». I hope to remain above this fray by simply assuming a more or less intuitive understanding of these two terms according to which (a) they are more or less equivalent in meaning; and (b) mean something like the following. To be neutral or impartial is to make a decision that is based exclusively on relevant reasons and which displays no bias towards any particular point of view on the relevant matter, or any person or persons holding such a view. A useful analysis along these lines is proposed by Bernard Gert who posits that «A is impartial in respect R with regard to group G if and only if A’s actions in respect R are not influenced at all by which member(s) of G benefit or are harmed by these actions». See his «Moral Impartiality», Midwest Studies in Philosophy, XX: 102-127. On this reading impartiality (and neutrality) is a property of a set of decisions made by a particular agent, directed toward a particular group. For our purposes, this would be a group sharing a particular view on some question of political morality arising in a charter case. For a survey of the literature concerning the concepts of impartiality (and neutrality), see T. Jollimore, «Impartiality» at http://plato.stanford.edu/entries/impartiality/#MorImp.
store the possibility of judicial impartiality and neutrality, a possibility which seems central to the legitimacy of legal decision-making within a liberal democracy. Judges are not, on this view, being asked to decide on the basis of their own best judgments concerning the demands of moral truth. Rather they are being asked to decide on the basis of the democratic community's best judgments concerning the demands of moral truth. Judges can be said, in such circumstances, to be doing nothing more contentious than doing their best to apply, in a fair, impartial and neutral manner, standards that originate from an entirely legitimate source, namely, the community's own fundamental moral beliefs and commitments.

If only matters were this straightforward. But of course they are not. As some of my critics have pointed out, we seem reasonably to disagree not only about the demands of Platonic moral truth. There is considerable room for disagreement about the demands of CCM as well, especially in the controversial legal cases in which disputes about its concrete requirements come fully to the fore. Of course, the sheer fact of disagreement in no way implies that there is no fact of the matter in

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13 That the norms of CCM can be largely discovered via a process of reasoning that can plausibly be described as «impartial» and «morally neutral» is also, of course, a highly contentious claim. It is also one that I cannot explore or defend here. Were I to do so, my argument(s) would be similar to those advanced by Joseph Raz in his discussion of «detached judgments» and by Julie Dixon in her splendid book Evaluation and Legal Theory. See Raz, The Authority of Law (Oxford: Clarendon Press, 1979), 153-157 and Dixon, Evaluation and Legal Theory (Oxford: Hart Publishing, 2001), passim, but especially her discussion of the agnostic observer of the Roman Catholic mass, 68-69. For my own, somewhat underdeveloped thoughts on the matter, see my Inclusive Legal Positivism (Oxford: Clarendon Press, 1994), 19-30.

such cases, and that CCM is therefore incomplete or indeterminate, and hence unavailable to a court as a ground for its decisions. This no more follows than there are no determinate answers available when there is reasonable disagreement about the nature of black holes, or about whether the defendant exercised reasonable care to ensure the integrity of his neighbour’s property when he set about chopping down his (the defendant’s) tree. But there is no getting round the fact that such disagreement threatens to undermine the practical possibility of neutral decision-making and hence legitimacy. How can the decision to apply a CCM norm in a particular way be properly described as impartial or neutral if there is so much partisan disagreement about its proper understanding or interpretation? Will judges not be forced, in the end, to base their choices on their own personal views about the demands of Platonic moral truth? What else could they do in such circumstances, short of simply declining to make a decision at all?

Once again in previous work, I have argued that things are not quite as bleak as might appear at first blush for defenders of charter review. In a good many CCM cases there is much more of a basis for agreement and consensus than initially meets the eye. In other words, the limits of justification do not extend only so far as we find explicit agreement. Drawing on the notion of reflective equilibrium, most closely associated with the political philosophy of John Rawls, I argued that our considered judgments concerning the commitments of CCM can often (or can at the very least sometimes) be brought into a kind of reflective equilibrium with one another. When this happens, we can be led to see that we actually agree (or are committed to agreeing, if one prefers that way of phrasing the point) on more than we think we do. We can, in other words, be led to recognize an implicit basis for explicit agreement on the meaning and implications of the relevant CCM norms when initially this might not have seemed possible. I argued that the judge’s role in a charter case —enforcing the commitments of CCM— will often lead her
to draw on these bases of agreement and to decide accordingly. When such a basis is found, and a decision is made on its footing, the fact of disagreement will sometimes be replaced by reasonable agreement. This was the case, I suggested, with respect to the question of same-sex marriage in Canada 15.

Despite all this there is no getting round this further point: it is distinctly possible that in a good many cases arising under CCM, especially those in which passions and controversy run deepest, and where differences are rooted in significantly different comprehensive doctrines 16, there is no uniquely correct answer to be found —just answers—. What, one might reasonably ask, are judges to do if they encounter a case in which this appears so? In my view, judges should —and in fact often do— engage in a type of moral reasoning traditionally associated with the common law. They should creatively develop or construct the norms of CCM, in an incremental, case-by-case way, in much the same manner as common law judges have historically developed, incrementally, and in a case-by-case manner, the principles of negligence, and the concepts of foreseeability and the reasonable use of force 17. In so doing, I suggest, they often engage in Thomistic determinations of common notions, deciding among available solutions, none of which is uniquely determined by, but each of which is fully consistent with, the relevant moral notion and with previous efforts by judges and legislators to shape it through the process of determination. Such previous attempts we might think of as having set «CCM precedents». Judges will, in such cases, no doubt

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15 Some commentators have criticized this assertion, suggesting that, notwithstanding various courts’ decisions on entitlements for unmarried same-sex couples and on various forms of discrimination, sex-based or otherwise, the question whether banning gay marriage is consistent with Canada’s CCM remains an open question. In other words, there continues to be reasonable disagreement on which construction of Canada’s constitutional norms of equality is better than which. On this see, B. Miller, supra note 14.

