

Terms of Entitlement: Is there a Distinctly Canadian “Rights Talk”?

EMMETT MACFARLANE *Queen’s University*

Introduction

The Charter of Rights and Freedoms brought about many changes in Canadian society; indeed, its impact is often described in revolutionary terms (Morton and Knopff, 2000; Ignatieff, 2000). One of the most understudied developments under the Charter is its influence on political debate and on how Canadian citizens understand and treat rights. As Alan Cairns writes, “The Charter has generated a vast, qualitatively impressive discourse organized around rights” (1992: 4). That little empirical work has been done to examine this “rights talk” phenomenon is particularly surprising because several scholars of Canadian politics have suggested that it can have negative—even destructive—implications for political discourse. The Charter era is said to encourage people to invoke rights in absolute terms and as trumps over opposing values or policies. According to critics, this makes political compromise difficult to achieve, increases tensions in pluralistic societies and generates a winner-take-all approach to politics.

This article examines this critique and presents a content analysis of newspaper coverage of several Supreme Court of Canada Charter decisions to investigate how rights are discussed and treated in the media. The news media are Canadians’ primary source of information relating to the Charter. As Sauvageau and others note, media coverage of the Supreme Court’s decisions plays a strong role “in reflecting and inspiring rights consciousness” (2006: 15). While news reporting is not a direct measure of “rights talk,” it contributes to society’s understanding of rights

Acknowledgments: A version of this paper was presented at the 2007 meeting of the Canadian Political Science Association. The author would like to thank Janet Hiebert, Jeremy Clarke, Elizabeth Goodyear-Grant, Miriam Smith and the anonymous reviewers for their thoughtful comments on earlier drafts or for helpful discussions.

Emmett Macfarlane, Department of Political Studies, Queen’s University, Kingston, ON, K7L 3N6, 4em1@queensu.ca.

and how rights are used as part of a broader political discourse. As the country's final court of appeal, the Supreme Court and the cases it decides tend to garner the most intense media attention; in fact, there has been a considerable increase in media coverage of the Court since the early 1990s (Sauvageau et al., 2006: 9). Through an analysis of the news coverage, this article evaluates the media's presentation of rights and considers the consequences for Canadian political debate. Rights discourse, as represented in the news media, is at times exhibited in a positive way, consistent with the general purposes of the Charter. Nonetheless, the following analysis demonstrates that the media often portray rights as simplistic and absolute objects, which threatens to diminish the quality of political debate over complex and controversial issues.

What is Rights Talk?

The Charter did not introduce rights to Canada; they existed and were protected by both legislatures and the courts before 1982. Yet, because the Charter empowers the country's courts to enforce its provisions through judicial review, rights claims assume a particularly pronounced stature as they can be more readily invoked to prevent violations of citizen liberties by government actors. As Michael Ignatieff points out, rights claiming can also have the positive benefit of helping to realize individual or group recognition (2000: 86). Thus, one of the key changes brought by the Charter is that it "increasingly encourages political demands framed as 'rights'" (Pal, 1993: 34).

Despite the positive virtues associated with this type of rights discourse, several critics suggest that the greater propensity of individuals to invoke rights can have negative effects on the quality of political debate. This line of reasoning is most fully espoused in the American context by Mary Ann Glendon. In her view, legal notions permeate political and public discourse, resulting in an "increasing tendency to speak of what is most important to us in terms of rights and to frame nearly every social controversy as a clash of rights" (Glendon, 1991: 3–4). The difficulty with this, according to Glendon, is that rights talk is invariably absolutist: to stake a claim to a specific right is to presuppose that claim overrides other considerations, values or policy initiatives. This is problematic, given that there is rarely consensus over which needs, values or interests should constitute rights (Glendon, 1991: 16). Presenting demands in terms of entitlements makes political compromise difficult to achieve. Absolutist rights talk, which fails to recognize legitimate limits on rights, can be further detrimental because it increases the chances for conflict and can hamper the more expansive and open types of dialogue which serve to foster understanding in a pluralistic society (Glendon, 1991: 44–5),

Abstract. One of the most frequently mentioned, yet seriously understudied, changes brought to Canadian society by the Charter of Rights and Freedoms is its influence on political debate and how citizens understand and treat rights. This empirical lacuna is significant because several scholars of Canadian politics have suggested that “rights talk” can have negative implications for political discourse, given that rights are too often presented in absolute, uncompromising terms. This article represents a first attempt to investigate this phenomenon. It presents a content analysis of the media’s presentation of rights issues, and evaluates how rights are portrayed during coverage of Supreme Court Charter decisions.

Résumé. L’un des changements les plus notables apportés à la société canadienne par l’adoption de la Charte des droits et libertés est son influence sur les débats politiques et, plus particulièrement, sur la manière dont les citoyens interprètent leurs droits. Ce changement important est toutefois très peu étudié. Cette lacune empirique est significative puisque plusieurs politologues canadiens ont suggéré que le « langage des droits » a des répercussions négatives sur les débats politiques, étant donné que les droits sont souvent décrits en termes absolus et définitifs. Cet article représente une première tentative d’exploration de ce phénomène. Il présente une analyse du contenu médiatique et évalue comment les médias dépeignent les droits dans leur couverture des décisions de la Cour suprême portant sur la Charte.

because promoting rights in absolute terms invariably brings them into competition with other rights.

A key component of Glendon’s thesis is that while rights talk is in broad terms an international phenomenon, some of its more detrimental aspects are unique to the United States: “American rights talk is set apart by the way that rights, in our standard formulations, tend to be presented as absolute, individual and independent of any necessary relation to responsibilities” (1991: 12). In fact, Glendon points specifically to the design of the Canadian Charter as curbing absolutist rights talk, specifically citing the reasonable limitations clause (section 1, which allows legislatures to defend reasonable limits on Charter rights) and the notwithstanding clause (section 33, which allows legislatures to temporarily set aside judicial decisions in certain circumstances) (1991: 39). She notes that, “like most postwar constitutions, the Charter has avoided hard-edged, American-style proclamations of individual rights” (1991: 167).

Glendon contrasts the leading abortion decisions in each country to illustrate her point. She argues the Supreme Court of Canada’s decision in *R. v. Morgentaler*, which declared unconstitutional the federal abortion law in 1988, is an example “of the combination of interest and caution that many Anglophone judges manifest toward American rights ideas” (1991: 163–64). She commends the decision because it was decided on narrow terms, leaving room for Parliament to enact new legislation as it saw fit. In contrast, Glendon contends the US Supreme Court’s *Roe v. Wade* decision stifled a process of legislative abortion reform that was slowly but surely working towards producing compromise on the issue (1991: 58). Because the Charter encourages the Canadian Court to articulate the purpose of rights and explicitly requires an

examination of reasonable limits, Court decisions and their outcomes are positively influenced by a more sophisticated and careful form of rights talk. For Glendon, the divergent approaches taken by the two courts in the abortion cases are emblematic of how these differences play out in practice.

Despite the Charter's explicit recognition of limits on rights, Canadian scholars have not been so sanguine about the document's correlating impact on rights talk. As the ink was still drying on the new constitutional document, Peter Russell warned about the dangers of some of the simplistic language used to promote the Charter during the entrenchment debate.

