

The Charter and Civil Religion

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“Human rights has emerged as the new secular religion of our time.”¹ So says Canada’s former Justice Minister, Irwin Cotler on numerous occasions. His view seems to be shared by a significant part of Canada’s population, especially legal, journalist, and academic elites. Canada’s Charter of Rights and Freedoms, along with the Supreme Court, is the focal point for an evocation of civil religion. This claim contradicts the expectations of many, since Canada is an allegedly secular society. Commentators frequently locate the level of its secularity somewhere between that of the religious United States, and the nonreligious European continent.² However, the manner in which important constituencies speak of the Charter, and the progressivist assumptions upon which their speech is based, reveals an attempt, intentional as well as inadvertent, to create a civil religion based upon the language of rights found in the Charter that postulates Canada participates in the unfolding of a progressive history toward a more democratic and egalitarian future in which individuals are thought to be unencumbered by history, nature, religion, tradition, or community.³ The “divinity” in which this civil religion cultivates worship is not the God of Abraham or any other ancient god, but “humanity” which has been the object of worship in the Enlightenment, and whose

¹ E.g., Irwin Cotler, Speech to Parliament of Canada, *Hansard*, (37th Parliament, 2nd session) October 28, 2002 (http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/016_2002-10-28/han016_1355-E.htm).

² As indicated by the subtitle of David Lyon and Marguerite Van Die, eds., *Rethinking Church, State, and Modernity: Canada Between Europe and America*, (Toronto: University of Toronto Press, 2000).

³ From a communitarian perspective, Michael Sandel refers to the vision of self proposed by this kind of ideology as the “unencumbered self” (*Democracy’s Discontent: America in Search of a Public Philosophy*, (Cambridge: Belknap, 1996), 65). Similarly, Harvey Mansfield, Jr., refers to it as the “expressive self” (Harvey Mansfield, Jr., *America’s Constitutional Soul*, (Baltimore: The Johns Hopkins University Press, 1991), 198).

ideological exponents have included John Stuart Mill, Turgot, Auguste Comte, Karl Marx, and others.

The Endurance of Civil Religion

Civil religion is an enduring political, historical, and philosophical problem. Despite, or because of, alleged secularization, civil religion persists although in forms we do not often recognize. Civil religion is frequently regarded as a product of premodern and preindustrial times before the rationalization of society. Premodern societies frequently made use of sacred symbols to invoke meaning and purpose for their societies, as well as to legitimate claims of rulers. For instance, the preamble of the Code of Hammurabi, the legal foundation of the Mesopotamian Empire, states that the sun-god Marduk (son of Enlil) is appointed ruler over all peoples, while his earthly analogue, Hammurabi, dispenses the essentials of just order. In ancient Greece, the polis was as much a religious cult as it was a political entity. Similarly, medieval European societies, guided by the central symbol of *sacrum imperium*, attempted to legitimate themselves under the auspices of the Christian symbol, *corpus mysticum* – the body of Christ. The Enlightenment consisted in large part of a struggle to detach political order from religious underpinnings, though frequently this meant replacing Christianity as the legitimating religion with secularism or historical progress as the legitimating religion.⁴

⁴ This story has been told numerous times. Most recently, by Michael Burleigh (*Earthly Powers: The Clash of Religion and Politics in Europe from the French Revolution to the Great War*, (Toronto: HarperCollins, 2006) and *Sacred Causes: The Clash of Religion and Politics, from the Great War to the War on Terror*, (Toronto: HarperCollins, 2007); most in-depth, by Eric Voegelin (*Modernity Without Restraint: The Political Religions; The New Science of Politics; and Science, Politics, and Gnosticism*, *Collected Works of Eric Voegelin*, vol. 5, ed., Manfred Henningsen, (Columbia, MO: University of

Contemporary debates in Canada concerning the place of religion in public life can be seen as instances of this civilizational struggle for legitimacy that was fought among Western nations for more than three centuries.⁵

Civil religion has been a persistent concern for political philosophers, even for those of the Enlightenment. If one surveys the findings of philosophers including Plato, Machiavelli, Bacon, Hobbes, Rousseau, and even Kant, perhaps the quintessential Enlightenment philosopher, one finds recognition that human beings need to connect their political societies to a divine source that legitimates their existence within a broader canopy of meaning than mere self-interest. They recognize the importance of civil religion even when some of them personally do not hold religious faith. Secularization, rationalization, or industrialization of modern societies seems to promise a political society grounded on reason alone, but even Kant, the preeminent Enlightenment philosopher, thought civil religion necessary because reason ultimately cannot ground itself. Put in more familiar terms, modern society seems to mean human beings relate to one another in terms of instrumentality and self-interest, which prompts a countermovement to preserve particular traditions and ways of life. Modern society has difficulty fully satisfying human beings' longings for meaningful communal life, which also helps explain the persistence of civil religion.

More recently, the very notion of secularization has come under scrutiny. Scholars including Peter Berger have called attention to a resurgence of religious practice across the globe. Some have countered by arguing that what appears as a retreat of

Missouri Press, 2000); *History of Political Ideas, Collected Works of Eric Voegelin*, vols. 19-26; *Order and History*, vols. 14-18.

⁵ Douglas Farrow, "Of Secularity and Civil Religion," in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*, ed., Douglas Farrow, (Montréal-Kingston: McGill-Queens University Press, 2004), 140-82.

secularization is in fact due to greater fertility rates among people who do not hold those secular principles. Defenders of the secularization thesis argue that people feel they do not need religion when they have the basic necessities taken care of by a welfare state. Their argument is unconvincing because they fail to prove the direction of causation; they may prefer the welfare state because they are nonreligious, not the other way around. This, at least, was Tocqueville's fear when he warned about the democratic propensity to seek shelter in a paternalistic state.⁶

Secularization is a problematic category, but one central to numerous controversies in Canadian public life, including the moral claims of the Charter as considered here. Iain Benson has shown that despite its scientific and nonreligious rhetoric, usage of the term "secular" is predicated on its own faith claims.⁷ At a basic level, human beings operate with "natural faith" assumptions because they cannot function if they must prove with absolute certainty the nature of everything they do. For instance, we assume the "floor is there in front of my foot" when we step, even though we do not seek to prove it has sufficient weight-bearing strength or that a mouse did not eat through its supports last night. In a broader sense, human action presupposes a natural faith in a stable cosmos in which human beings can plan and make decisions. This faith extends to politics because all societies presuppose what might be termed a cosmic-representative framework for their particular existence and for viewing their particular actions as significant and honorable to themselves and the world. Seen in this

⁶ See Peter L. Berger, *The Desecularization of the World: Resurgent Religion and World Politics*, (Grand Rapids, MI: Eerdmans, 1999) and Pippa Norris and Ronald Inglehart, *Sacred and Secular: Religion and Politics Worldwide*, (Cambridge: Cambridge University Press, 2004); Heyking, "Secularization: Not Dead Yet, But Never What it Seemed," *International Studies Review*, 7 (2005): 279-84.; Alexis de Tocqueville, *Democracy in America*, trans., Harvey Mansfield and Delba Winthrop, (Chicago: University of Chicago Press, 2000), II.4.6.