16 Abortion and same-sex marriage are obvious examples of this possibility.

be exercising discretion to choose from among non-excluded solutions. But there is, in my view, no better way to proceed in these circumstances\textsuperscript{18}.

Now if we acknowledge that a process of determination is indeed what should be (and perhaps is) going on in many such cases, then we once again encounter our threat to democratic legitimacy. The threat, and the reason we face it yet again, should be fairly obvious by now: in developing CCM in this way, judges can no longer straightforwardly be viewed as attempting to follow, in a fair, impartial and neutral manner, standards previously set by others with the democratic authority to do so. On the contrary, it is they who will themselves be setting the relevant standards. At the very least they will be deciding what authoritatively established standards shall be taken to mean and imply for the particular kind of situation in which a charter question has arisen. They will, in short, be involved in the creation, not the discovery, of law. Or to put it in terms perhaps more familiar to constitutional lawyers, they will be engaged in construction not interpretation\textsuperscript{19}.

So admitting what appears all but certain, that CCM is not always fully determinate, threatens to reintroduce our original concern that

\textsuperscript{18} It might be thought that there is at least one other option worth considering here: we could return such questions for authoritative settlement by elected legislators. There are many reasons for thinking that this is not, in the end, an attractive option to pursue. See my discussion of «the circumstances of rule making», in \textit{A Common Law Theory of Judicial Review: The Living Tree, passim}, but especially 203-215 & 259-270. See also D. Reaume, «Of Pigeonholes and Principles: A Reconsideration of Discrimination Law», \textit{Osgoode Hall L. J.}, 40 (2002), 113. See also, my discussion below (pp. 28 ff) of the uncertain borderlines between hard and easy cases, that is, between cases in which discretion is (or at least seems) necessary and those in which it is not. For the time being, we will assume that there are cases in which it is reasonably clear that discretionary choice is necessary. And our question is: how to reconcile the exercise of discretionary choice with the fundamental requirements of democracy.

\textsuperscript{19} Henceforth I will use the term «construction», and mean by it the creative or discretionary development of a moral principle or concept in the manner suggested by Aquinas when he referred to the «determination of common moral notions».
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charter review cannot possibly be justified in a liberal democracy. It appears to assign judges a role, the creative construction of CCM, that renders us no longer masters in our own houses. We can, it seems, no longer maintain ownership of each and every one of the laws that regulate our lives and restrict our liberties. Handing over such a significant power cannot be justified on the usual ground: that judges are simply applying, in a more or less neutral and impartial manner, standards authoritatively set earlier on, through one or more of the democratic procedures we encounter in liberal democracies. Of course we must never lose sight of the fact that even in run of the mill cases not involving the construction of CCM, judges do not always succeed in displaying, to an acceptable degree, these same judicial virtues of fairness, impartiality and neutrality. And in such cases the usual justification will be not be available either. But in all such cases there is at least the theoretical possibility that the judges will succeed in displaying the required virtues. And we at least have an intelligible basis for criticism and complaint when that possibility is not actualized in a particular judicial decision. But nothing remotely like this seems available when the judge’s decision requires her creatively to construct the relevant elements of CCM using her discretion. There simply is no such justification and no such basis for assessment and critique.

If, despite what I have just conceded, we continue to ask judges to make the kinds of discretionary determinations that sometimes seem necessary when CCM is in play, then we appear left with two options. First, we can abandon all pretense of reconciling charter review with the demands of democratic legitimacy. We can, that is, reject the practice altogether, or attempt to justify it by way of competing values, for example

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20 Among the most noteworthy instances is perhaps Bush vs. Gore, where the United States Supreme Court decided on what appeared to many observers to be purely partisan political grounds. See Bush vs. Gore, 531 U. S. 98 (2000). In the view of many, Citizens United vs. Federal Election Commission, 558 U. S. (2010) provides yet another example.
justice, or values closely associated with the rule of law. Alternatively, we can develop a more nuanced account of what it is that judges should be up to when they engage in the discretionary construction of CCM by way of common law reasoning. It is this latter option that I propose to pursue in the remainder of this paper. My question is this. Is there a way of engaging the process of CCM construction, via a kind of case by case reasoning modeled on the common law, that still allows for the possibility of impartial, neutral decision making? If there is, then we may yet have a means of reconciling discretionary charter review with liberal democratic principle. We may yet be able to maintain ownership of all the laws and legal decisions that regulate our lives and restrict our liberties, even those discretionary decisions with which we fundamentally disagree—to see them as, in one very important sense, our decisions not those of the judges.

What follows is a preliminary sketch of what such an account might look like. I argue that discretionary constructions of CCM can be rendered consistent with liberal democracy if we place significant restrictions on the kinds of reasons upon which judges may legitimately draw when they engage that process. The restrictions I have in mind are inspired by the theory of public reasons developed in a number of places by John Rawls, but most notably Lecture VI of Political Liberalism. Rawls’ view has also been adopted and adapted by Larry Solum in «Pub-
lic Legal Reason” and by Ronald Den Otter in *Judicial Review in the Age of Moral Pluralism*. In what follows, I attempt to show how, were we to restrict judges to reasons of the kind endorsed by Rawls, Solum and Den Otter, the discretionary development of CCM can be rendered faithful to the fundamental commitments of liberal democracy. The sketch I provide is, I hasten to repeat, quite preliminary. But my hope is that it is detailed —and plausible— enough to convince even the most ardent skeptic that there just might be something of value in the line of argument it would have us pursue.