"Protecting rights and freedoms" is a deceptively simple idea.... While this simplistic language undoubtedly assisted in winning public support for the Charter, it is not very helpful in understanding the real political consequences of such an instrument. The trouble with this language is that it tends to reify fundamental rights and freedoms, by treating them as things which people either possess in their entirety or not at all. But in our actual civic experience we do not encounter these rights and freedoms in such a zero-sum fashion. We enjoy more or less of them. What we have to settle about these rights and freedoms is not whether or not we will "have" them but what limits it is reasonable to attach to them and how decisions about these limits should be made. (1983: 43)

A quarter century into the Charter era, Russell's concerns have been repeated, but largely unexamined, by the academic community.

As Janet Hiebert contends, the predominant view of the Charter—one that envisions it merely as insulating rights from government action—fails to recognize the role of the limitation clause in accommodating values not specifically enumerated in the rest of the document (1993: 117). According to Hiebert, an "unbridled enthusiasm for the Charter has generated a propensity to assume a 'rights must be paramount' view of Canadian politics which affords little scope for s. 1" (1993: 118). The result is the potential impairment of meaningful political debate needed to resolve, or balance, rights with competing values.

Other observers cite Glendon directly and apply her thesis to the Canadian context (Simpson, 1994; Peacock, 1996: 124; Morton and Knopff, 2000: 156). Anthony Peacock warns that "the language of rights has moral consequences, and we can conceive better and worse regimes of rights" (1996: 124). He notes that careless use of rights talk has divided American society into irreconcilable groups, and wonders whether the same might be happening in Canada. Jeffrey Simpson argues that "what Professor Glendon observes about her own excessively litigious society is creeping into Canadian discourse and infecting the political culture" (1994: 57). Disputes over governmental policy choices and the normal disagreements in a pluralistic society are conflated with fundamental

human rights. This makes reaching compromise and accommodation a more onerous task. F.L. Morton and Rainer Knopff contend that, as part of the institutional transfer of power to the courts, the “moral inflation of rights claiming” transforms “reasonable disagreement into uncompromising rights talk” (2000: 157). Elsewhere, Knopff writes that courtroom rights talk “implies permanent winners and losers, painting one side as angelic and the other as satanic” (1998: 705). This “encourages participants to speak the language of extremism both in and out of the courtroom” (Knopff, 1998: 702).

These authors’ arguments are intuitively appealing but they fail to provide any empirical evidence or endeavour to address Glendon’s assertion that the Charter’s design pre-empts rights talk in its absolutist, individualist form. This article is an attempt to begin filling this empirical void by endeavouring to verify the existence of a distinctly Canadian rights talk as presented through the media and evaluate the degree to which it comports with Glendon’s thesis. Does news coverage present rights-based issues in a manner that would lead Canadians to recognize limits on rights? Does media treatment of Court decisions acknowledge the Charter’s reasonable limits and notwithstanding provisions? Are rights often posed as being in competition with each other? Are rights presented as trumping other values?

Approach to Examining Rights Talk

If there is truth in Glendon’s assertion that the Charter facilitates a nuanced understanding of rights, news reports should convey an appreciation for the notion that rights have limits and that the Charter explicitly provides for those limitations through section 1 and the notwithstanding clause. To investigate the extent to which this occurs, two separate content analyses are presented. The first examines 103 articles from the country’s two English-language national newspapers, the *Globe and Mail* and the *National Post*. The articles examined in this analysis comprise the newspapers’ coverage of Charter decisions concerning seven different rights issues: prisoner voting rights in *Sauvé v. Canada* (2002), restrictions on third-party advertising in election campaigns in *Harper v. Canada* (2004), A Reference re Same-Sex Marriage (2004), the prohibition of private health insurance in *Chaoulli v. Quebec* (2005), religious accommodation in *Multani v. Commission scolaire Marguerite-Bourgeoys* (2006), the dissemination of national election results in *R. v. Bryan* (2007) and the federal government’s security certificates regime in *Charkaoui v. Canada* (2007). These cases were selected because they span a recent five-year period and implicate a range of different rights issues (and sections of the Charter), including freedom of religion (s. 2a), freedom of expression

(s. 2b), the right to vote (s. 3), the right to life, liberty and security of the person (s. 7), the right not to be arbitrarily detained or imprisoned (s. 9) and equality (s. 15). Selection was limited to articles in which the Court's decision, or reaction to the decision by public officials, interest groups or the public, was the prime focus.¹ Collection of articles was also limited to those published within three weeks of the decision. This captures virtually all of the articles pertaining to each case, as the vast majority of coverage occurred within the first two or three days of the Court's decision.

Two of the cases, the same-sex marriage reference and *Chaoulli*, captured substantially more media attention than the others. Media attention varied wildly: the number of articles generated by each case ranged from four (*Bryan*) to 42 (*Chaoulli*). This distribution conforms to the findings of others that very few Supreme Court decisions receive broad coverage (Sauvageau et al., 2006: 65), and those that do are the most controversial ones (Miljan and Cooper, 2003: 166). The very nature of news coverage of the Court's decisions means that some cases will generate a disproportionate amount of coverage, with many others receiving little to none at all. Furthermore, each case involves diverse issues and invokes different levels and types of support or opposition. This makes case selection inherently difficult.

Nevertheless, the selection of these cases is suitable for three reasons. First, while the large number of articles devoted to only two of the seven cases could conceivably generate uneven results with respect to the total dataset, the actual results are generally consistent in most categories across all cases.² Second, while this investigation necessarily entails some basic quantitative data, it is largely a qualitative inquiry into how the print media convey important rights issues to the public. The qualitative, case-by-case analysis which follows is more crucial than simple number crunching to understanding how the media portray rights in Canada. Third, while other cases could conceivably have been selected, the seven ultimately chosen involve a wide variety of rights and all cover a recent five-year period.

A smaller, single-case analysis was carried out to provide a short examination of news coverage of the Supreme Court's 1988 abortion decision in *Morgentaler*. Glendon asserts that *Morgentaler* specifically exemplifies the type of decisions which mitigate an absolutist conception of rights. In order to investigate whether this more nuanced view of the rights in question were translated to the public by the news media at the time, analysis of 21 articles is presented from the *Globe and Mail* coverage of that decision.³

This article is but a first step in the empirical examination and evaluation of Glendon's thesis in the Canadian context. Although it would be interesting to examine coverage in French-language or regionally based newspapers, the scope and purpose of this article as an initial inquiry

into this component of rights discourse makes the country's two national newspapers a useful and significant starting point for empirical study. Further, others have demonstrated that media analyses limited to these two newspapers can be effective (Trimble and Sampert, 2004).

More importantly, as this article constitutes a first foray in exploring this phenomenon, my objective is limited. The news media are but one component of rights discourse, and while they play a part in reflecting and shaping grassroots debate, other important manifestations of rights discourse could be scrutinized. These include the rhetoric invoked by public officials or interest groups (some of which is clearly reflected in media accounts and is discussed below), or the language used on a grassroots medium like Internet blogs. One might even fashion a survey in an attempt to ascertain how individuals conceive of rights. Nevertheless, I believe the method described here is an effective way to capture an important ingredient of public rights discourse.

