THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS, GRÉGOIRE C.N. WEBBER (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2009)

It is by this point a pedestrian observation that the central analysis of rights limitations in s. 1 of the *Canadian Charter of Rights and Freedoms*,[1] as enunciated by the Supreme Court of Canada in its famous *Oakes* test,[2] is part of a continuum of similar tests from various states around the world. These tests all employ a form of "proportionality analysis."[3] Around these tests an international theoretical and doctrinal literature continues to grow.[4] There are substantial criticisms to be made of this proportionality analysis, and I have offered some of these criticisms in other writing,[5] to which arguments I will return later in this review. As the subtitle of his new book suggests, Grégoire Webber has some claims to make about the limitation of rights, which also turn out to relate to this proportionality analysis.[6] In particular, he wishes to challenge what he calls the "received approach" to the limitation of rights that undergirds proportionality analysis, challenging indeed the very conceptualization of what a limitation of a right is.

Webber's constructed opponent, the received approach, separates the definition and limitation stages of rights analysis, and then it, in Webber's words, "settle[s] on the regulative ideas of *proportionality* and *balance* between harm and benefit to assess legislation."[7] Webber argues that this approach misconceives the very nature of rights, and limitations of rights, and in the process ends up undermining the very significance of rights. The full argument will take some unpacking, to which I will turn momentarily. I will also refer to Webber's related views on the central role of democratic legislatures — rather than courts — in defining the shape of rights and their limitations. Webber's argument, as will become clearer, is significantly innovative — indeed, those stuck in some central Canadian establishments' ideological modes have probably found it too innovative, without even needing to read it. However, I will argue, Webber's innovative argument is actually subject to a significant weakness in its overly theoretical approach to a claim that actually needs to relate to a more determinate legal context. In my concluding comments I will develop that criticism, arguing that Webber's argument falters in its present form, although the innovative content of his argument does offer several key principles that we should in fact incorporate

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1 Part I of the *Constitution Act, 1982* [*Charter*]. The standard citation format would go on to reference the *Constitution Act, 1982* to a piece of legislation in the United Kingdom. Such a citation format has constitutional and political implications that I respectfully decline to support.

2 *R. v. Oakes*, [1986] 1 S.C.R. 103.

3 For an important recent discussion, see Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum. J. Transnat'l. L. 72.

4 On the theory side, see especially Robert Alexy, *A Theory of Constitutional Rights*, trans. by Julian Rivers (Oxford: Oxford University Press, 2002). Alexy's influence has clearly made it to Canadian discussions and is prominent in the wonderful recent collection on the *Oakes* test edited by Luc B. Tremblay & Grégoire C.N. Webber, *The Limitation of Charter Rights: Critical Essays on* R. v. Oakes (Montreal: Thémis, 2009). As I have also suggested on other occasions, it is to be hoped that this latter book draws even a bit of attention to Tremblay's ongoing very important writing on rights limitation, to which the unfortunate inattention to date is arguably explicable only in terms of an appalling failure by leading anglophone constitutionalists to pay attention to French-language writing on the topics they address.

5 See e.g. Dwight Newman, "Self-Defeating and Self-Transforming Dimensions of Proportionality Analysis," Book Review of *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* by James B. Kelly & Christopher P. Manfredi, eds. (2010) 15 Rev. Const. Stud. 177 [Newman, "Review of *Contested Constitutionalism*"].

6 Grégoire C.N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009) [Webber, *The Negotiable Constitution*].

7 *Ibid.* at 4 [emphasis in original].

into our understanding of constitutional analysis in the transition beyond certain tired ideological positions.

In reacting to Webber's book there would, of course, be various interesting points to pursue that I will not develop at any length in this review. However, before turning to the main argument, I will mention two of these other points related to Webber's intellectual forebears in order that they are out of the way and need not distract from the central argument. First, Webber's book derives from an Oxford doctoral thesis that Webber pursued under the supervision of Professor John Finnis, and Webber's work shows the influence of that supervision. Reading a number of the chapters, one almost finds that Webber, albeit finding his own voice, has found one rather reminiscent of Finnis. In a slightly repetitive but ultimately quite powerful restating of its key conceptual claim about the nature of rights, Webber's argument has some of the tones of Finnis' masterpiece *Natural Law and Natural Rights*.[8] Finnis' views on some specific legal issues have not made him beloved by a certain group of legal academics and activists, who might take a comparison to him to be no compliment.[9] But a holistic reading of Finnis identifies a remarkable body of thought, and a vision of rights that has the capacity to face up to an overly individualistic rights discourse, and it is this vision of rights with which Webber's tones resonate quite beautifully. Given his long-standing and sophisticated thinking about such issues as transitions in legal systems,[10] Finnis's supervision has guided several masterful works of Canadian legal writing, notably those by Kent McNeil[11] and Brian Slattery[12] — Webber's work joins a great legacy.