So on what kinds of reasons should judges be expected to draw when and if they are asked to engage in the discretionary construction of CCM in a liberal democracy? Putting it another way, what kinds of restrictions can we, members of a democratic community, legitimately place upon judges’ discretionary decisions and the kinds of reasons upon which they draw in making them, so as not to abandon completely our claim to being masters in our own house? Let’s begin by dismissing one misguided thought: that limits are simply out of the question here because the concept of discretion implies the complete absence of restriction, and hence the absence of any possibility of rational development, assessment and critique. Were this true, then permitting judges to engage in discretionary constructions of CCM norms would, in effect, be demanding no more than that they render a decision, or that they make a decision based on some reason or other, whatever that might be —including the purely partisan moral reasons that raise so much difficulty for defenders of charter review—. This would be to flirt with abandoning our moral autonomy altogether.

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22 J. Rawls, *Political Liberalism*, supra note 2; L. Solum, «Public Legal Reason», *Virginia Law Review*, vol. 92, 1449 (2006); R. Den Otter, *Judicial Review in an Age of Moral Pluralism* (New York: Cambridge University Press, 2009). I wish to acknowledge, in particular, the degree to which my account accords with and draws upon Den Otter’s. His excellent book came to my attention only after I had conceived and sketched the main arguments of the present paper.
But the concept of discretion carries no such implication. As Ronald Dworkin once remarked, to say that a decision maker has [what Dworkin called] strong discretion on some matter is not to grant her open license. Even when her decision is «not controlled by a standard [or reason] furnished by the particular authority we have in mind when we raise the question of discretion», we retain the possibility of legitimate critique for failure to meet appropriate standards of good decision-making. «The strong sense of discretion is not tantamount to license, and does not exclude criticism. Almost any situation in which a person acts (including those in which there is no question of decision under special authority, and so no question of discretion) makes relevant certain standards of rationality, fairness, and effectiveness» 23. Presumably, we can add further restrictions here, restrictions arising from the special role judges play in liberal, constitutional democracies. It would, I take it, be a clear violation of a judge's responsibility in any legal case, including one in which the construction of CCM norms is involved, were he to decide on the basis of a coin flip (chance), on his daily horoscope (a scientifically discredited mode of ascertaining truth), or on which lawyer was least annoying in presenting her case (irrelevant facts about the presenter, not the case being presented). It would be wrong were he to decide on the basis of who provided the larger bribe (personal advantage), on which decision was more likely to further the judge's own personal ambitions or partisan political agenda (ibid.), or for the reason that he disliked the cut of the defendant's jib (personal taste). It would be equally wrong were the decision biased in some way. It would be wrong, for example, were it blatantly homophobic, racist, misogynist, or nepotistic. At least this would be true in any of the liberal, constitutional democracies with which I am concerned in this paper.

But of course dismissing the misguided thought that discretion entails open license does not get us very far, even with these sorts of additions,
because it isn’t discretion alone that leads to our fundamental difficulty. It’s discretion coupled with the fact of reasonable pluralism in matters moral. Our main worry is not that judges might end up constructing CCM on the basis of reasons that everyone would agree are bad ones. The fear is that there are far too many plausibly good reasons for different constructions of CCM norms, and no means of adjudicating among them in a way that appears neutral. In other words, it’s not that there is no way at all to distinguish good from bad reasons—clearly, the fact that a lawyer has been the least annoying in presenting her case in favour of construction C(1) is a bad reason; and the fact that construction C(2) can be justified on the basis of a principle acceptable to all reasonable citizens within the relevant jurisdiction, and recognized in a long line of judicial determinations of that principle, is a rather good one—. On the contrary, the main worry is that there is an overabundance of moral reasons and the constructions of CCM they appear to support. And all of these will seem perfectly good, plausible or convincing to some reasonable person or other within the community. The problem is only exacerbated by the fact that, for each of these constructions, there will likely be some significant segment of the relevant jurisdiction—defined, perhaps in terms of their commitment to a particular comprehensive doctrine, say, Catholicism or libertarianism—who would like nothing better than to see that particular construction win the day. Indeed, it is quite possible that members of the community who find themselves within that particular segment will be able to mount a reasonable—though by no means decisive—case for the claim that their preferred construction is actually the only one consistent with CCM and the jurisprudence which has hitherto shaped its particular contours within that particular community. And the same might well be true of other segments of the population and the comprehensive doctrines that unite them. 24 How, it might

24 I will return to this last point, and its significance for debates on the legitimacy of charter review, in the final section of this paper. See note 46 and surrounding text.
be asked, is a judge to adjudicate in the midst of all these options? And most importantly for our purposes, how is she to do so in a way that can plausibly be characterized as neutral or impartial? It is here, I suggest, that the notion of public reasons might prove helpful. So what are public reasons, and how might these be used by courts in such a way as to legitimate their discretionary constructions of CCM?