Analysis and Results

The analysis is divided into two broad sections. The first investigates whether Glendon is correct to assert that rights in Canada are understood as having limits. To inquire whether the newspaper articles conveyed the idea that rights are not absolute, three different variables are measured: a reference to the Charter's general limitations clause (s. 1); mention of the notwithstanding clause (s. 33); and any phrasing that otherwise specifies, explicitly or implicitly, limits on rights. The second section of analysis investigates the type of claims presented in opposition to the rights in question. Measures were taken in two instances: where competing rights are presented in opposition to the primary right claimed and where values other than rights are invoked to oppose the primary right claimed. The distinction between "competing rights" and "competing values" is not always clear cut, and the implications of this are also discussed below. The overall results are displayed, by case, in Table 1. It is important to note that some articles did not include any of these indicators, while others may have made reference to all five different indicators.

Newspaper Treatment of "Limits on Rights"

Section 1: The Reasonable Limitations Clause

The total figures show that a fairly small percentage of articles refer to the provisions of the Charter that Glendon argues mitigate absolutist rights talk in Canada. Only seven of 103 articles refer to the reasonable limitations clause, five of which pertain to a single case, *Sauvé*. That section 1

TABLE 1
References to Indicators, by Case, Total (Percentage)

Case (# of articles)	Limits on rights			Competing claims	
	Section 1	Section 33	Any phrasing re: limits	Competing rights	Competing values
Bryan (4)	0	0	1 (25%)	0	4 (100%)
Chaoulli (42)	1 (2%)	7 (17%)	10 (24%)	17 (40%)	21 (50%)
Charkaoui (8)	0	0	5 (63%)	8 (100%)	0
Harper (6)	1 (17%)	0	3 (50%)	4 (67%)	5 (83%)
Multani (7)	0	0	2 (29%)	5 (71%)	0
S.-S. Marriage (28)	0	15 (54%)	0	16 (57%)	13 (46%)
Sauvé (8)	5 (63%)	4 (50%)	3 (38%)	1 (13%)	5 (63%)
Total (103):	7 (7%)	26 (25%)	24 (23%)	51 (50%)	48 (47%)

was addressed so frequently in relation to this case was likely due to the fact it concerned the right to vote, located under section 3 of the Charter, which is articulated in such unequivocal terms: “every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” It would be immediately clear to even casual observers that *Sauvé* focused almost entirely on the reasonableness of limiting the right; unlike in most other cases, the Court did not need to exert much energy deciding whether the issue at hand fell under the scope and definition of the right in question.

Glendon is correct to assert that section 1 has profound implications for judicial decision-making. The Supreme Court “places heavy reliance” on defining the limitations of rights in its Charter jurisprudence (Sharpe and Roach, 2005: 62). Indeed, in all of these cases except the same-sex marriage reference, the Court engaged in section 1 analysis. Yet this data reveals that section 1 is rarely acknowledged, which corresponds with Sauvageau and others’ finding that the media “usually fail to explain how rights come to be defined by the court and how they can be limited by government” (2006: 231). That newspaper coverage neglects this in its treatment of most cases means the public is not sufficiently exposed to the notion that rights are often subject to carefully considered limitations by the Court.

When the articles are broken down by type (news, opinion columns, and editorials—Table 2) the analysis shows that in “hard news” stories, section 1 is not acknowledged even once. This might not be too surprising given the propensity for news articles to present the results of the case in a “who wins and who loses” manner. While news stories devote considerable space to examining the central, often controversial, issues

TABLE 2
References to Indicators, by Article Type, Total (Percentage)

Case Case (# of articles)	Limits on rights			Competing claims	
	Section 1	Section 33	Any phrasing re: limits	Competing rights	Competing values
News (44)	0	8 (18%)	12 (27%)	25 (57%)	21 (47%)
Columns (45)	5 (11%)	15 (33%)	8 (18%)	19 (42%)	20 (44%)
Editorials (14)	2 (14%)	3 (21%)	4 (29%)	7 (50%)	7 (50%)
Total (103):	7 (7%)	26 (25%)	24 (23%)	51 (50%)	48 (47%)

of the case, as well as acquiring reaction from interested parties, prominent officials and the general public, little time is spent dealing with the nuance of the decision. By contrast, columnists and editorials tend to devote more time to analysis and critique, and are more likely to make reference to judicial reasoning.

The news coverage occasionally refers to legal questions of proportionality or minimal impairment (see analysis of general phrasing that indicate limits on rights, below), but the articles do so without explaining the Court's "reasonable limitations" analysis. This suggests that Canadians, as consumers of news, are only rarely exposed to the notion that the Charter explicitly mandates a consideration of the limits or boundaries of its guarantees. The significance the reasonable limits clause has for the Court's jurisprudence is not instilled in the public's understanding of the Charter. Despite her hopes for section 1, the idea that rights are understood as objects that are either won or lost is exactly what Glendon laments.⁴

Section 33: The Notwithstanding Clause

The notwithstanding clause is referred to in one-quarter (26/103) of all articles, but in seven of the twenty-six instances the clause is mentioned, it is only to point out that, under the particular circumstances, it cannot be used. Section 33 only applies to sections 2 and 7 through 15 of the Charter (although sexual equality rights are also exempt because of the language of s. 28). Because the right to vote is enumerated under section 3, four articles dealing with *Sauvé* noted the clause's inapplicability in that case. In three articles pertaining to the same-sex marriage reference, the clause was mentioned to point out provincial governments could not invoke it because the definition of marriage is the exclusive jurisdiction of the federal government. It is perhaps more useful to observe that *potential use* of the clause is mentioned in only 18 per cent (19 of 103) of articles. Over half of the references to section 33 pertain to coverage

of the same-sex marriage reference, which seems to have been fuelled by debate over whether Conservative party leader Stephen Harper would be forced to use it if he wanted to preserve the traditional definition of marriage (for example, see Simpson, 2004).

The rather limited reference to section 33 is understandable, given the convention of disuse into which it has fallen: its use has generally been viewed as politically infeasible ever since the decision by Quebec premier Robert Bourassa to invoke it to restore the province's French-only sign law in 1988, amid intense debate over the Meech Lake Accord (Russell, 2007). The incident drew a harsh rebuke from the public, particularly among citizens outside Quebec, as the provincial government was seen as trampling rights asserted by the Supreme Court in its ruling on the matter in *Ford v. Quebec* (1988). On one notable occasion, Alberta Premier Ralph Klein quickly backtracked after facing intense negative publicity when his government introduced legislation using section 33 to limit lawsuits of victims of forced sterilization (Henton, 1998). Tsvi Kahana has examined the use of the notwithstanding mechanism and found that in most cases where it has been used public reaction was virtually non-existent because "these uses were both invisible and inaccessible" (2001: 255).⁵ The general reluctance of politicians to even consider resorting to the notwithstanding clause is reflected in the news stories that mention it. This impairs Glendon's appeal to section 33 as an element of the Charter that generates a less absolutist way of conceiving of rights.