⁷ Iain T. Benson, "Notes Toward a (Re)Definition of the 'Secular,'" *University of British Columbia Law Review*, 33 Special Edition (2000): 519-50 and "Considering Secularism," in *Recognizing Religion*, 83-98.

light, the difference between preamble to the Code of Hammurabi and the Charter of Rights and Freedoms is slight because both make similar assumptions about their cosmic-representative status, even though they differ in symbols and outlook. Benson observes that political evocations of secularism presuppose a belief in the historical unfolding of the amelioration of the human condition, that is, the ideals of the Enlightenment. Political philosopher Eric Voegelin argued in numerous places that the Enlightenment belief in an ever-perfecting future is an ersatz faith based unfounded claims about how specific intellectual and civilizational entities are representative of future humanity. The collapse of European colonial powers, whether French, English, or Soviet, tends now to make us skeptical of grandiose claims concerning the meaning or even end of history, but the faith in an increasingly progressive, egalitarian, and free future is common among democratic societies. It forms the basis of contemporary evocations of dignity, as argued below.

The most recent attempt to evoke civil religion is found in the myth that the Charter of Rights and Freedoms represents the progressive historical unfolding of human potentiality, freedom, and equality. This myth is meant to unify a society fractured along regional and cultural lines; it attempts to rectify a legitimation crisis. Instead of drawing its sacred symbols from historical Christianity, it draws its symbols from the “democratic faith” of pluralism, tolerance, cosmopolitanism, autonomy, and equality. It is the historical myth political scientist Alan Cairns has in mind when he contrasts the future- and rights-oriented Charter with the more Spartan, organic, and quasi-Burkean

Constitution Act, 1867, which was oriented toward history and to origins.⁸ Political scientist Peter Russell notes the same legitimating myths by contrasting the “evolutionary, piecemeal” Burkean constitution of 1867 with the “great Lockean project of democratically contracting together to adopt a Constitution” of 1982.”⁹ This change from a “dark” past to an enlightened secular future can be seen in the statements of Trudeau and others who viewed the Charter as a secular document to supersede the age of religion as encapsulated in the Constitution Act of 1867.¹⁰

Indeed, there might be something about democracy itself that requires a leap of faith in human capacity for self-rule. Since many progressives consider democratic rule demands a degree of selflessness, tolerance, and enlightenment that most people currently lack, they regard democracy as a project for the future. This explains the importance of the Court over Parliament, which they see as too fraught with common prejudice to serve as an adequate guarantor of human rights. Patrick Deneen summarizes “democratic faith”: “If faith is a belief in that which is unseen, then it may be that democracy is as justifiably an object of faith as a distant and silent God. This is particularly the case for those who perceive a radical gulf between that system of government that we now call

⁸ Alan C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, (Toronto: McClelland & Stewart, Inc., 1995), 97-118.

⁹ Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed., (Toronto: University of Toronto Press, 2004), vii. Distinguishing 1867 as Burkean from 1982 as Lockean is questionable. As Leo Strauss argues, Burkean natural right is closer to Locke, and therefore less “organic,” than most Burkean conservatives notice (*Natural Right and History*, (Chicago: University of Chicago Press, 252-93)). Moreover, Janet Aizenstat demonstrates that Locke was indeed present in 1867 (*The Canadian Founding: John Locke and Parliament*, (Montréal-Kingston: McGill-Queens, 2007). For Aizenstat, Canadian constitutionalism of the past has been marked by a turn towards political romanticism, which suggests 1982 marks a change Locke to Jean-Jacques Rousseau and his romantic heirs.

¹⁰ George Egerton, “Trudeau, God, and the Canadian Constitution,” in *Rethinking Church, State, and Modernity*, 96.

democracy – rife with apathy, cynicism, corruption, inattention, and dominated by massive yet nearly unperceivable powers that belie claims of popular control – and the vision of democracy as apotheosis of human freedom, self-creation, and even paradisiacal universal political and social equality that coexists seamlessly with individual self-realization and uniqueness. In absence of such a faith, ambitions might wither amid cruel facts and hopes dissipate in the face of relentless reality.”¹¹ “Individual self-realization and uniqueness,” equality, freedom, self-expression, autonomy, and other symbols are hallmarks of the progressive myth. Drawing upon Isaiah Berlin for the Canadian context, Janet Ajzenstat refers to the sentiments behind these ideals as Romantic: “the essence of the romantic movement, so far as I can see [is] will and man as an activity, as something which cannot be described because it is perpetually creating; you must not even say that it is creating itself, for there is no self, there is only movement. That is the heart of romanticism.”¹² Insofar as this movement is directed toward some form of idealized future, it is a utopian faith. Ironically, the faith in the future in which selves are unencumbered by religion, tradition, or anything it has not chosen, is meant to bind a Canadian society divided among regional, ideological, culture, ethnic, and other lines. It is ironic to postulate a sense of self that is inherently solipsistic as the balm that would bind Canadian society together. As noted above, modern liberal democratic society is based upon an amalgam of principles that counteract one another, and so the strategy of adopting the unencumbered self as a neutral ground upon which Canadians will

¹¹ Patrick J. Deneen, *Democratic Faith*, (Princeton: Princeton University Press, 2004), xvi. This future-oriented democratic faith is also subject to critique in Janet Ajzenstat, *The Once and Future Canadian Democracy*, (Montréal-Kingston: McGill-Queens University Press, 2003).

¹² Isaiah Berlin, *The Roots of Romanticism*, quoted in Ajzenstat, *The Once and Future Democracy*, 131.

purportedly meet and agree will necessarily be found wanting, and will inspire some counter-movements, examined below in some domains of Canadian constitutionalism.¹³

Having seen the reasons for the endurance for civil religion despite (and because of) modernity, and why secularization is a problematic category, we are in a better position to assess Cotler's claim about Canada's civil religion.

Civil Religion in Canada's Past

Civil religion was frequently evoked in the nineteenth- and early-twentieth-centuries, though regional and religious differences made it impossible for a pan-Canadian evocation to take hold.¹⁴ As the "great code," to use Northrop Frye's term, of British as well as French North America, it is unsurprising that the Bible formed the canopy of political symbols Canadians used to portray their way of life. For instance, the French Canadians frequently saw themselves as the New Israelites and Loyalists frequently compared their flight from the American revolutionaries to the Israelites' exodus from Egypt.¹⁵ For the latter, the colonial project over Canada West was justified as a means of preparing it for "Commercial enterprise, mental culture, and moral

¹³ I have explored others, specifically the Supreme Court's jurisprudence concerning religious organizations, in light of Alexis de Tocqueville's account of democracy in, "Civil Religion and Associational Life Under Canada's Ephemeral Monster," in *Civil Religion Then and Now: The Philosophical Legacy of Civil Religion and Its Enduring Relevance in North America*, Eds. Ronald Weed and John von Heyking, unpublished manuscript. This current essay elaborates an assertion made in the other essay concerning the Court's problematic reliance on "anticipated consensus" to justify rights.

¹⁴ Andrew E. Kim, "The Absence of Pan-Canadian Civil Religion: Plurality, Duality, and Conflict in Symbols of Canadian Culture," *Sociology of Religion*, 54(3) (1993): 257-75.