2. PUBLIC REASONS

According to Larry Solum, a good deal of contemporary scholarship assumes that the notion of public reason originated with Rawls. But as Solum points out, the idea has a long pedigree stretching at least as far back as early modern times. Hobbes, Rousseau and Kant each discussed the idea, though their conceptions of public reason differed from one another. According to Hobbes, public reason is the reason or judgment of the sovereign which, for familiar Hobbesean reasons, must hold sway over private exercises of reason in all matters concerning public life. For Hobbes, then, what distinguishes public from non-public reasons is not the type of reasons applicable in each domain but rather the person or persons through whom reason or judgment is exercised. Reason becomes public whenever it is exercised by the sovereign power, whomever or whatever that might be, and for whatever reasons he/she/it deems appropriate. For Rousseau, on the other hand, public and private reason are distinguished, not in terms of the agent through whom reason is exercised, but in terms of the kinds of reasons to which appeal is made: partisan reasons of self interest, for example, versus reasons pertaining to the common good and which are supposedly expressible via the general will.

As with Rousseau, Rawls’ theory of public reason draws the line between public and nonpublic reason (and reasoning) in terms of the kinds of reason to which each appeals. These can be distinguished, according to Rawls, in terms of a number of key features. First, “the limits imposed by public reason do not apply to all political questions but only to those involving what [Rawls] call[s] «constitutional essentials» and questions of basic justice” 26. Thus, questions concerning the scope of free expression fall within the domain of public reason; questions concerning the most efficient means of ensuring a competitive auto industry do not. What precisely Rawls means by «constitutional essentials» and questions of «basic justice» is not altogether clear. But however that issue is resolved, the resolution will surely be such as to subsume, under the domain of public reason, the kinds of morally charged, fundamental questions with which courts are typically concerned when they engage in charter review. These include questions like the coercive regulation of hate speech, pornography and campaign financing, the banning or regulation of abortion and euthanasia, and the right of child soldiers incarcerated in foreign detention facilities, and subjected to torture and interrogations that flagrantly flout constitutional principles, to the protection and assistance of their government 27. If these are not concerned with constitutional essentials and issues of basic justice, it is hard to imagine what might be.

A second key feature of public reason for Rawls is that it is the common reason of a liberal democratic society, «its way of formulating its plans, of putting its ends in an order of priority and of making its decisions accordingly» 28. It «is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizen-
ship. The subject of their reason is [as in Rousseau] the good of the public...» 29. Nonpublic reasons, on the other hand, include the reasons of «churches and universities and of many other associations in civil society» 30. They include the highly contentious, moral and political premises characteristically found within various comprehensive doctrines, such as Christianity, Islam, utilitarianism, Kantian deontology, Aristotelian virtue ethics, libertarianism and communitarianism. These may legitimately be appealed to by private citizens in discussions pertaining exclusively to their private affairs and the affairs of the various private institutions and associations to which they belong. That it has been so decreed by the Pope is a legitimate nonpublic reason for Catholics when debating some contentious matter of Catholic theology, even those bearing on questions of basic justice, for instance the morality of abortion or euthanasia. It is not, however, a public reason to which citizens can legitimately appeal «when they engage in political advocacy in the public forum, and thus for members of political parties and for candidates in their campaigns, and for other groups who support them. It holds equally, for how citizens are to vote in elections when constitutional essentials and matters of basic justice are at stake» 31. As Rawls stresses, citizens often engage in decidedly political dialogue outside of public forums, and hence they are not always restricted to public reasons when conversing about political questions broadly construed, including those pertaining to constitutional essentials and questions of basic justice. Not so public officials. Whenever they are acting as officials a complete ban on appeal to non-public reasons applies. «It applies in official forums and so to legislators when they speak on the floor of parliament, and so to the executive in its public acts and pronouncements» 32. More importantly,

29 Ibid., 213
30 Ibid., 213.
31 Ibid., 215.
32 Ibid., 216.
«it applies also in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review. This is because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents. Since acts of the legislative and the executive need not be justified in this way, the court’s special role makes it the exemplar of public reason.»

It is worth stressing that, for Rawls (and others who draw a similar distinction) public and nonpublic reason do overlap with one another in many ways. Both include, for example, elementary rules of inference and agreed rules governing the evaluation of evidence. What principally distinguishes the two domains in this regard is that public reason is restricted to premises enjoying widespread support within the community. These include «presently accepted general beliefs [...] and the methods and conclusions of science when these are not controversial».

But, crucially, they also include what Rawls calls a «political conception of justice». This is a shared conception of justice on which all reasonable people within a particular liberal democratic society, regardless of their other deep differences, could reasonably be expected to agree as a common basis upon which to conduct public life. It is a conception which each person, from the vantage point of his or her own partisan, comprehensive conception could reasonably accept as a reasonable basis upon which the coercive power of the state is to be exercised on her behalf and that of her fellow free and equal citizens.

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33 Ibid. Whether citizens and legislators should be restricted to public reasons when they debate issues within public forums is a highly controversial issue. It is also one on which I hope to remain neutral since my focus here is on charter cases. My claim is only that, in adjudicating cases under CCM, judges can justifiably be limited to public reasons. For attempts to relax Rawls’ ban on non-public reasoning by citizens and legislators see, for example, J. Waldron, «Religious Contributions to Public Deliberation», San Diego Law Review, 30 (1993); R. Bellamy, Liberalism and Pluralism: Towards Politics of Compromise (New York: Routledge, 1998); R. P. George & C. Wolfe (eds.), Natural Law and Public Reason (Washington, D.C.: Georgetown University Press, 2000).