The relatively limited reference to section 33 might be viewed as a reflection—or even cause—of another important reality that undercuts Glendon's assertion that it fosters a tempered view of rights: fewer than half of Canadians are even aware the clause exists (Nanos, 2007: 54). On that basis, there is little reason to believe that the notwithstanding clause plays a strong role in injecting a less absolutist conception of rights into the public's consciousness. In fact, there are grounds to assert that debate about section 33 exacerbates the harmful sort of rights talk Glendon describes. Section 33 is frequently described as the "override" clause, even though that word appears nowhere in the Charter. Rather than being viewed as a device used to protect or assert other democratic values, discussion about the clause tends towards vilification: section 33 is viewed as a way for governments to take away, or override, rights.

Newspaper coverage reflects this. In two-thirds of the articles making reference to the notwithstanding clause (17 of 26), it is described as "overriding" or "overturning" rights, or "rejecting," "overruling" or "opting out" of the Charter. In only a handful of instances is section 33 described in the more accurate sense of a legislature temporarily suspending a judicial judgment, or substituting Parliamentary will or other values for the Court's decision. The idea of "overriding" rights so dominates general perceptions about the notwithstanding clause that Prime Minister Paul

Martin attempted to salvage a faltering 2006 election campaign by promising to abolish Parliament’s capacity to use it (Russell, 2007: 68). Therefore, while there is little reason to disagree with Glendon that the inclusion of section 33 reflects the idea that rights have democratic limits, its (mis)-use in practice has generated almost the opposite effect on discourse that she would hope. Fully half of Canadians are unaware the notwithstanding clause even exists. The other half views it with suspicion or disdain, as a potential weapon against their constitutionally protected rights.

General Limits on Rights

If the elements of the Charter Glendon champions as inculcating a more nuanced view of rights are not widely discussed, or rarely even alluded to in news reporting, perhaps general references to limits on rights are sufficient to foster a more moderate “Canadian” view of rights. To that end, the analysis accounted for any words or phrasing which might indicate that rights have limitations. Twenty-four (23 per cent) of 103 articles included such language. The specific phrases are examined in Table 3.

More than half of the phrases which might be associated with the notion of limits on rights are couched in a relatively inaccessible, legalistic language. Many of the phrases, such as “minimal impairment” or “proportionality” are likely taken from a reading of the Court’s section 1 analysis. Others, such as “in accordance with the principles of fundamental justice” come directly from the language of section 7 and refer to the internal limits on the rights themselves. But absent any explanation, such phrasing is unlikely to elicit any explicit sense from the reader that the rights in question are not absolute. Only nine articles in the entire sample make any precise declaration that there are “limits on rights” or that rights are “not absolute.” Like the reporting of the specific Charter

TABLE 3
References to Limits on Rights

Explicit language referring to “limits on rights” or that rights are “not absolute”	9
“in accordance with principles of fundamental justice” (in section 7)	3
“justified” infringement	3
Restrictions are “proportionate” to aim of legislation	2
“reasonable protection”	2
“The <i>Charter</i> does not confer a “freestanding” right to health care”	1
“rational connection”	1
“compromise between liberty and security”	1
“restrictions must be minimal”	1
“minimal impairment”	1
Total:	24

provisions (sections 1 and 33), the media's coverage in a broader sense fails to convey the idea that rights have limits.

An Absolutist Conception of Rights

Coverage of Supreme Court cases and rights issues in Canada's two national newspapers fails to convey the impression that rights can be subject to legitimate, democratic limitations. The two elements of the Charter to which Glendon ascribes a more nuanced, Canadian understanding of rights are given poor treatment in the print media. The reasonable limitations clause is rarely acknowledged, which in itself reflects the news media's inability to translate to the public an accurate representation of how the Court's rights adjudication operates in practice. And while more consideration and debate is devoted to the notwithstanding clause, it is so often portrayed in a simplistic or inaccurate manner that the attention it receives serves only to intensify an absolutist conception of rights.

News stories seldom provide an explicit recognition that there are limits on rights even in more general terms. This has important implications, not just for Canadians' understanding of the Charter or how the Supreme Court works, but for the ability of citizens to resolve disputes or achieve compromise in a pluralistic society. If rights are cast in absolute terms, critics of rights talk suggest, they are invariably utilized as trumps over competing claims and values. Further, an absolutist conception of rights makes it exceedingly difficult for elected governments to achieve certain policy goals, even if those goals have broad public support, because the rights invoked to oppose them are viewed as taking precedence. The next section evaluates how opposition to the rights at stake in these cases are portrayed in the media.

Competing Claims

Aside from presenting rights in uncompromising, absolute terms, rights talk under the Charter is also said to manifest in people the assumption that other values which come into conflict with rights are ultimately inferior (Hiebert, 1993: 119). As a result, rights talk is said to encourage people to couch competing claims in rights-based terms (Glendon, 1991: 4). To evaluate the extent to which this occurs, the analysis here accounted for instances in which articles made reference to competing rights or mentioned other values which conflict with the right in question. The results are displayed, by case, in Table 4. In 51 of 103 articles (50 per cent), a competing right was invoked, and in 48 (47 per cent), a competing value was mentioned.

The distinction between competing "rights" and competing "values" is not always obvious. A good illustration of this concerns claims of

TABLE 4
Competing Rights and Values, by Case

Case (total # of articles)	Central right or freedom	Competing right	Competing value
Bryan (4)	Expression		Electoral fairness 4
Chaoulli (42)	Right to life, security of the person, health care	Equality 17	Public health system 9 Parliamentary sovereignty 6 Made in Quebec plan 3 Government resources 3 Total: 21
Charkaoui (8)	Due process	National security 8	
Harper (6)	Expression	Equality 4	Electoral fairness 5
Multani (7)	Religion	Security 5	
S.-S. Marriage (28)	Equality	Religion 16	Tradition/religious values 13
Sauvé (8)	Vote	Victim's rights 1	Respect for rule of law 4 Parliamentary sovereignty 1 Total: 5
Total (103)		51 (50%)	48 (47%)

support for “national security” with respect to *Charkaoui*, where the Supreme Court declared parts of the federal government’s security certificates regime unconstitutional because they contravened the suspect’s right to due process. Supporters of the policy argue that national security should override those concerns. The claim is not explicitly couched as a right to national security and might justifiably be categorized as a competing value. At the same time, one might legitimately regard national security as a collective right or even as an extension of section 7’s right to security of the person, which would be in jeopardy if the government failed to detain or deport suspected terrorists.⁶ Similarly, concern for equality in reaction to the Court’s “right to health care” decision in *Chaoulli* might properly be regarded as a competing value, since those invoking it did not explicitly refer to the equality provisions in section 15 of the Charter but to equality in a more general sense. Yet implicit in the notion that people should have equal access to health care regardless of their ability to pay is the idea that the less fortunate have a *right* to the same standard of care as the more affluent. Nevertheless, because the line between “rights” and “values” in some of these instances is not so easily defined, a closer examination of each case is important.

Case-by-Case Analysis

Freedom of religion in *Multani*

The principal account of the Supreme Court’s *Multani* decision was straightforward. The ruling, which declared that a Quebec school board could not prohibit a Sikh student from wearing his kirpan (a ceremonial

dagger) to school, was framed as a victory for religious freedom. The primary source of opposition to the decision, as reflected in five of the seven articles pertaining to the case, was based on the security or safety of other people attending the schools. Two of these articles had direct references to the notion that freedom of religion should be subject to limits when there are genuine safety concerns. The Court's ruling determined, however, that an outright ban of the kirpan went beyond what was reasonably necessary to ensure safety at schools.