Second, and on a somewhat more critical note, Webber at several stages in the book draws upon the writings of Carl Schmitt without any contextualization of the particular claims drawn.[13] One particularly puzzling passage quotes from Schmitt as if the pertinent lines described the parliamentary challenges of today rather than those of Weimar Germany, about which Schmitt was writing.[14] Schmitt is potentially a genuinely dangerous intellectual companion. On most interpretations, his critiques of parliamentary democracy were connected with his promotion of fascism and the Third Reich.[15] Webber, of course, has no association with such ideas and, indeed, calls in many ways for fuller forms of democracy. The points he draws from Schmitt are framed in support of such an argument. However, Schmitt is one theorist whom one should probably contextualize when drawing upon. The points Webber takes from Schmitt are straightforward and would not have required drawing from Schmitt and evoking confusion or perhaps even consternation for some readers. It might well have been a wiser course not to unnecessarily draw on Schmitt without being able to

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8 John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

9 See e.g. Samuel A. Marcosson, "The 'Special Rights' Canard in the Debate Over Lesbian and Gay Civil Rights" (1995) 9 Notre Dame J.L. Ethics & Pub. Pol'y 137 at 173, where Finnis is accused of engaging in a "jurisprudence of insult," stereotyping homosexuals, and being engaged in an "attempt to articulate out of anti-gay Catholic doctrine a moral basis for legal disadvantaging of gay men and lesbians."

10 See e.g. J.M. Finnis, "Revolutions and Continuity of Law" in A.W.B. Simpson, ed., *Oxford Essays in Jurisprudence, Second Series* (Oxford: Clarendon Press, 1973) 44.

11 Kent McNeil, *Common Law Aboriginal Title: The Right of Indigenous People to Lands Occupied by Them at the Time a Territory is Annexed to the Crown's Dominions by Settlement* (D.Phil. Thesis, Oxford University, 1987), subsequently published as Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

12 See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (D.Phil. Thesis, Oxford University, 1979) [unpublished].

13 See e.g. Webber, *The Negotiable Constitution*, *supra* note 6 at 16, 18-19, 150-51.

14 *Ibid.* at 151.

15 He has often been called the Kronjurist des Dritten Reiches (Crown Jurist of the Third Reich).

engage more fully with a contextualization of his work. But the choice Webber made in this regard is simply one of youth rather than anything more significant. Clearing this deadwood from the path permits us to enter into an examination of Webber's central argument.

Turning to that central argument, Webber's reiterative claim essentially amounts to a claim that all rights are properly internally limited, even though constitutional bills of rights contain external limitation clauses, and that failing to treat rights as internally *rather than* externally limited actually has devastating effects for rights discourse. First, the received approach of treating rights as externally limited ends up, in Webber's critique, leaving judges engaged in a balancing of incommensurable interests and trying to optimize a set of principles without being able to articulate the maximized value.[16] Second, Webber argues, treating rights as subject to widespread external limitations ends up treating rights as merely prima facie requirements, and thus undermines the possibility of any genuine absolute rights.[17] The latter undermining of rights discourse connects to a concern Webber has that allowing rights not defined with their limitations in them allows these improperly defined rights to have the prestige of being "rights," and puts genuine rights and exaggerated rights on the same level, making violation of all "rights" something to be expected rather than condemned.[18] Such, Webber holds, are the dangers of separating the definition and the limitation of a right into separate processes, when the limitation of rights is actually better regarded as a specification of rights.[19]

One of his reiterations makes clear the danger that Webber's description of the received approach treats it as more homogenous than it is. In discussing what he considers the broad — even "exaggerated" — account of rights, Webber launches the claim that "[i]t should strike one as fantastic that perjury and political speech are awarded the same status by the received approach."[20] This situation would indeed have a fantastic component were it fully true. Webber's claim for it in the Canadian context would be that the standard approach to Canadian freedom of expression law provides prima facie s. 2(b) protection to any activity conveying or attempting to convey meaning, with an exception only for violence,[21] and thus gives the same s. 2(b) status to perjury and political speech, such that limitations on each fall to be analyzed under the s. 1 test. However, that prevalent description of the law masks richer realities. First, there is a gradation of forms of expression accepted at the s. 1 stage, with a recognition of forms of expression closer to or farther from the core purposes of the s. 2(b) freedom resulting in a different application of s. 1 to different sorts of expression,[22] undermining any full-fledged claim that perjury and political speech have the same "status." Second, there is live debate within the Supreme Court of Canada on the possibility of further exclusions from the scope of prima facie s. 2(b) protection.[23] Third, a readiness to look beyond the case law of the Supreme Court towards an actual consideration of freedom of expression in lower courts identifies further lines of case law separating forms of expression

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16 Webber, *The Negotiable Constitution*, *supra* note 6 at 89-97.
17 *Ibid.* at 102-105, 111-13.
18 *Ibid.* at 3-5.
19 *Ibid.* at 3.
20 *Ibid.* at 122.
21 *Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R. 927 at 968-69.
22 See e.g. *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *R. v. Keegstra*, [1990] 3 S.C.R. 697.
23 See e.g. *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45.

not fitting the goals of the s. 2(b) guarantee, and thus not receiving s. 2(b) status,[24] a line of argument that risks challenging Webber's alliterative alignment of perjury and political expression.