34 Ibid., 224.
ON THE NEUTRALITY OF CHARTER REASONING

As Rawls stresses, there is no uniquely justified (or most justified) political conception of justice: these can vary from one society to the next, and presumably from time to time within one and the same society. More importantly, though a particular conception might be acceptable to each person as a reasonable basis upon which political power is to be exercised, it almost invariably demands some degree of compromise from everyone. Different citizens with differing comprehensive doctrines will almost always prefer the political conception closest to the one judged ideal from the vantage point of their own comprehensive doctrine. But each, recognizing the fact of reasonable pluralism, will also realize that garnering the benefits of civil society almost inevitably requires that (most) everyone must settle for less than their ideal choice. Each will also acknowledge the requirement that an acceptable compromise from her vantage point must also be, for no doubt different reasons and perhaps to a greater or lesser degree, an acceptable compromise for others whose comprehensive doctrines suggest a quite different order of preference. This, Rawls claims, is a requirement of the duty of civility, is recognized in all reasonable comprehensive doctrines within a liberal democracy and serves as the basis for agreement on a shared political conception. Commenting on the concern that a political conception, because it involves so much compromise and must therefore be couched in terms acceptable to all, will be unacceptably «shallow», Rawls writes:

«[...] we think we have strong reasons to follow [an accepted political conception] given our duty of civility to other citizens. After all, they share with us the same sense of its imperfection, though on different grounds, as they hold different comprehensive doctrines and believe different grounds are left out of account. But it is only this way, and by accepting that politics in a democratic society can never be guided by what we see as the whole truth, that we can realize the ideal expressed by

35 In this respect, a political conception of justice is similar to a CCM. Indeed, a society's CCM is perhaps best viewed as identical with, or at least a part of, a society's public conception of justice.
the principles of legitimacy: to live politically with others in the light of reasons all might reasonably be expected to endorse.  

Later, Rawls nicely summarizes this crucial feature of public reason and its appeal as an ideal for social deliberation within a liberal democracy as follows.

«The ideal [...] expresses a willingness to listen to what others have to say and being ready to accept reasonable accommodations or alterations in one's own view. Public reason further asks of us that the balance of those values we hold to be reasonable in a particular case is a balance we sincerely think can be seen to be reasonable by others. Or failing this, we think the balance can be seen as at least not unreasonable in this sense: that those who oppose it can nevertheless understand how reasonable persons can affirm it. This preserves the ties of civic friendship and is consistent with the duty of civility. On some questions this may be the best we can do».  

Rawls’ reflections suggest a way of determining whether or not a reason is public and hence can serve as a legitimate basis for the proper exercise of political power, including, importantly for our purposes, discretionary constructions of CCM in charter cases. They are not necessarily the reasons that the community happens widely to accept at any particular point in time as a common basis for public justifications.

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36 Ibid., 242-243.
37 Ibid., 253.
38 In this paper I have, for purposes of analysis, treated public reasons as though they were a type or class of reasons distinct from the reasons constituted by CCM. The former are characterized as a distinct set of reasons upon which judges might draw in rendering the norms of CCM more determinate. In truth, the norms of CCM are probably best viewed as a part of public reason, that part which is distinctly linked to the community’s authoritatively expressed constitutional commitments (e.g., the provisions of its constitutional charter or bill of rights). In short, all the reasons upon which judges legitimately draw in deciding constitutional cases are instances of public reasons. Viewed in this way, the argument of this paper is meant to show that discretionary construction of CCM norms is warranted because and to the extent that judges draw from the same bank of reasons – public reasons – as they do in cases involving the application of CCM. I owe this point to Brian Burge-Hendrix.
There are a number of reasons why this cannot be the appropriate standard. Among these is the fact that people do not always hold reasonable, well-founded beliefs. On the contrary, they sometimes hold what I elsewhere call «mere moral opinions», beliefs that are, e. g., rooted in false empirical claims and/or stereotypes, insufficiently thought out, or are deeply inconsistent with other, more fundamental, well-thought-out beliefs and commitments. A second reason is that even when unfounded moral opinions are purged from the resources upon which courts may draw, what usually remains is reasonable disagreement. So actual, explicit agreement is far too stringent a test of acceptable public reasons. Were we to restrict judges to moral reasons to which everyone (or most everyone) within the community explicitly agrees, then public reason would be far too shallow a pool from which they could draw in fashioning their CCM constructions. Hence the lesser standard of reasons we could all accept as reasonable—or at the very least, as Rawls puts it, not unreasonable—. But how, in practical terms, is that standard to be applied?

Den Otter provides a useful test that helps ensure that exercises of public power are at the very least sensitive to the reasonable views of everyone: public reasons are «those that an ideal reasonable dissenter would consider good enough». They are not necessarily the reasons everyone would (reasonably) prefer under ideal conditions of deliberation. Nor are they reasons which every reasonable person in such circumstances would consider particularly strong, or ideally worthy of

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39 In my previous defenses of charter review, I argue that one of the primary roles of courts when engaged in that practice is to hold the community to its fundamental moral commitments in instances where democratic procedures, responding to unfounded moral opinions within the community, threaten to lead to their violation. On this see A Common Law Theory of Judicial Review: The Living Tree, passim.