Although the treatment *Multani* received in the newspapers was predominantly rights-oriented, two articles noted that the ruling also appealed to the values of accommodation and multiculturalism. Indeed, the case exemplifies the difficulties many Western liberal democracies are facing with respect to the "reasonable accommodation" of minority ethnic and religious groups. One article reports an argument made by religious groups that the outcome in *Multani*, and its allusion to multiculturalism, is reason to assert that religious groups are entitled to other rights, such as the right of Muslims to wear hijabs in private schools or to have prayer rooms at universities and colleges (see Heinrich, 2006). Without commenting on the legitimacy of these claims, this type of example of the escalating predisposition to frame demands as entitlements is one of the principal concerns of some Canadian rights talk critics. Rainer Knopff argues that one impact of judicial review under the Charter has been to encourage inflationary rights claiming:

Although rights may exist, and can even be the subject of a fundamental popular consensus, the issues covered by their rhetorical cloak in the courtroom are rarely of this fundamental ilk. The people may agree that theocratic establishments violate the fundamental right of freedom of religion, while reasonably disagreeing about the merits of Sunday closing laws. They may agree that equality is a fundamental right—one that prohibits, say, slavery—while disagreeing profoundly, but legitimately, about whether this right protects only equality of opportunity or also equality of result.... The courtroom politics of rights, however, rhetorically gives these second-level disagreements the colour of truly fundamental ones. (1998: 700)

While I do not believe the examples surrounding *Multani* constitute a particularly negative form of inflationary rights claiming, it is important to recognize that some grievances are more central to religious freedom than others. For example, the failure of some universities to provide prayer rooms is not as egregious an injury to freedom of religion as would be the case if universities prohibited prayer. For some critics, rights claims might be limited to such instances where compromise is impossible because the core of the right is at threat (Hiebert, 2002: 55–56; Knopff and Morton, 1992: 48–49). To invoke rights in more "peripheral" contexts is to devalue the concept of rights.

Equality in the same-sex marriage reference

Where inflationary rights talk might have a more detrimental impact on the quality of political discourse is when rights are invoked for the sole purpose of countering other rights claims. In over half of the articles pertaining to the Court's same-sex marriage reference, in which equality was the central issue, mention is made of concern for religious freedom. Yet there is little reason to believe that religious rights were threatened by potential changes to the definition of marriage, especially since neither the federal nor any provincial government at any point suggested religious institutions would be compelled to solemnize same-sex marriages. The debate later involved whether provincial civil servants could refuse to solemnize same-sex marriage (Tibbetts, 2004a). No articles involving this particular issue were included in my analysis (based on the criteria explained in above); however, this constitutes an example of the inflationary nature of rights claiming.

The debate over same-sex marriage was contentious. By the time the federal government referred the matter to the Supreme Court, several provincial appellate courts had ruled that the traditional definition of marriage was unconstitutional. Earlier Supreme Court decisions extending the Charter's section 15 provisions to protect the equality rights of gays and lesbians seemed to indicate how the Court would rule if the government had appealed any of the lower courts' decisions,⁷ and so the reference itself was generally viewed as a manoeuvre designed to provide the Liberal government with political cover. Rather than making the politically divisive choice to change the definition of marriage itself, the government could argue the Court decision forced its hand and that it had to proceed to conform to the Charter. In fact, after three reference questions had initially been sent to the Court, Prime Minister Paul Martin added a fourth asking the Court to rule on the constitutionality of the opposite-sex definition. The Court refused to answer, in essence leaving the decision in the hands of the government.

In the course of answering the original three questions, the Court ruled that the definition of marriage falls under the exclusive jurisdiction of the federal government, and that the proposed legislation changing the definition of marriage to include same-sex couples was consistent with the Charter. The third question concerned whether religious freedom protected religious officials from having to perform same-sex marriages. On this point the Court was clear: section 2(a) of the Charter protects religious officials from being compelled to perform marriages contrary to their beliefs. As a result, newspaper coverage accurately portrayed the decision as upholding both equality and religious freedom.

The Court's ruling undercut opposition to same-sex marriage predicated on grounds of religious freedom; further, this is fully reflected in

the newspaper coverage. Most articles which made reference to religious rights appear to take pains to note that the Court's ruling meant those rights do not conflict with equal marriage rights. One article quotes a cleric supportive of same-sex marriage as noting that religious freedom was invoked as a "straw demon" by those opposing the change (Cowan, 2004). Additionally, nearly half of the articles included references to tradition or religious *values* in opposition to same-sex marriage, in addition to those citing religious freedom.

Newspaper coverage of the same-sex marriage reference was generally sophisticated and accurate. The clarity and political shrewdness of the judicial decision itself played an important role in this regard. Nevertheless, the relative frequency with which religious rights were invoked in opposition to same-sex marriage signifies an inclination towards a less than robust form of political debate. While in this instance the Court's decision successfully nullified the idea of a direct competition between the rights in question, the initial political discourse surrounding the marriage issue took on an impoverished tone as a result of rights talk.

Freedom of Expression in *Bryan* and *Harper*

The freedom of expression issue presented in *Bryan* did not generate competing rights claims. Of concern in this case was a provision in the *Canada Elections Act* which prohibits the transmission of election results to parts of the country where the polls are still open. A narrow five-to-four majority held that the measure was a reasonable limit on free expression given the aims of ensuring fair elections. Although the majority expressed some concern about "informational equality" (the idea that all voters base their judgment with access to the same level of information), the primary issue was maintaining public confidence in the integrity of the electoral system. Although only two articles were published about this case in each of the two newspapers, the decision was cast in a negative light. Both a *Globe* editorial and a column published in the *Post* contend the ruling tramples freedom of expression, and none of the articles make reference to the possibility of limits on the right. That a delay in being able to transmit election results might constitute only a marginal restriction on expression was not acknowledged in any of the articles concerning this case. The media's criticism of *Bryan* arguably stems from its self-interest in the case: the restrictions imposed by the impugned legislation implicated news outlets perhaps more than any other individual or group in the country.

Limits on free expression were more readily acknowledged with respect to *Harper*, a case in which the Supreme Court upheld restrictions on third-party elections advertising. The legislation restricts spending for third parties to \$3,000 per riding and \$150,000 nationally. The

Court's six-to-three majority ruled this was a reasonable limit on expression given the aim of preventing wealthy individuals or groups from dominating political debate. Five articles cited electoral fairness or democratic values, while four refer to equality in opposition to the freedom of expression claim. News coverage of *Harper* generally reflected the sentiment that the decision affirmed Parliament's legislative goal of balancing expression and equality. Unfortunately, these details tend to get subsumed in the "win or lose" style of reporting. Reaction to the decision by interested parties, such as the National Citizens' Coalition (NCC) which brought the case, and the Conservative party, were given relative prominence in the hard news articles. NCC vice-president Gerry Nichols is quoted at the top of one article as saying the Court's decision serves to "stab our democracy in the heart" (see Tibbetts, 2004b) and Stephen Harper, who headed the NCC prior to re-entering politics is quoted in another article saying the Court has failed to protect rights (see Makin, 2004). The first sentence of a *Post* editorial decried the decision as a "win for the censors." The prominence given to such comments is unsurprising; news stories frequently highlight conflict between parties (Sauvageau et al., 2006: 76). This in turn often makes rhetoric surrounding rights a focal point.