¹⁵ Northrop Frye, *The Great Code: The Bible and Literature*, ed., Alvin Lee, (Toronto: University of Toronto Press, 2006). See Norman Knowles, *Inventing the Loyalists: The Ontario Loyalist Tradition and the Creation of Usable Pasts* (Toronto: University of Toronto Press, 1997), 97; Louis François Laflèche, *Quelque considérations sur le rapports de la société avec la religion et la famille* (1866) excerpted in Ramsay Cook, ed., *French Canadian Nationalism: An Anthology* (Toronto: Macmillan of Canada, 1969), 102.

influence” which was done by bringing the “The Fairyland of the Rockies! [and] The Wonderland of the West!” into submission to the sweet dictates of the Bible.¹⁶ Sectarian difference between Protestant Upper Canada (and then Ontario) and Roman Catholic Lower Canada (and now Québec) prevented the emergence of pan-Canadian civil religion. Sectarian differences frequently meant Christianity was at odds with itself, which favored moves, in 1867 and in the second part of the twentieth-century, to establish political life on liberal principles of consent rather than on the basis of Scriptural and ecclesiastical authority.¹⁷ The first part of the twentieth-century saw various attempts to evoke a pan-Canadian civil religion, including the Social Gospel movement and Prime Minister Mackenzie King’s attempt to wed Christian theology with political economy as a way of overcoming regionalism and of greeting modernity.¹⁸ In the second half of the twentieth-century, the national unity crisis made it risky to evoke pan-Canadian visions, and decreased religiosity in the wake of secularization and Québec’s Quiet Revolution made any attempt to ground unity in religious, especially Christian, symbols, an especially dubious enterprise. Even so, Québec nationalists frequently draw upon quasi-Hegelian terminology to evoke what they see as the historical inevitability toward independence.¹⁹

¹⁶ R.W. Norman, *Our Duties and Opportunities* (Montreal: 'Gazette' Printing House, 1877), 189 and 210. These references are covered by Preston Jones, “Sacred Words, Fighting Words: The Bible and National Meaning in Canada, 1860-1900,” in *Civil Religion Then and Now*.

¹⁷ See Frederick Vaughan, *The Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic*, (Montréal-Kingston: McGill-Queens University Press, 2003), 134-51; Janet Ajzenstat, *The Political Thought of Lord Durham*, (Montréal-Kingston: McGill-Queens University Press, 1988), 35-41.

¹⁸ Ramsay Cook, *The Regenerators*, (Toronto: University of Toronto Press, 1985); William Lyon Mackenzie King, *Industry and Humanity*, ed., David Bercuson, (Toronto: University of Toronto Press, 1973).

¹⁹ Barry Cooper, “Quebec Nationalism and Canadian Politics in Light of Voegelin’s *Political Religions*,” in *Politics, Order, and History: Essays on the Work of Eric Voegelin*, eds., Glenn Hughes et al., (Sheffield: Sheffield Academic Press, 2001), 208-232.

Even so, the national identity crisis, combined with the question of secularization, is the source of more recent evocations of civil religion. While serving as the basis of human rights, the Charter is also a nation-building document meant to transcend the “particularities” of region and language. This is one of the meanings of Trudeau’s symbol, “reason over passion,” where reason represents cosmopolitan Canada united by law, and passions represent the parochial provinces, especially Quebec with its ethnic nationalism. One of the purposes of civil religion is to legitimate a founding act. For this reason, Machiavelli claims Numa Pompilius was more important than Romulus because the former founded the civil religion that legitimated Rome’s founding and allowed it to endure.²⁰ In a similar manner, the Charter has been seen as providing a moral language to form the souls of Canadians. Alan Cairns writes: “A citizenry seized of the constitutional recognition accorded by the Charter would be drawn out of provincialism into a pan-Canadian sense of self... [T]he Charter was a nationalizing, Canadianizing constitutional instrument intended to shape the psyches and identities of Canadians.”²¹ Whether a “pan-Canadian sense of self” is something that can be created or discovered, or whether it is a chimera, remains to be seen. Even so, civil religion is the way societies historically have attempted to consolidate themselves. Liberalism usually does not speak of (and often resists) viewing politics as “soulcraft” because such language seems paternalistic and undermines liberal principles of moral autonomy and consent. However, evidence drawn from liberal philosophers, as well as practices of liberal

²⁰ Niccolò Machiavelli, *Discourses on Livy*, I.11.

²¹ Cairns, *Reconfigurations*, 197.

politicians and jurists, suggests it is common to liberal democracies. The question is not *whether* political institutions, including laws, educate us morally, but *how*.²²

Democratic Faith and the Charter

The democratic myth of a progressively unfolding historical process toward greater freedom and equality most frequently finds its home among those who regard the Supreme Court as the primary guardian of human rights. Former Prime Minister Paul Martin appealed to this constituency when, in the 2006 federal election campaign, he promised to withdraw the federal government's ability to use section 33 of the Charter of Rights and Freedoms to override Supreme Court decisions, a move that would transform the constitutional order from one of supposed balance between Supreme Court and Parliament to one with Court sovereignty. Both critics and defenders of the Supreme Court have noted how it has taken over the role, from churches among others, as the "conscience of the nation," which corresponds to the function of the Charter as a force for secularization in Canadian society.²³ Yet, while Canada can no longer be characterized as a regime of, in John Moir's words, "legally disestablished religiosity," neither can it be understood as a fully "secularized" society, nor even a unitary one.²⁴

²² See the essays in *Cultivating Citizens: Soulcraft and Citizenship in Contemporary America*, eds., Dwight D. Allman and Michael D. Beaty, (Lanham, MD: Lexington Books, 2002).

²³ Egerton, "Trudeau, God, and the Canadian Constitution," 108.

²⁴ John S. Moir, *Church and State in Canada: 1627-1867: Basic Documents*, (Toronto: McClelland and Stewart Limited, 1967), xiii; Egerton, "Trudeau, God, and the Canadian Constitution"; Farrow, "Of Secularity and Civil Religion," 140-82; Iain T. Benson, "Considering Secularism," *ibid.*, 83-98 and "Notes Toward a (Re)Definition of the 'Secular,'" 519-50; John von Heyking, "Harmonization of

The Charter myth is meant to overcome a twofold ambiguity that Canada's constitutional order is neither (1) fully secularized (nor fully not-secularized) nor (2) fully pan-Canadian (nor so decentralized to justify dissolving the federation). Pierre Trudeau thought the Charter (with the Supreme Court) could heal both sources of the legitimacy crisis (which he also provoked) and legitimate his founding. The peculiar piety various members of society, including political, academic, legal, and academic elites, display toward the Charter and the Supreme Court expresses the attempt to resolve this crisis of legitimacy. Cotler's evocation of human rights as the new secular religion is the clearest expression but there are others. Editorialist Jeffrey Simpson states with some irony, "The Charter of Rights and Freedoms is the closest thing Canadians have to a canon these days with the Supreme Court justices as legal cardinals."²⁵ One finds more serious references to the "nation's new secular religion" in legal literature.²⁶ Pollster Allan Gregg pinpoints the source of the religiosity of secular liberals when he criticizes them for avoiding moral and political philosophy to discuss major cultural issues. They instead hide behind procedure and sovereign commands by the Supreme Court, in a manner consistent with

Heaven and Earth?: Religion, Politics, and Law in Canada," *University of British Columbia Law Review*, 33 Special Edition (2000): 663-98; Peter Emberley, *Divine Hunger: Canadians on Spiritual Walkabout*, (Toronto: HarperCollins Canada, 2002).