support but for the fact of reasonable pluralism. Rather they are reasons, as Rawls would have it, that such persons would all judge to be at the very least «not unreasonable», in the sense that those who oppose them can understand how reasonable persons could affirm them in justifying an exercise of public power. In drawing exclusively from such reasons, judges «must cast their constitutional arguments in ways that might appeal to reasonable dissenters [...] a person who is willing to be persuaded by the better argument, assumes that reasonable moral disagreement will characterize difficult constitutional cases, and will conclude that [the act] in question is publicly justified only when the state has produced sufficiently public reasons on its behalf» 41. Public reasons, so construed, are «typically [...] as neutral as possible with respect to the wide range of reasonable conceptions of the good and normative political ideologies that currently exist in the [community]. They should be uncontroversial, which means that an ideal reasonable person could not reasonably reject them» 42. Nonpublic reasons, on the other hand, are usually «based on perfectionist standards of human flourishing, on contested theories of political morality, or on controversial empirical claims» 43. As Bruce Ackerman notes, an argument «that incorporates a premise that a particular way of life is sinful, unpopular, unnatural, unconventional, misguided, silly, or idiotic is exactly the kind of argument that the state must eschew. An argument that contains a premise that a particular way of life is superior to others or that certain people are by nature inferior is also insufficiently public» 44.

41 Ibid., 11.
42 Ibid.
43 Ibid.
3. WHY PUBLIC REASON?

So the appropriate standard, I would like to suggest, is this: A reason is sufficiently public, and hence a legitimate basis upon which a court can draw when engaging in discretionary constructions of CCM, when it is a reason to which no reasonable dissenter could reasonably object, given the duty of civility. It is one that such a dissenter could, despite his differences, accept as «good enough», as, at the very least, «not unreasonable». So how can the employment of such reasons be brought to bear on questions concerning the justification of charter review? Let's begin by recalling what brought us to this point. I began with an admission. As many critics of charter review have pointed out, that practice is hard to reconcile with the fundamental principles of democracy, especially in a society marked by the fact of reasonable pluralism. It appears to take the power of decision away from citizens and their democratically chosen representatives and place it in the hands of a small group of democratically unaccountable judges. It is they, not the people and/or their elected agents, who ultimately end up setting the fundamental standards of political morality governing the exercise of public power. Now (a) were it true that, in settling such questions, judges were simply determining the requirements of moral norms ultimately set or accepted by the people themselves, in an easily identifiable CCM; (b) were it clear, perhaps upon due reflection but clear nevertheless, what those norms require in all cases; and (c) were it true that judges are, for some reason, better able or better situated to engage in the kind of reasoning and reflection required to answer such questions; then it would be fairly clear how one might go about trying to justify charter review in a liberal, constitutional democracy. Judges would not be doing anything significantly different from what we expect of them in ordinary, run of the mill cases. They would be applying, in a fair, impartial and neutral manner, standards authoritatively established elsewhere in ways that seem perfectly consist-
ent with the fundamental ideals of democracy. Or at least that’s what we could reasonably demand of them, and we would have a rational basis for criticizing them for any failure to live up to our expectations. But things are different when CCM proves inadequate to the task. In any case in which its demands appear indeterminate, judges seem forced to exercise discretion, to creatively determine or construct the norms of CCM that they then set about applying to the cases that come before them. In other words, they appear forced to engage in the creation of norms, not their (it is hoped) fair, impartial and neutral application. And this, it was acknowledged, brings us right back to our original worry—that charter review cannot possibly be justified in a modern, liberal democracy.

We are now, I hope, in a position to see that restricting judges to public reason in such cases allows us a promising means of warding off democratic concerns about CCM constructions. Such constructions are consistent with liberal democratic principles because and insofar as they appeal to reasons to which no reasonable dissenter could object, given the duty of civility which features in his comprehensive doctrine, as well as the reasonable comprehensive doctrine of every other reasonable member of a liberal democratic community marked by the fact of reasonable pluralism. Such a dissenter could no more object to a decision based on such reasons than he could object to a decision, properly taken by a properly constituted democratic, majoritarian decision procedure, with which he disagrees. In both cases, our dissenter might prefer that a different decision have been made. But in each case, he must be prepared to recognize the legitimacy of the decision actually taken, despite his displeasure with its substance. So appeal to public reasons in justifying the discretionary construction of CCM norms allows each citizen, including those who strongly, but reasonably, dissent from that development, to take ownership of it nevertheless, to see it as the product of a process of decision which appeals to reasons to which they could not reasonably object.
4. **INDETERMINACY YET AGAIN?**

So restricting judges to public reasons seems to present a promising way of answering the concerns of those worried about the democratic legitimacy of charter review. But of course our critic will not likely be satisfied with this manoeuvre. Theories of public reason have been subject to numerous criticisms, at least one of which threatens to undermine completely the plausibility of my account \(^{45}\). Public reasons, given their shallowness —they must be shallow or abstract enough to attract the support of all reasonable people— very seldom seem to lead to one and only one reasonable conclusion. On the contrary, different constellations of such reasons often lead to contradictory results, and even when we restrict ourselves to one such constellation, different weightings of the included reasons can have much the same result — no uniquely correct solution. In short, public reasons seem to suffer from the very kind of uncertainty and indeterminacy that has concerned us from the start. In most any case involving charter review, any number of public reasons will seem relevant and these can almost always be weighed differently: reasons of equality, for example, often compete against reasons of liberty, as is typically the case in affirmative action cases, or cases involving polygamous marriage. Security of the person sometimes competes with reasons of liberty in cases lying at the edges of life, e. g., those dealing with abortion and euthanasia. It also competes in the many cases involving national security that have become an all too prevalent feature of modern life. Yet if there is no single set of relevant public reasons in such cases, or no uniquely correct way of balancing them even when there is, there will be no uniquely correct answer to the question a judge might attempt to answer by invoking them. No uniquely correct answer