Right to due process in *Charkaoui*

All eight of the articles pertaining to *Charkaoui* pitted the rights of the accused against national security concerns. The Court struck down only specific provisions of the federal government's security certificates regime, leaving much of the scheme intact. Nonetheless, it ruled that secret hearings to determine the legitimacy of detaining a suspect violates the suspect's rights to prompt review under section 10(c) of the Charter and to life, liberty and security under section 7 because the individual faces detention and possible deportation under the proceedings. Much of the news coverage of this case focused on the fact that Parliament now needed to legislate provisions which better balance the due process issues and national security concerns.

Unlike *Bryan*, which received largely negative treatment in both newspapers, *Charkaoui* garnered highly favourable coverage in columns and editorials. It is plausible that this stems in part from the fact that in *Charkaoui* the Court took great care to balance two salient, rights-oriented concerns—an individual's due process rights and collective national security—whereas with respect to *Bryan* the right to free expression was viewed by critics of the Court's decision as trumping any countervailing concern for electoral fairness. A more cynical view would suggest the difference merely stems from the media's conflict of interest in *Bryan*. Nevertheless, news coverage of *Charkaoui* clearly demonstrates that not

all competing rights issues are presented to the public as irreconcilable disagreements.

Right to vote in *Sauvé*

Sauvé is perhaps less remarkable for what news coverage of the decision illustrates about rights talk than it is for the decision itself. The majority of articles refer to the rule of law or Parliamentary sovereignty as the primary sources of opposition to the Court's five-to-four decision striking down the prohibition on prisoner voting. One article focused on the ruling as conflicting with victim's rights. As noted above in regards to the Charter's limitations clause, news coverage of this case is notable for the relatively consistent mention of section 1. In that sense, it accurately portrays the majority decision.

What is more significant about *Sauvé* is that the judges in the minority take the majority to task for an approach to section 1 analysis that views rights as trumping important values not explicitly enumerated in the Charter:

[This case] involves justifications for and against the limitation of the right to vote which are based upon axiomatic arguments of principle or value statements. I am of the view that when faced with such justifications, this Court ought to turn to the text of s. 1 of the Charter and to the basic principles which undergird both s. 1 and the relationship that provision has with the rights and freedoms protected within the Charter. Particularly s. 1 of the Charter requires that this Court look to the fact that there may be different social or political philosophies upon which justifications for or against the limitations of rights may be based. (para. 67)

The assertion that competing principles or values might reasonably be sufficient to limit rights under section 1 is precisely the benefit Glendon ascribes to that part of the Charter's design. The *Sauvé* decision illustrates that this does not always translate into the type of jurisprudence Glendon touts as one of the key benefits to this understanding of rights (although there are obviously diverging opinions among the judges on this point).

Right to life, liberty and security in *Chaoulli*

The *Chaoulli* decision—in which the Supreme Court struck down Quebec legislation prohibiting the purchase of private medical insurance—is one of the most controversial and widely reported Charter cases ever handed down. The justices actually split three to three with one judge abstaining on whether the law was unconstitutional under the Canadian Charter, ruling four to three that it contravened the Quebec Charter of Human Rights and Freedoms. According to Robert Sharpe and Kent

Roach, the ruling “marks a dramatic break from the Supreme Court’s previous deferential approach to broad issues of social and economic policy” (2005: 77). Because it seemingly pitted against each other two of the most revered symbols of Canadian identity—the Canadian Charter and the public health care system—it is unsurprising the case garnered extensive media coverage. *Chaoulli* is also the type of case one would expect to be emblematic of Glendon’s thesis. The health care system is illustrative of the fact that Canadian political culture is less individualistic than its American neighbour. If any Charter decision was going to foster a debate framed in terms of values or policy rather than rights claiming, it would be this one.

Yet the dominant narrative of news reporting centred on the Court’s declaration of a right to timely health care. The crux of the *Chaoulli* decision came down to the Court’s reasonable limitations analysis and the majority’s explanation that the ban of private insurance was not proportional to the government’s goal of protecting the public health system.

The example illustrated by a number of other Canadian provinces casts doubt on the argument that the integrity of the public plan depends on the prohibition against private insurance. Obviously, since Quebec’s public plan is in a quasi-monopoly position, its predominance is assured. Also, the regimes of the provinces where a private system is authorized demonstrate that public health services are not threatened by private insurance. (para. 74)

It should be noted that several of the hard news stories did a good job of explaining this reasoning, particularly articles initially reporting the decision. Yet the majority of stories ignored this analysis and instead focused on the general notion that the Court had declared “a right to health care”; many of these articles quoted from the decision short, pithy phrases such as “access to a waiting list is not access to health care” (para. 123).

Half of the stories make mention of value-oriented claims in opposition to the Court’s decision: nine focus on the virtues of a public health system, six argue in favour of the legislature’s purview to determine social policy, three defend Quebec’s autonomy in the matter and three contend the Court should not make rulings that implicate scarce government resources. The plurality of claims, however, are couched in terms of equality. Although rarely invoking explicit language like “right to equality,” 17 articles reference equality claims driven by statements like “people should have equal access to health care,” “the decision pits the rich against the poor” or “people with less money deserve the same care as the rich.” That unequivocal rights language was not invoked in these instances might suggest that reaction to the *Chaoulli* decision was tempered by a “Canadian” appeal to certain values. However, to argue that people deserve equal access is to make the implicit claim they have a right to it, particularly when the equality claims are presented in the uncompromising

manner of taking precedence over an individual's right to purchase private medical insurance.

Because the *Chaoulli* decision also involved a dispute over concrete, relatively complicated policy issues, news coverage of the decision was not entirely consumed by a competition of rights issues. Nonetheless, the supremacy of the rights frame with which the newspapers portrayed the issue in this case tends to reinforce the notion that rights deserve primacy over other values and concerns.

Rights versus Values

This case-by-case analysis presents a somewhat ambiguous picture of how the media portray rights and competing claims. Whether an incommensurable clash of rights is presented depends on the context, the issues involved and the quality of the Court's decision. In some instances, the media do a good job of capturing the balancing process that sometimes comprises the core of judicial decisions. Nonetheless, competing value claims are rarely depicted as being as fundamental as rights. In some cases this is because the Court itself regards rights as more essential than other values, as in *Sauvé*, or the media may treat rights as more fundamental out of its own interest, as in *Bryan*. Broadly speaking, however, the win-or-lose style of reporting Court decisions gives high priority to the "battle for rights" at play, and the reactions of various rights claimants. This is in part a result of the newspapers' general portrayal of rights as absolute.