²⁵ Jeffrey Simpson, "Leave the Prayerbook at Home, Stockwell," *Globe and Mail* (Toronto), March 31, 2000, A15.

²⁶ Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion," *Supreme Court Law Review*, 2005, 29(2d): 175.

what Thomas Hobbes refers to the sovereign as a “mortal god.”²⁷ For Gregg, their “secular fundamentalism” of submitting to the court’s commands is no less “fundamentalist” than those who resort to divine commands found in Scripture.²⁸ Among Charter-skeptics and critics of the Court, Robert Ivan Martin refers to the Supreme Court as a theocracy of relativism “in the grip of a secular state religion,” with the Supreme Court as its rulers.²⁹

Many comparisons of the Supreme Court as a “theocracy” or as “high priests” are polemical, though have a grain of truth insofar as the Charter, the Court, and its decisions are considered sacred and beyond contestation. Even ironic evocations, like that of Simpson, reflect this piety for reasons explained below. Part of this reverence is par for the course in a constitutional democracy in which the Supreme Court has come to be regarded as the final arbiter of rights and freedoms that must be protected from majority power. However, the Charter myth moves discourse beyond merely protecting rights. Chief Justice Beverley McLachlin expresses this added piety when she describes the Charter as the authoritative statement of the “hypergoods” to which Canadian society

²⁷ As predicted for a political society guided by Hobbesian principles (see Travis D. Smith, “Hobbes on Forgiving Those Who Trespass Against Us,” in *Civil Religion Then and Now*. See Thomas Hobbes, *Leviathan*, XVII.

²⁸ Allan Gregg, “The Christian Comeback,” *Saturday Night Magazine*, November 2005, 22. A scholarly analysis of “secular fundamentalism” can be found in Paul F. Campos, “Secular Fundamentalism,” *Columbia Law Review*, 94(1994): 1814-27.

²⁹ Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy*, (Montréal-Kingston: McGill-Queens University Press, 2003),

subscribes, and views the Supreme Court as the primary arbiter between the “total claim” the law makes upon citizens and the “total claim” religion makes on its believers. Following philosopher Charles Taylor, McLachlin regards “hypergoods” as the highest goods to which a society holds. They form the “horizon” of our moral consciousness and they need articulation as a “necessary condition of adhesion.”³⁰ In other words, the Court has the task of making effective the effective truth of human rights, our hypergoods, which, so the argument goes, are higher than others including, perhaps, friendship.

Whether either law or religion makes a total claim upon individuals can be seriously questioned. For instance, Jean Bethke Elshtain, in direct response to CJ McLachlin’s argument, observes that because the Supreme Court is a political organ adjudicating both “total claims,” the “total claim” made by law ends up a little more “total” than that made by religion. In other words, only law makes a “total claim.” But Elshtain argues that neither law nor religion make a “total claim.” Referring to the Gospels of Luke and Mark in which Jesus says, “Render unto Caesar what is Caesar’s; unto God what is God’s,” she observes that both law and religion make partial, not total, claims upon the self, and that practical, not legal, judgment is the appropriate manner to negotiate the two claims.³¹ For this reason, Elshtain grants greater scope for practical wisdom, negotiation, and compromise exercised through legislatures and civil society to protect rights. The difference between the views of McLachlin and Elshtain reflect widely divergent starting points of political analysis. McLachlin takes it as given politics and religion make total and ultimately, irreconcilable claims upon one another. In this sense her starting point resembles that of Jean-Jacques Rousseau, who advocated a civil

³⁰ The Right Honorable Beverley McLachlin, P.C., “Freedom of Religion and the Rule of Law: A Canadian Perspective,” in *Recognizing Religion in a Secular Society*, 12-34.

³¹ Elshtain, “A Response to Chief Justice McLachlin,” 35-40.

religion over and against Christianity because the latter confused people by making them submit both to pope and to sovereign.³² Elshtain partially follows John Locke who thought that people are capable of making partial submissions to religion (though not the pope, as long as he commanded divisions) and sovereign. Elshtain's starting-points enable her to conclude that people in general draw from their partial commitments to look for legislative ways, and nongovernmental ways, to protect rights by cultivating among citizens habits of civility and tolerance. McLachlin's starting-points lead her to conclude that government, and the Court in particular, is the best if not exclusive guarantor of rights. If Ajzenstat is correct in her observation that in the past thirty years Canadian liberalism has transmogrified from its original Lockean form to a Romantic version, then we can expect McLachlin's Rousseauian vision of the place of religion in political society to gain greater prominence.

The Living Tree

The language that various constituencies use to describe the Charter and the Court is weighted with pious language that betrays an expectation that they are agents of historical progress toward freedom and equality. This language would be meaningless if it were not accompanied by specific mechanisms and doctrines to guide legal decisions. , Two are identified in this section and the next: 1) the Court's "living tree" metaphor and

³² McLachlin cites Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship*, (Chicago: University of Chicago Press, 1999), 84, 123-4. See Jean-Jacques Rousseau, *Social Contract*, IV.8. For details, see Ronald Weed, "Jean-Jacques Rousseau on Civil Religion: Freedom of the Individual, Toleration, and the Price of Mass Authenticity," in *Civil Religion Then and Now*.

2) the judges' self-understanding about the nature of judicial decision-making. We begin with the living tree.

A measure of the difference between the nature of the Canadian regime from the American regime, and their corresponding myths and civil religions, can be seen in a recent debate over judicial activism at a conference marking the Charter's 25th Anniversary between Canadian Supreme Court judge Ian Binnie and American Supreme Court judge Antonin Scalia. Scalia argued that judicial activism can be avoided by maintaining a jurisprudence of original intent, by interpreting the Constitution in light of the intentions of the Founders. Binnie rejected Scalia's originalism in favor of interpreting the constitution in light of contemporary moral standards, the so-called living tree: "I say that if you erect a silo over our court system based on a theory of originalism, it is a very good reason to throw it out."³³ Aristotle writes of original intent that when, in a particular case, following the letter of the law causes an injustice, a judge should decide the case as "the lawmaker himself would say if he were there, and which, if he had known, he would have put in the law."³⁴ Unfortunately, both Binnie and Scalia failed to see that they were not debating over legal philosophy so much as asserting specific myths about their own regimes. Original intent only makes sense in a regime that has been founded by a lawmaker, and for whom that founding extends moral authority into its present. This is more the case of the United States, whose founding was made explicit by a revolutionary war and by Founders who wrote an extensive proemium to its laws, namely, the *Federalist Papers*. That Canada was founded is open to question. Peter

³³ Kirk Makin, "Senior U.S., Canadian judges spar over judicial activism," *The Globe and Mail*, February 17, 2007, A.2

³⁴ Aristotle, *Nicomachean Ethics*, trans., Joe Sachs, (Newburyport, MA: Focus Publishing, 2002), 1137b23.