\(^{45}\) For very helpful surveys of the various objections made to theories of public reason, together with valuable efforts to address them, see Den Otter and Solum, *supra* note 22.
to the question whether, e.g. a particular affirmative action program, or a practice sanctioning and regulating voluntary euthanasia, can be publicly justified in a particular modern, liberal democracy. No way of determining whether, and if so when, habeas corpus may legitimately be suspended in times of national emergency. If this is so, then instructing a court to appeal to them in deciding difficult charter cases in which the construction of one or more CCM norms seems required, might seem of little help. The court will once again be forced to exercise discretion, the sovereign prerogative of personal choice. It will be forced to choose a reasonable, but at the same time reasonably contestable, balance among the relevant public reasons and to decide accordingly. In short, we seem once again to have taken away the community’s right to determine, for itself, the fundamental norms by which it is governed.

So my analysis gave rise to this troubling question: How can one seemingly indeterminate source of guidance, public reason, be at all helpful in dealing with similar problems of indeterminacy lurking in a different source of guidance, CCM? We seem right back where we started —with no means of answering those worried about the democratic legitimacy of charter review. In answer to this particular objection, I would like to draw attention to a number factors—. First, it should be stressed that if discretionary choice ends up being necessary when public reasons are invoked, it is only after all the other relevant sources of determinate guidance have been exhausted. In other words, it is only after all the explicit legal decisions, and norms and judgments of CCM have been considered and reconciled in an attempt to reach reflective equilibrium; and only after the further dictates of public reason, such as they are, have been examined and given due measure, that a court will be called on to exercise discretionary judgment. Only then will a court be called on to choose from among options arguably left open to it. But more importantly, if the court does make such a choice, and does so responsibly, it will end up choosing an option that everyone, dissenter
included, will have to acknowledge to be at the very least *not unreasonable* —and quite possibly the only one actually consistent with *public reason*—. This last point —the standing possibility that someone might actually be correct in her belief that she has what turns out to be the uniquely correct balancing of the relevant public reasons in a Charter case, despite her inability to convince everyone else of this fact, leads me to a further consideration that I would like to spend the final part of my paper exploring.

It is tempting to think of charter cases as falling into one of two distinct categories: those in which it is clear that the relevant norms provide determinate guidance and those in which it clearly does not [as an aside, this sort of picture is quite often lurking in the background in contexts in which the possibility of discretionary choice under binding norms is in play. Attempts to justify or discredit discretion as a mode of decision-making in such contexts often assume that we actually know when the limits of determinate, authoritative guidance have been reached. And then the question is: On what type of grounds must the (appropriate) decision-maker decide, if at all? But this is almost never the case, a point to which I'll return in a moment]. Let's assume, for the time being, that a particular case, Case 1, does clearly fall into the first category. In other words, it seems clear to all reasonable people that public reason justifies one and only one construction of the relevant norms of CCM, a construction according to which the legislation in dispute is constitutionally invalid. Let's further assume that the arguments I have advanced here and elsewhere are sufficient to justify the court's having the power to construct the norm in such a way as to render the statute constitutionally invalid 46. There is, I would like to suggest, no violation of demo-

46 In addition to the argument developed here, which focuses primarily on the question of democratic legitimacy I would draw on the various arguments advanced in *A Common Law Theory of Judicial Review: The Living Tree*, most notably those deriving from what I call «the circumstances of rule-makings». See *supra* note 19.
ocratic principle in such a case. Now consider a second case, Case 2, that falls into the second of my two categories. It seems clear to everyone that public reason is incapable of ruling out all but one competing construction of the relevant CCM norms. It’s equally clear that at least one of these constructions supports a construction warranting a declaration of constitutionality, and also clear that at least one other construction supports the opposite conclusion. It’s very tempting to argue that the court should, in Case 2, be required to defer to the elected legislators and leave the disputed legislation untouched. Since the relevant public reasons seem clearly to have run out, the court might be said to lack a democratically legitimate warrant to construct the relevant CCM norm so as to underwrite a declaration of invalidity. Hence, the court should simply leave matters as they stand. It should, in other words, leave the legislation untouched.

There are, however, a number of things to be said in response to this particular line of argument. First, we should once again bear in mind that if its uncertain whether a norm or set of reasons yields a uniquely correct solution to a question, it does not follow that it certainly does not. This no more follows than it follows from the fact that it’s uncertain whether Tom is bald that he certainly has a full head of hair. Hence, the legislation in question might in actual fact be invalid despite the fact that its not clearly so. Suppose our critic accepted this point. He might then go on to reply that I have simply ignored here the importance of context and associated burdens of proof. Returning to Tom and his

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47 I have framed this objection in terms of public reasons but the argument actually applies to any of the norms and reasons upon which a court might draw in exercising charter review, including for our purposes the norms of CCM. It is seldom, if ever, clear whether or not a court is in fact faced with indeterminate CCM norms. Someone might argue that in any such case the court should always defer to the legislature. It should not, in other words, draw on further public reasons to create a discretionary construction upon which the court then relies to declare the relevant legislation unconstitutional. My reasons for thinking that this would not be a good option in the case of further indeterminate public reasons apply equally here.
questionable head of hair, consider a context in which the burden is on whomever wishes to declare Tom bald. And suppose that, for some reason or other, that burden dictates that Tom is not to be considered bald unless it can be proved that he is in fact so. In other words, if we cannot conclusively establish that he is bald, then he must be treated as if he is not. Might we not say analogous things about judges and the context in which they deal with hard constitutional cases? For reasons having to do with the archetypal role of judges in a constitutional democracy, one might be tempted to assert that the burden of proof always lies on courts to establish, before issuing a declaration of invalidity, either that the impugned legislation clearly violates a CCM norm and is therefore unconstitutional, or failing this, that public reason clearly warrants one and only one result: that the relevant CCM norm should be extended in such as way as to render it unconstitutional. In other words, one might be tempted to argue that courts really are under obligation to defer to the legislature unless they can decisively show that the relevant constitutional norms (such as they are, or as constructed in the only reasonable way sanctioned by public reason) have been violated by their enactments. Unless they can demonstrate that the relevant norms have been violated, then the case must, in effect, be treated as one in which it is certain that they have not.