This pattern of reporting is, on a qualitative level, the same in both of Canada's two English-language national newspapers. The quantitative results for each newspaper are presented in Table 5. With the exception of section 33, which garnered more frequent mention in *Globe and Mail* articles, Canada's two national newspapers are remarkably consistent in their presentation of rights issues (and in the amount of coverage devoted to Supreme Court decisions). The similarity is all the more significant

TABLE 5
References to Indicators, by Newspaper, Total (Percentage)

Newspaper	Limits on rights			Competing claims	
	Section 1	Section 33	Any phrasing re: limits	Competing rights	Competing values
<i>Globe and Mail</i> (53)	3 (6%)	17 (32%)	11 (21%)	26 (49%)	24 (45%)
<i>National Post</i> (50)	4 (8%)	9 (18%)	13 (26%)	25 (50%)	24 (48%)
Total (103)	7 (7%)	26 (25%)	24 (23%)	51 (50%)	48 (47%)

given content analyses by others have found notable differences in reporting from the *Globe and Mail* and the *National Post*, such as with respect to federal election campaign coverage (Trimble and Sampert, 2004).

Abortion and the *Morgentaler* Decision

If news coverage of the cases explored above suggests Canada does not enjoy a particularly sophisticated form of rights talk, then it is useful to examine the media’s treatment of *Morgentaler*, the Supreme Court decision on abortion, which is cited by Glendon as epitomizing the differences between Canada and the US discourse around rights. Because the *National Post* did not exist at the time of decision, analysis is limited to 21 *Globe and Mail* articles reporting the ruling. The results are displayed in Table 6.

The single reference to the Charter’s limitations clause was in a news article which provided an excerpt of the Court’s decision. Only four articles made mention of the notwithstanding clause, three of those describing its use as an “override” of rights or the Charter. Nearly half of the articles framed the issue as a right to abortion or women’s right to choose versus the right to life of the foetus and only two raised deference to Parliament as a competing value.

Glendon correctly notes that *Morgentaler* differs from the US Court’s *Roe v. Wade* abortion decision in that it does not prevent the legislature from enacting new regulations against the procedure. Yet the inability of Parliament to successfully pass new legislation in the immediate aftermath of the Court’s decision, and the apparent unwillingness to do so in the two decades since the case was heard, is evidence to some observers of the irreconcilable division over the issue. According to F.L. Morton, the failure of new legislation to pass in the immediate aftermath of the decision “suggests that the polarizing effects of rights talk is at work in

TABLE 6
References to Indicators in Coverage of *Morgentaler*, by Article Type, Total (Percentage)

<i>Morgentaler</i>	Limits on rights			Competing claims	
	Section 1	Section 33	Any phrasing re: limits	Competing rights	Competing values
News (14)	1 (7%)	3 (21%)	3 (21%)	7 (50%)	1 (7%)
Columns (5)	0	0	0	3 (60%)	1 (20%)
Editorials (2)	0	1 (50%)	1 (50%)	0	0
Total (21):	1 (5%)	4 (19%)	4 (19%)	10 (48%)	2 (10%)

the Canadian body politic” (1992: 313). It is difficult to be sure of the extent to which legislative inaction on abortion is the result of issue avoidance or simply satisfaction with the status quo. Glendon’s assertion, made only a few years after *Morgentaler*, is that the decision served to foster compromise and reflected a less absolutist understanding of rights in the Canadian context. That no attempt has been made since 1990 to address the policy vacuum left by the decision suggests, at the very least, that compromise has not been reached. Further, the Liberal party’s ability to use abortion as a wedge issue against the Canadian Alliance or Conservative party in consecutive elections, even at times when it was not on any party’s agenda, lends some support to Morton’s argument. During the 2006 campaign Paul Martin raised the spectre of abortion in the context of his promise to abolish federal use of the notwithstanding clause so that Stephen Harper could not “pick and choose which rights Canadians will keep and which will be taken away” (Kennedy, 2006). This example is emblematic of the way invoking rights can inhibit, or in this case pre-empt, genuine debate. Nonetheless, as the news coverage of *Morgentaler* reflects, the abortion issue is subject to the crippling impact of rights talk. This confirms Russell’s assertion that Court decisions such as this recast these issues “in less compromising and more strident terms—making consensual resolution of the issues more difficult than before” (1994: 173).

Conclusion

The analysis presented here indicates that there is a Canadian form of rights talk at play in newspaper coverage of Supreme Court cases and that it comes with both positive and negative consequences. Invoking a right is not an inherently negative act. Cases like *Charkaoui* and *Multani* epitomize what, in the minds of many, the Charter was intended to accomplish. Constitutional rights provide an avenue for individuals or groups to appeal to values so basic they transcend simple majoritarian preferences. Rights, before and after the Charter, are more than rhetorical devices; they are safeguards against unwarranted government power. It is because of their importance that society should be alarmed when rights are treated in a haphazard manner.

This analysis shows that rights discourse, as represented in the news media, is not so distinct from the American version described by Glendon. It is largely individualistic, absolutist and uncompromising. Canadian newspapers do little to indicate to readers that most Charter decisions involve extensive limitations analysis, and discourse surrounding the notwithstanding clause only aggravates this conception of rights. Nonetheless, the preceding examination suggests that an appeal to values other

than rights tends to moderate the negative aspects of rights claiming. Whether or not Charter disputes are presented as an uncompromising clash of rights is dependent on the issues involved and the tenor of the Court's decision.

Yet there is reason to be concerned with the generally simplistic portrayal of rights by the media. All rights claims are usually presented as holding equal weight, regardless of how central or marginal the circumstances might otherwise indicate. Further, there is a tendency for individuals to invoke rights-based language to support their arguments. Several news stories refer to "the right of Parliament" or "the right of the Supreme Court" to make a decision. The *Chaoulli* decision led some to claim that doctors had the right to set their own fees, patients a right to pay for procedures, that the decision instilled a "constitutional right to two-tier health care," that judges assert the right to make people's decisions for them or that medicare itself was a "birthright."

If the media help to shape broader public debate or reflect prevailing attitudes towards rights, then this portrayal has considerable implications not just for meaningful political debate but for the development of public policy. Rights talk makes it difficult for politicians to articulate support for legislative policies that comes up against rights-based claims. Any attempt to do so will be perceived as an unabashed attempt to trample rights because, as this analysis indicates, the public is rarely subject to a portrayal of rights in the news that treats them as anything but absolute. Hiebert argues that the primacy which rights are afforded in political discourse discourages an approach to Charter issues which recognize collective or general welfare values (1993: 120). *Chaoulli* is a prominent example of how this manifests itself. Moreover, when a clash of rights presents itself in the most strident terms, such as with respect to the abortion issue, meaningful debate is substituted for entrenched acrimony and an acute chill on the implementation of policy compromise.

Glendon's contention that the Charter fosters a more nuanced view of rights is perhaps correct as it applies to judicial decision making in Canada, even if there are exceptions like *Sauvé*, where the outcome does not seem to mesh with her view of the purpose of the reasonable limitations clause. The evidence presented here, however, suggests this more "sophisticated" understanding of rights is not often transposed to the public consciousness through the media. While the newspapers generally do a good job of detailing the outcome of Charter cases and the reaction of relevant parties to Court decisions, they present little more than caricatures of how legitimate limitations on rights are balanced with other values or policy concerns. This reinforces the concerns of Canadian scholars who suggest rights talk has dangerous implications for political discourse. If the news media present at least one significant indicator, then Canadian rights talk, like its American counterpart, is not always

conducive to the genuine give-and-take that is necessary in diverse democratic states.