Russell, the dean of constitutional studies in Canada, reports in the Preface to the First Edition to his book, *Constitutional Odyssey*, which is pointedly subtitled with the question, “Can Canadians Become a Sovereign People?,” that his broodings were prompted by a remark that American political theorist Walter Berns, and colleague at the University of Toronto, posed to him: “Peter, you Canadians have not yet constituted yourselves as a people.” Russell concluded that Berns was right, which caused him to worry that Canada’s project of Lockean-style constitutional contracting (which presupposes a founding) was based on a mistake. In the most recent third edition of the book, he is more optimistic that Canadians can be a sovereign people, but he is not yet fully convinced.³⁵ Seen in this light, if the American regime was founded, the Canadian regime is in search of a founding, and it has fallen upon its Supreme Court judges to divine the contemporary standards, “hypergoods,” by which to interpret the 1982 document. It is worthwhile pausing to note that if Binnie is correct, then the 1982 document is already out of date except to the extent he can pour contemporary understandings into it.

Because Canada is in search of a founding, a Numa Pompilius as well as a Romulus, Binnie and his colleagues have adopted the “living tree” metaphor of constitutional interpretation. One measure of the extent to which the Supreme Court has taken hold of the progressivist myth is to note the difference between its explanation of the “living tree” metaphor and its original appearance. Lord Stankey originally described the constitution as a “living tree” in the famous *Persons* case that extended voting rights

³⁵ Russell, *Constitutional Odyssey*, ix.

to Canadian women.³⁶ In it he defended a purposive reading of the law that would transcend the intention of those who framed it. They could not have anticipated all the possible applications of the law. Stankey writes:

The British North America Act planted in Canada a living tree capable of growth and expansion *within its natural limits*. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention.

Their Lordships do not conceive it to be the duty of this Board -- it is certainly not their desire -- to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, *but within certain fixed limits*, may be mistress in her own house, as the provinces to a great extent, *but within certain fixed limits*, are mistresses in theirs (emphasis added).

Three times in his evocation of the “living tree” metaphor, Stankey mentions the “natural” or “fixed” “limits” of the law. This is appropriate for the metaphor because trees are objects that grow but have a nature that gives it form and limit.

Stankey’s emphasis on limits contrasts with more recent Supreme Court evocations of the “living tree”: “The ‘frozen concepts’ reasoning runs contrary to one of

³⁶ *Edwards v. Canada (Attorney General)* [1930] A.C. 124 (P.C.) at 136 (<http://www.chrc-ccdp.ca/en/browseSubjects/edwardspc.asp>)

the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of *progressive* interpretation, accommodates and addresses the realities of modern life.”³⁷ When asked by interveners in the Same-Sex Reference case to consider Stankey’s reference to “natural limits,” the Court cited differences in opinion over the nature of those limits as evidence that no such natural limits exist, as if difference of opinion establishes the impossibility of truth.³⁸ Besides, the Court asserted it was obliged only to rule on the legislative act before it, which spoke only of same-sex marriage.

The living tree metaphor distills the “progressivist” or historicist jurisprudence of the Court and signals how it reads the Charter as a mechanism to bring about the freedom and equality. Its basis is not so much philosophy as a faith that history is unfolding in this manner. As shown in the next section, they might respond that legal interpretation requires reference to unwritten principles that have some relationship to natural law or some moral aspiration that the Charter might embody to restrain Canadians so as to remind them of the necessity of respecting each others’ rights. While the Charter, along with judicial review, serves this function, it takes a particular mindset and ideology to assume the principles of natural law or the law’s moral aspiration are to be found in “progress.” “Progress” implies time is moving toward an end-point, and end of history. As noted, progress and end of history are the hall-marks of the philosophic

³⁷ *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79). Emphasis added.

³⁸ *Ibid.* at 27. In fact, it is hard to resist concluding that same-sex marriage, which changes the legal definition of marriage from a man and a woman to two persons, also undermines the Court’s ability to restrict marriage to a union of two persons because “two” depends on viewing marriage as needing two to procreate. Both those who wish to preserve the older definition of marriage, and those who wish to move “beyond conjugality,” consider same-sex marriage a way-station to abolishing marriage as a meaningful category altogether. Some celebrate this move in the name of freedom and self-realization, while others, who view marriage as uniquely situated to raise the next generation and as an important intermediary civil society institution, see it as dangerous (see John von Heyking, “Why Exclude Oedipus?: On the Incoherent Statism of Same Sex Marriage.” *The Interim*, September 2006, XXIV(7): 10-11 (www.theinterim.ca)).

Enlightenment, as seen in thinkers including Voltaire, John Stuart Mill, Auguste Comte, G. W. F. Hegel, and Karl Marx. Common to these end-of-history ideologies is the assumption that history must be guided by an intellectual vanguard who has divined the end of history in such a manner that makes it inaccessible to the rest of society. While the ideologue frequently acts in the name of democracy, in extreme versions democracy becomes irrelevant, a condition referred to as “Talmon’s Fork”: “either a democratic vote elects the enlightened power, or it does not. If so, it is unnecessary. If not, it is pernicious.”³⁹ Many have noticed its “religious” and “prophetic” dimension precisely because the end of history is taken as a revelation, given exclusively to the elite, a “democratic faith” that gives hope when the theological virtue of hope has been abandoned in favor of political utopianism.⁴⁰

Even so, when jurists appeal to the living tree metaphor, they engage not in legal interpretation but in a kind of reasoning closer to moral philosophizing. Legal reasoning takes the form of moral deliberation because jurists are liberated from the constraints of text and original intent in favor of “fundamental values.”⁴¹ As Roderick MacDonald observes of trends in judicial reasoning and Canadian legal education:

The broadening of justificatory materials may evidence a democratization of legal reasoning, but it also invites judgments in which reasons for decision sometimes seem more a recitation of *ex post facto* rationales than

³⁹ Kenneth Minogue, *Alien Powers: The Pure Theory of Ideology*, (New York: St. Martin’s Press, 1985), 183.

⁴⁰ In addition to Voegelin, see Minogue, *Alien Powers*. The best critique of end-of-history ideology remains Barry Cooper, *The End of History: An Essay on Modern Hegelianism*, (Toronto: University of Toronto Press, 1984).

⁴¹ Iain T. Benson, “Considering Secularism,” 83-98 and “Notes Toward a (Re)Definition of the ‘Secular,’” 519-50. According to Cairns: “‘Rights’ pushes university law faculties in the direction of legal theory and political philosophy” (*Reconfigurations*, 202).

an engagement with the disciplining *ex ante* constraints of a coherent normative regime. That there is a concurrent professorial tendency to pass directly to questions of high political theory without careful consideration of the specific issue to be decided and the intermediate level questions of political, economic and social policy is hardly surprising. For many law teachers today, the judicial decision serves simply as a pretext for armchair philosophizing.⁴²

But these fundamental values are not those of society so much as those to which society aspires. As such, the line between legal reasoning and moral reasoning, and indeed, prophecy, gets blurred. Moreover, if the Court is in the business of legislation, then expertise in judicial, as opposed to moral, reasoning becomes less crucial for eligibility to serve. The courts' evocation of special wisdom undermines its own claims, just as demonstrated in the next section, its evocation of unwritten principles of dignity undermines dignity.