This latter argument is problematic, I believe, for at least two reasons—which brings us back to the way in which the original objection was framed. First, and foremost is a fact to which I drew attention above: that cases do not come neatly packaged into my two clearly defined categories—those in which it is clear that the relevant norms and reasons are determinate [Case 1] and those in which they are clearly not [Case 2]. In short, there is almost never a clear borderline between hard and easy cases. Rather, we find what might be called an «epistemically uncertain borderline» between the two. Putting it another way, it is often epistemically uncertain whether we are faced
with what, for want of a better term, I’ll describe as «normative indeterminacy» 48. If so, then there is no escaping the fact that, for virtually every case in which the possibility of normative indeterminacy looms large — i. e. virtually every controversial charter case — a difficult decision will have to be made as to which of the two categories is in play. And this will be one with which reasonable people could reasonably disagree, one person believing that the relevant norms and/or public reasons yield a determinate answer to the relevant question, the other thinking that they do not. In short, the decision that a case does or does not require discretionary choice among CCM constructions, or among weighted clusters of further public reasons bearing on that choice, seems itself to be one upon which reasonable people will reasonably disagree. Should a judge simply place all epistemically uncertain (i. e. controversial) cases into the category of cases in which indeterminate normative guidance is to be found, and then defer to the legislature’s views of its constitutional responsibilities, then someone’s reasonable view will be automatically rejected. More to the point, it will be rejected in a way that ignores the fact of reasonable pluralism and arguably does violence to the duty of civility. Someone whose perfectly reasonable view is that the case actually falls into the category of normative determinacy, and hence actually does involve a determinate violation of his constitutional rights, or of the only reasonable extension or construction of them, would have every right to complain. He would have every right to complain that the court had abdicated its responsibility to attempt, to the best of its abilities, to hold the legislature to its constitutional responsibilities. He would also have every right to complain that the court had failed to take his constitutional rights seriously.

48 By «normative indeterminacy» I mean the absence of a uniquely right answer to the question «What does this norm actually require in this particular case with these particular facts?». In such a case, it isn’t just uncertain what the right answer is; there is no right answer.
So a simple policy of judicial deference in all cases where it is unclear whether the relevant CCM norms or further public reasons provide determinate guidance seems unacceptable. Judges cannot avoid the hard calls, which brings me to my final point, one that returns us, once again, to the nature of public reasons and the role they play within a liberal democratic community. The proposals defended in my paper hardly add up to a recipe for unbridled judicial activism of a sort that is incompatible with the fundamental tenets of democracy. A decision with respect to which a sincere attempt is made to offer justification in terms of CCM, or failing that, in terms of a CCM construction justified by way of some reasonable balance of relevant public reasons, should not be viewed as an alien force compelling us to act independently of our convictions. And this is true even when the decision is one with which many of us deeply disagree. Rather it should be viewed by each and every one of us as an exercise of public power to which none of us, reasonable dissenters included, could object, given our commitment to the duty of civility, a duty of vital importance in any democratic society marked by the fact of reasonable pluralism. It will be a decision to which we can all sign on, so to speak. To repeat, this is not to say that we will always agree with the decision made, including the decision that a discretionary construction of CCM norms was called for. Nor will we always agree with the balance of public reasons on which a court might have relied in justifying the construction it chose to act on. Nor, for that matter, will we all agree with a court’s judgment as to the relevant public reasons, thinking, perhaps, that what the court took to be a public reason is in actual fact a partisan, nonpublic reason that has no place in constitutional adjudication. But insofar as, and to the extent that, the decision is based on a good faith attempt to strike a reasonable balance of what are sincerely taken to be the relevant public reasons, and given that this step is taken only after all other resources have, in the opinion of the court, been exhausted, it is one which all reasonable citizens can accept as good enough. Each can view the decision as one that allows her to continue
to maintain ownership of each and every decision regarding the proper exercise of public power in her democratic community—including, importantly, decisions taken by judges in the exercise of charter review.\footnote{I wish to thank a number of individuals for their very helpful comments on earlier versions of this paper. These include: Matt Grellette, Stefan Sciaraffa, Fabio Shecaira, Noel Struchiner, Wayne Sumner, and Lorraine Weinrib, Grant Huscroft, Brad Miller, Natalie Stoljar, Brian Burge-Hendrix and Imer Flores. I also wish to acknowledge the helpful comments of all those who contributed to the discussions of the paper when it was first presented to the Faculty of Law, University of Toronto; at the First Annual Graduate Conference in the Philosophy of Law, McMaster University, held May 5-7, 2010; and at «Living Tree Constitutionalism: Democracy and the Rule of Law», held May 22-23, 2010 at The Institute for Legal Research at the National Autonomous University of Mexico (UNAM).}