Nonetheless, further empirical research is needed before these conclusions can be taken as authoritative. First, it is worth pointing out that I am unaware of any similar empirical research that would seek to confirm whether Glendon's thesis is true *even in the American context*. Second, my own analysis did not include an examination of the French-language newspapers. There is reason to believe that given Quebec's unique political culture, the French-language media based there may provide a different presentation of rights issues than their English counterparts. Third, as noted above, there are different indicators of public rights discourse, including more grassroots-level media like the Internet. It is entirely conceivable that researchers applying different methodologies to the empirical study of this phenomenon may reach dissimilar conclusions. Additional research would serve to enrich not only the debate at hand, but broader debates implicating the Charter as well.

Notes

- 1 I omitted from analysis articles that may have made reference to the Court's decision but in which the decision was not subject to analysis or comment. For example, when collecting articles pertaining to *Chaoulli v. Quebec*, I did not include articles which focused on the health care systems of other countries.
- 2 The primary exception is the degree to which the notwithstanding clause is invoked (something that tends to be associated with only the most controversial and heavily covered cases).
- 3 Because the *National Post* did not exist at the time, I limited my analysis to the *Globe and Mail* and separated the results from the main dataset.
- 4 The two-stage approach the Court often takes to Charter adjudication may also influence perceptions in this regard. The Court often gives rights a liberal and generous interpretation at the definition stage, applying limitations under section 1 at the second stage of analysis. This contrasts with the American Court's approach (the US Bill of Rights contains no clause equivalent to section 1) where "internal limitations" are applied when the Court defines the scope of a given right. Scholars have pointed out that the Canadian approach lends to the view that rights are absolute. (Knopff and Morton, 1992: 40–44; see also Janet Hiebert's discussion on determining "core" versus "periphery" rights, 2002: 69–70). I would like to acknowledge the contribution of one of the anonymous reviewers on this point.
- 5 I would like to thank one of the anonymous reviewers for pointing to this.
- 6 I am grateful to one of the anonymous reviewers for suggesting how section 7 might be implicated here.
- 7 See: *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 and *M. v. H.*, [1999] 2 S.C.R. 3.

References

- Cairns, Alan C. 1992. *Charter versus Federalism: The Dilemmas of Constitutional Reform*. Montreal: McGill-Queen's University Press.

- Cowan, James. 2004. "Tories 'whomped' gay advocate says: Toronto celebrants call Harper a 'girly man' for opposition to gay marriage." *National Post*, December 10, A4.
- Glendon, Mary Ann. 1991. *Rights Talk: The Impoverishment of Political Discourse*. New York: The Free Press.
- Heinrich, Jeff. 2006. "Supreme Court decision on kirpans in schools gives Quebec Muslims hope." *National Post*, March 4, A12.
- Henton, Darcy. 1998. "Klein does flip-flop on victims' bill: Premier admits 'mistake' over bid to override rights on sterilization." *Toronto Star*, March 12, A2.
- Hiebert, Janet. 1993. "Rights and Public Debate: The Limitations of a 'Rights Must be Paramount' Perspective." *International Journal of Canadian Studies* 7–8: 117–35.
- Hiebert, Janet. 2002. *Charter Conflict: What Is Parliament's Role?* Montreal & Kingston: McGill-Queen's University Press.
- Ignatieff, Michael. 2000. *The Rights Revolution*. Toronto: House of Anansi Press.
- Kahana, Tsvi. 2001. "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter." *Canadian Public Administration* 44 (3): 255–91.
- Kennedy, Mark. 2006. "Tories want new law on abortion, PM alleges: Raises old charge." *National Post*, January 12, A6.
- Knopff, Rainer. 1998. "Populism and the Politics of Rights: The Dual Attack on Representative Democracy." *Canadian Journal of Political Science* 31(4): 683–705.
- Knopff, Rainer and F.L. Morton. 1992. *Charter Politics*. Scarborough: Nelson Canada.
- Makin, Kirk. 2004. "Top court upholds spending limits: Justices rule unrestricted political ads could 'manipulate or oppress the voter.'" *Globe and Mail*, May 19, A8.
- Miljan, Lydia and Barry Cooper. 2003. *Hidden Agendas: How Journalists Influence the News*. Vancouver: UBC Press.
- Morton, F.L. 1992. *Morgentaler v. Borowski: Abortion, the Charter and the Courts*. Toronto: McClelland & Stewart.
- Morton, F.L. and Rainer Knopff. 2000. *The Charter Revolution and the Court Party*. Peterborough: Broadview Press.
- Nanos, Nik. 2007. "Charter Values Don't Equal Canadian Values: Strong Support for Same-Sex and Property Rights." *Policy Options* 28(2): 50–55.
- Pal, Leslie A. 1993. *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada*. Montreal: McGill-Queen's University Press.
- Peacock, Anthony A. 1996. "Strange Brew: Tocqueville, Rights, and the Technology of Equality." In *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory*, ed. Anthony A. Peacock. Don Mills: Oxford University Press.
- Russell, Peter. 1983. "The Political Purposes of the Canadian Charter of Rights and Freedoms." *The Canadian Bar Review* 61: 30–54.
- . 1994. "Canadian Constraints on Judicialization from Without." *International Political Science Review* 15(2): 165–75.
- . 2007. "The Notwithstanding Clause: the Charter's Homage to Parliamentary Democracy." *Policy Options* 28(2): 65–68.
- Sauvageau, Florian, David Schneiderman and David Taras. 2006. *The Last Word: Media Coverage of the Supreme Court of Canada*. Vancouver: UBC Press.
- Sharpe, Robert J. and Kent Roach. 2005. *The Charter of Rights and Freedoms*. 3rd ed. Toronto: Irwin Law.
- Simpson, Jeffrey. 1994. "Rights Talk: The Effect of the Charter on Canadian Political Discourse." In *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life*, ed. Philip Bryden, Steven Davis and Peter Russell. Toronto: University of Toronto Press.
- . 2004. "Stephen Harper just doesn't get it." *Globe and Mail*, December 15, A25.

- Tibbetts, Janice. 2004a. "Provinces scorn Cotler's appeal: Same-sex wedding." *National Post*, December 18, A16.
- . 2004b. "Supreme Court upholds election ad limits: Lobby groups outraged." *National Post*, May 19, A9.
- Trimble, Linda and Shannon Sampert. 2004. "Who's in the Game? The Framing of the Canadian Election 2000 by the *Globe and Mail* and the *National Post*." *Canadian Journal of Political Science* 37(1): 51–71.

Cases

- Supreme Court of Canada. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791.
- Supreme Court of Canada. *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350; 2007 SCC 9.
- Supreme Court of Canada. *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.
- Supreme Court of Canada. *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827.
- Supreme Court of Canada. *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256; 2006 SCC 6.
- Supreme Court of Canada. *R. v. Bryan*, 2007 SCC 12.
- Supreme Court of Canada. *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.
- Supreme Court of Canada. *Sauve v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519.