Unwritten Principles

In December 2005, Chief Justice Beverly McLachlin delivered a speech in New Zealand that outlined her vision of how judges have the authority to appeal to unwritten principles in judging laws.⁴³ These principles include freedom, equality, dignity,

⁴² Roderick A. MacDonald, "Post-Charter Legal Education: Does Anyone Teach Law Anymore," *Policy Options*, February 2007, 77

⁴³ McLachlin, "Lord Cooke Lecture," Wellington, New Zealand, 1 December 2005 (http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/UnwrittenPrinciples_e.asp).

federalism, democracy, constitutionalism, and respect for minorities. They can derive these principles from three principal sources: 1) customary law or “usages” of political actors who “acknowledge and respect the legitimate constraints on their spheres of decision-making”; 2) “inference from the constitutional principles and values that have been set down in writing”; and 3) international law. The second source is of principal concern in this analysis of the Charter as civil religion.

CJ McLachlin claims “the contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law. Like those conceptions of justice, the identification of these principles seems to presuppose the existence of some kind of natural order. Unlike them, however, it does not fasten on theology as the source of the unwritten principles that transcend the exercise of state power. It is derived from the history, values, and culture of that nation, viewed in its constitutional context.” Contemporary judges are to work out the implicit principles of the “rich intellectual tradition” that Canada has inherited from the “common law thinking from medieval times, through the English and American revolutionary ages, and into the high Victorian era of empire out of which Canada’s written constitution emerged.”⁴⁴ McLachlin, and Binnie in his debate with Scalia, is animated by a desire to oppose sheer sovereign will, and she accordingly cites the examples of Nuremberg which saw Nazis commit evils because they were simply following orders, and Sir Thomas More’s resistance to King Henry VIII. While they display salutary skepticism towards claims of the inherent goodness of democratic decision-making, their invocations of

⁴⁴ Ibid., quoting M.D. Walters, “The Common Law Constitution in Canada: Return of *Lex non Scripta* as Fundamental Law,” *University of Toronto Law Journal*, 51 (2004): 136.

Nazism and Henry VIII suggests the inherent badness of liberal democracy, or at least of legislatures, which is self-serving.

Responding to claims (like those of Scalia) that judges simply resort to private conscience when they resort to unwritten principles, McLachlin claims, referring to More (as portrayed by Robert Bolt), “it is clear that what he means is the legal conscience of a jurist who has considered the nature of law.” A shift of tone marks McLachlin’s analysis. She begins the speech by outlining the importance of natural law in Anglo-American law, and expounding upon its instances. She ends by locating the legitimacy of jurists in their knowledge of the “nature of law.” This is an astounding claim. First, knowledge of natural law is not the same as knowledge of the “nature of law.” One may have knowledge of the contents of natural law (e.g., do not murder) without fully understanding their reasons, in the same way one can know the contents of the Ten Commandments without knowing the mind of God. Indeed, McLachlin offers numerous examples of laws that are by nature but she is vague on what is natural about them. Second, claiming knowledge of the “nature of law” is to claim philosophical wisdom, not simply knowledge of the tradition of common law dating back to medieval times or found in the “usages” of contemporary political actors.

Knowing the “nature of law” differs fundamentally from knowing its contents. As Eric Voegelin observes, “‘the law’ is the substance of order in all realms of being. As a matter of fact, the ancient civilizations usually have in their languages a term that signifies the ordering substance pervading the hierarchy of being, from God, through the world and society, to every single man. Such terms are the Egyptian *maat*, the Chinese

tao, the Greek *nomos*, and the Latin *lex*.”⁴⁵ Voegelin observes that the Egyptian notion of *maat* signified order of the gods who create the order of the cosmos. Contemporary society replaces the order of the gods with the progressive myth of humanity’s unfolding freedom and equality. In ancient Egypt, the *maat* was preserved by the Pharaoh; in China the *tao* was preserved by the king who ruled “all below heaven”; in Greece and in Rome, the *nomos* and *lex* were preserved by the piety instilled by the civil religion of the polis and empire. The *nomos* and *lex* were preserved by the civil religion, though philosophers including Plato and Cicero asserted the authority of philosophical wisdom of the nature of law. Unfortunately, if McLachlin were to follow the Anglo-American understanding of the nature of law more closely, her defense of the legitimacy of judicial interpretation would fall apart. For philosophers like John Locke, all human beings can have access to the natural law.⁴⁶ Nature, or nature’s God, is their legislator while the sovereign executes the natural laws for them. The Anglo-American tradition of political and legal thinking does not necessarily require a special caste of judges who know the natural law, though contemporary judicial activism appears to exaggerate the central but “cloaked” position in the regime that the Anglo-American legal tradition gave them.⁴⁷ Even so, claiming knowledge of the “nature of law” emphasizes moral philosophy, which, as argued above, would make moral philosophers more qualified than (or at least as qualified as) legal practitioners to serve as judges.

McLachlin appears closer to Plato and Cicero because she ostensibly appeals to the rational basis of the unwritten constitutional principles. However, she can only do

⁴⁵ Voegelin, *The Nature of Law and Related Legal Writings*, eds., Robert Anthony Pascal, James Lee Babin, and John William Corrington, (Baton Rouge: Louisiana State University Press, 1991), 24.

⁴⁶ John Locke, *Second Treatise of Government*, chap. 2.

⁴⁷ Paul Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism*, (Chicago: University of Chicago Press, 2003).

this because part of Canada's inheritance has been the Enlightenment, with its conflation of philosophical wisdom and political authority. Put another way, Canada has inherited the Enlightenment assumption that political society can be made rational, which, as Canadian political philosopher George Grant pointed out long ago, derives from the Enlightenment transformation of wisdom into technology, and politics into administration: not quite rule by philosophers so much as rule by sociologists.⁴⁸ As noted above, McLachlin refers to the Court's role in articulating society's "hypergoods," those goods beyond which no goods can be understood, and its role in articulating the "total claims" those "hypergoods" place on citizen-subjects. The judiciary's claim to having a special knowledge corresponds to its role as controlling the language with which people use to shape their moral lives. By claiming to shape language, the Court takes on the role of poets as well. Historically, it is the role of poets to articulate the fundamental principles of a civilization. Examples include Homer for Greece, Dante for Italy, Shakespeare for English-speaking peoples, Goethe for Germany, and Cervantes for Spain. It is also the role of sacred texts, the "great code" of the Bible, to articulate those principles. McLachlin's claims about "hypergoods" push them toward "great code" status.

Despite the grandiose claims of its partisans, Pierre Manent has more recently observed of contemporary manifestations of the working-out of the Enlightenment, that democratic societies, guided by judges, hold out utopian promises of actualizing human dignity, freedom, and equality, but at the expense of eliminating the "mediating"

⁴⁸ See George P. Grant, *Technology and Empire* (Toronto: House of Anansi, 1969). Grant's account of "modernity," and Canada's position in it, is not unproblematic. See John von Heyking and Barry Cooper, "'A Cow is Just a Cow': George Grant and Eric Voegelin on the United States," *Athens and Jerusalem: George Grant's Theology, Philosophy, and Politics*, eds., Ian Angus, Ron Dart, and Randy Peg Peters, (Toronto: University of Toronto Press, 2006), 166-89.

activities of self-government, and ultimately, political life. Judicial invocations of dignity constitute the “spiritual” or religious component of contemporary politics, but they are self-defeating because the inherent separation of powers found in Anglo-American constitutionalism, and inherent in modern life in general (i.e., the split between religion and politics, state and society), ensures that each utopian evocation will be resisted or countered in some way.⁴⁹ Part of the genius of liberal democracy is that it is composed of multiple and frequently contradictory principles that check one another. For example, exponents of equality usually restrain from seeking the full implications of their desire for equality when they realize they would harm liberty, especially their own liberty.

The same leavening (and at times, undermining) of principles holds for dignity. McLachlin calls “basic human dignity” the notional heart of “today’s fundamental norms.” It is the basic “hypergood.” Dignity is rooted in reason, as with her natural law thinking generally. By taking this route, she seems to reject a major viewpoint among legal scholars, that of Michael Perry for example, according to which “every human being is sacred” and that sacredness can be justified along nonsectarian lines.⁵⁰ McLachlin also avoids expressing dignity as the absolute uniqueness of the individual and the “infinite value” of personhood, in the manner of Jacques Maritain, who influenced both Pierre Trudeau and the participants of the 1948 Universal Declaration of Human Rights, a central document of the third source she lists of Canada’s unwritten

⁴⁹ Pierre Manent, *A World Without Politics?: A Defense of the Nation State*, trans., Marc A. LePain, (Princeton: Princeton University Press, 2006).

⁵⁰ Michael J. Perry, *The Idea of Human Rights: Four Inquiries*, (Oxford: Oxford University Press, 1998); see Jean Bethke Elshtain, “The Dignity of the Human Person and the Idea of Human Rights: Four Inquiries,” *Journal of Law and Religion*, 14(1) (1999-2000): 53-65. Liberal thinkers generally have underestimated dignity’s intractable relationship with the divine, which is more explicit in ancient and medieval understandings. See the essays in Robert P. Kraynak and Glenn Tinder, *In Defense of Human Dignity: Essays for Our Times*, (Notre Dame, IN: University of Notre Dame Press, 2003). See also David Walsh, *The Growth of the Liberal Soul*, (Columbia, MO: University of Missouri Press, 1997).

principles, international law.⁵¹ Dignity is the basis of “government by consent, the protection of life and personal security, and freedom from discrimination,” and she notes these can be “supported by a democratic argument grounded in conceptions of the state and fundamental human dignity that we have developed since John Stuart Mill.”

Her statement requires some clarifications. Dignity as a philosophic concept was fully stated by philosopher Immanuel Kant. So strongly did he assert it that he called dignity not a quality of human beings, but their very definition: “Humanity itself is a dignity, for man can be used by no one (neither by others nor even by himself) merely as a means, but must always be used at the same time as an end.”⁵² Kant’s influence can be seen by observing that dignity is absent from the 1789 Declaration of Rights of Man and Citizen but is in the opening words of the preamble of the 1948 Universal Declaration of Human Rights. Dignity is the respect for the moral law within human beings, which shows them how to act with pure moral motive and not due to self-interest, as a Hobbesian doctrine of modern natural rights would assert. Yet, modern natural rights, with their grounding in self-interest, form the basis of those aspects of democratic life she grounds in dignity: “government by consent, the protection of life and personal security, and freedom from discrimination.” While Kant gives us dignity, one can derive government by consent and the other implications from Thomas Hobbes, for whom human beings are naturally more brutish than dignified. As Manent observes: “To put it rather bluntly: human rights concern natural freedoms, including and above all animal

⁵¹ See Max Nemni, “The Charter’s Christian Roots,” *National Post*, February 17, 2007, A23.

⁵² Immanuel Kant, *The Metaphysical Principles of Virtue*, trans., James Ellington, (New York: Bobbs-Merrill Company, Inc., 1964), 127.

and physical nature; human dignity is freedom against physical or in general selfish nature, and it is spiritual liberty.”⁵³

Unsurprisingly, contemporary jurisprudence ignores this contradiction between the rhetoric of dignity and the actual way it gets applied and justified. Instead, jurists think they reconcile them. Kantian dignity is rigorous and rather ascetic, while contemporary usurpations of Kantian dignity are meant to protect Hobbesian impulses: “To respect the dignity of other human beings is no longer to respect the respect they hold within themselves for the moral law. Today it is more to respect the choice they have made, whatever that choice may be, in asserting their rights. For Kant, respect for human dignity is respect for humanity itself; for contemporary moralism, respect for human dignity is respect for the ‘contents of life,’ whatever it may be, of other human beings. The same words are used, but with an altogether moral perspective.”⁵⁴ Indeed, Manent’s assessment is mild compared to that of Kant: “Being persuaded of the magnitude of one’s moral worth, but only through want of comparison with the law, can be called moral arrogance.”⁵⁵ Contemporary morality leads to the politics of recognition, whereby the state is obliged to recognize all other lifestyles. Obviously, not all lifestyles can be recognized. Thus, the Court finds itself recently having to weigh the rights of religious believers against the most recent lifestyle demanding recognition, homosexuals. Just as the Court’s Kantian rhetoric masks Hobbesian natural rights, so too does its task of “balancing” mask the reality that recognizing some lifestyles undermines others.⁵⁶ Indeed, the Court’s “living tree” metaphor also reflects its way of invoking Kantian

⁵³ Manent, *A World Without Politics?*, 193.

⁵⁴ Manent, *A World Without Politics?*, 193.

⁵⁵ Kant, *The Metaphysical Principles of Virtue*, 98. Susan Shell distinguishes Kantian dignity from its contemporary evocations (“Kant on Human Dignity,” in *In Defense of Human Dignity*, 53-80.

⁵⁶ Heyking, “Why Exclude Oedipus?”

morality for Hobbesian politics. Understanding dignity and human rights in light of “the times” simply obscures the fact that one understands them in terms of the majority’s understanding, or what the Court deems its opinion should be when it knows its interests. What else are “the times” but an expression of society’s “usages” and customs (the first of McLachlin’s sources of unwritten principles)?

This last point, which is a question of public morality, returns us to McLachlin’s comment about John Stuart Mill. As a philological point, Mill is not as concerned about dignity as he is of individuality. But the philological point reveals Mill’s philosophical point. In *On Liberty*, Mill mentions dignity only a few times and by it he means honor and self-worth. Conversely, Chapter Three is titled, “On Individuality, as One of the Elements of Well-Being.” For Mill, individuality is about expressing personal genius. While liberty, in the sense of prohibiting the state from interfering with private lives, benefits all, the liberty of geniuses benefits society most of all, because it is the spur of progress. Mill considers the leveling effects of modern liberty as serious a threat to the liberty of genius as state coercion. Unlike McLachlin, Mill does not think all lifestyles deserve to be protected. Some are more harmful and shameful than others. Mill thinks it should be up to society, not the state, to enforce public morality in the form of shunning, verbal protest, or boycott. Mill acknowledges public morality is in need of a moral system that encourages human beings, in seeking their self-interest, to have humanity as the object of their interest. Borrowing from French sociologist Auguste Comte, Mill, up to his last writings, defended the notion of the religion of humanity as the moral basis of

liberalism.⁵⁷ Kant also considered history as progressive and humanity the proper object of moral action. Indeed, history as progressive helps to constitute human rights because it is only at a late stage of human “development” when we see each other as “human,” just like us and not as members of a particular class, race, or nation, and thereby worthy of the same respect we seek for ourselves.

As many Enlightenment thinkers up to Friedrich Nietzsche show, the very notion of humanity as an object of contemplation and action presupposes a historical understanding of human development. Humanity is built upon the historic individuality of every individual and the increasing consciousness of each generation that its object of action is humanity, not simply family, tribe, polis, sect or religion. While sounding noble, what this sentiment means, however, is that only the present generation can fully be said to be human: “Thus, just when today’s humanity seeks and is proud to exclude nothing of what is currently human, it excludes its whole past, all past generations. At the very moment when it embraces itself wholly, it ceases to comprehend itself.”⁵⁸ Humanity as the current generation, for whom the “living tree” would be most alive (a form of self-flattery, or “moral arrogance” as Kant would say), might help to explain why the Court seems to favor a form of dignity that emphasizes personal autonomy and respect “more a function of what one can do, than simply the fact that one exists regardless of one’s condition or abilities.”⁵⁹ Dignity as rational agency instead of the irreplaceability of the person favors the active and the strong, not the disabled, unborn, or

⁵⁷ John Stuart Mill, “Theism,” in *Three Essays on Religion*, (Amherst, NY: Prometheus Books, 1998), 255-57; Linda Raeder, *John Stuart Mill and the Religion of Humanity*, (Columbia, MO: University of Missouri Press, 2002).

⁵⁸ Manent, *A World Without Politics?*, 129.

⁵⁹ David M. Brown, “‘Human Dignity,’ Human Rights and the End of Life: The North Wind Blowing From Canada,” Paper presented to Conference on Suffering and Hope, University of St. Thomas, Houston, TX, November 10-13, 2005: 14-15. (<http://www.stthom.edu/academics/centers/cts/DBrown.pdf>).

dying. It favors the present generation, and pushes the new arrivals and those leaving, further to the margins. For most Enlightenment thinkers including Comte and Mill, humanity as the end of moral action is ennobling. For Kant it is noble but problematic because the idea of one generation progressively superseding previous generations means they end up treating previous generations as means, which contradicts the categorical imperative of treating human beings as ends. Finally, Nietzsche thought humanity expresses the flattest disposition of the soul, the Last Man, because historical progress revealed only its animality. The laws of humanity have become the “hypergoods” of Canadian constitutionalism. Yet, the more McLachlin and her colleagues side with the religion of humanity in Mill and Comte, with a dose of Kant, the less they are able to uphold the “spiritual” unencumbered self propounded in their writings, and the more they must resort to Hobbesian realpolitik.

Conclusion

The increasing frequency with which civil religion gets evoked in Canada betrays a deepening anxiety that the twin legitimization crises the Charter is meant to heal – 1) regionalism and 2) the question of secularization – are in fact festering. The more the Court appeals to a “progressive” reading of the Charter that seeks unwritten principles in a natural order that is said to transcend sovereign will, the more they must rely on sovereign will to enact it, and even legitimate, it. This split mind enables elites to make simultaneous and contradictory claims that are serious (e.g., Irwin Cotler), ironic (e.g.,

Jeffrey Simpson), and politically calculated (e.g., Paul Martin) proclamations of the Charter's divinity.

The attempt to create a civil religion out of the Charter is also self-defeating because it is based upon the Enlightenment myth of progress, which is less widely adhered to than it was even twenty years ago. A variety of critics, many of whom may be characterized a "post-modern," have criticized the myth of progress to the point that faith in it may be regarded as dead. David Walsh, in his meditation upon our "postmodern" civilizational moment, explains the endurance of this faith in the secular world and the reasons for its death:

What has made a secular world possible has been its capacity to draw us onward through the mysterious promise of a future that transcends our past. Its whole secret has been its ability to persuade us that we are moving toward a state that will be qualitatively better and different than that in which we are now. That is, a secular ethos trades on the residue of transcendent longing and mystery still present within us even if we no longer accept the spiritual articulation of that movement. As soon as we recognize that there is no great or glorious future awaiting us, that the satisfactions we possess now are the best that can be attained in the future, that we are literally going nowhere, the whole project is undermined. The secular emperor is revealed to have no clothes. That collapse of the

modern project is the source of the disorientation we now encounter in our civilization.⁶⁰

Our postmodern situation is marked by moral fragmentation as well as renewed openness to spiritual concerns, which makes talk of “hypergoods” making “total claims” upon us as inadequate if not dangerous. Jean Bethke Elshtain’s observation that politics and religion make partial claims is more attuned to the needs of our society.⁶¹

Whether the problem of civil religion, which seems to be a permanent feature of political life in general, will endure in Canada will depend on whether Canadians can answer in the affirmative, Peter Russell’s question of whether Canadians can be a sovereign people. Because of the indelible cosmic-representative features of political life, perhaps it would be more reasonable instead to ask *what kind* of civil religion Canadians would have if they were to become a sovereign people. If they do become sovereign, then their constitutional crises might make it less tempting to articulate an assertive civil religion as that articulated by Chief Justice McLachlin, Irwin Cotler, and others, which can be done by avoiding the grand constitutional engineering that characterized the 1980s but that politicians avoided throughout the 1990s.⁶² Assertive evocations of civil religion are attempts to consolidate power over a crisis of legitimacy. Once a regime is legitimated, civil religion reinforces its founding as occurs in the United

⁶⁰ David Walsh, *Guarded By Mystery: Meaning in a Postmodern Age*, (Washington, DC: Catholic University of America Press, 1999), 101.

⁶¹ See also the essays in the cited volume by William Galston, David Novak, and H. Tristram Engelhardt, Jr., on the need for political pluralism to correspond to the moral pluralism that characterizes the public life of liberal democracies.

⁶² Throughout this essay we have spoken of Canada’s twin legitimacy crises as revolving around 1) regionalism (mostly Québec) and 2) the question of secularization. The constitutional bickering of the 1980s addressed the first of these, and it is tempting to refer to the growth of freedom of religion cases in the late 1990s as a result of the second. On the latter, see my “Harmonization of Heaven and Earth?”.

States. If a regime follows the path of the living tree, by which the founding process is perpetual, then civil religion will increase in its assertiveness.

Canadians have gotten used to being told their society has successfully separated religion from politics, and that it is a secularized society. This essay has shown that this view is based on a flawed understanding of what secular means, and that Canadian political life is indeed imbued with religiosity, though not in the form Canadians normally expect. By achieving greater clarity on the nature of political and religious life, it may be possible to negotiate their corresponding claims with greater tolerance and understanding.