Webber's point on freedom of expression would perhaps remain as a concern with the symbolic implications of a potential alignment in the public mind of different forms of activity meeting whatever threshold of expressiveness is required, but nonetheless differing in value. I would actually argue that expression is a special case, and perhaps a weaker example for Webber to attempt to utilize in this regard than other rights might be. Once one passes an appropriate threshold into actual expression, one of the central values of freedom of expression is precisely to provide protection to expression with which some or many disagree and, indeed, to expression whose very value as expression some or many might challenge. Freedom of expression inherently gives a shared status of sorts to expression one personally finds more and less valuable, doing so on the basis of a shared understanding of more important values being thereby protected.[25]

That said, when one moves to other rights in the Canadian context specifically, one also encounters a descriptive problem with Webber's claims as to the contents of the ever-looming bogeyman of the so-called received approach. Each right within the Canadian *Charter* has a set of internal limits applicable to the scope of the right that must be engaged before one actually moves to the proportionality analysis that Webber's account presents as all-pervasive.[26] To say this much is not to say that these internal limits might be lesser in some instances than some would prefer, although I will return later to the implications of a different kind of theoretical argument than present in Webber for why these internal limits are cast much like they are. So, it is only *unreasonable* search and seizure that is subject to proportionality analysis, with *reasonable* search and seizure already being within the state's legitimate authority.

To the extent that Webber's claims are potentially too sweeping, his book is less persuasive than it might have been. In a book-length work he might usefully have actually engaged with some of the details of the received approach in different jurisdictions, and thereby added some nuance and more precise contribution bearing more directly on existing legal doctrines. As his argument stands, Webber goes on to argue for a larger democratic role in limiting rights and for greater judicial deference to that democratic project,[27] and his

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[24] See e.g. *R. v. Lawrence* (1993), 141 A.R. 183 (C.A.), leave to appeal to S.C.C. refused, [1993] 3 S.C.R. vii (heckling not protected by s. 2(b)); *697578 Ontario Ltd. v. Niagara Falls (City of)* (2001), 28 M.P.L.R. (3d) 266 (Ont. Sup. Ct. J.), aff'd (2002), 168 O.A.C. 228 (C.A.) (nude entertainment at nightclub not considered expressive in absence of proof of special creativity or expressive value); *Adult Entertainment Association of Canada v. Ottawa (City of)*, 2007 ONCA 389, 283 D.L.R. (4th) 704 (bans on physical contact not causing s. 2(b) issue in context of alleged expressive value of lap dancing). See generally Dwight Newman, "Constitutional Law: Charter of Rights" in *Halsbury's Laws of Canada*, 1st ed. (Markham: LexisNexis, 2010) vol. 43, 409 at HCHR-39 [Newman, "Constitutional Law"].

[25] See generally Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982).

[26] For this general structure of *Charter* analysis in the Canadian context, see Newman, "Constitutional Law," *supra* note 24 at HCHR-2.

[27] See discussion in Webber, *The Negotiable Constitution*, *supra* note 6, c. 5. See also Grégoire C.N. Webber, "The Unfulfilled Potential of the Court and Legislature Dialogue" (2009) 42 Canadian Journal of Political Science 443.

argument has some weight.[28] However, his claim partly depends on an overstated view that the courts have failed to engage in the limitation of rights through specification.

Webber's argument has some symbolic traction, in the same body of argument with Bradley Miller's important piece on s. 1, which worries about a two-stage interpretation partly on the basis that defining rights too broadly gives an added appearance of legitimacy to rights claims that should not have that legitimacy.[29] This argument, presented by both Webber and Miller, each in their own ways, should receive much more attention than it has to date. In the sophisticated form in which it appears in the deep theoretical argument on offer in Webber's book it is an innovative point, and should make us think carefully about the shape of internal limits on rights. Webber's book invites us to think about rights in new ways and is a welcome contribution to constitutional theory discourse.

However, that said, any purely abstract analysis of the problems of a two-stage rights analysis also runs a constant danger that it does not bear on the actual institutional circumstances of Canadian constitutional analysis. The two-stage analysis was adopted significantly for purposes of allocating burdens of proof in the courtroom as between rights claimants and the state. Miller is aware of and thinking about that connection, but Webber's book-length work does not mention this consideration.

Constitutional theory that abstracts from all institutional considerations may be interesting and of importance. However, in the absence of further argument, it is unlikely to offer specific policy prescriptions applying within actual institutional contexts. My central worry with Webber's argument, which abstracts a received approach from various jurisdictions without engaging in any detail with the specificity of any particular jurisdiction, is that it has little actual prescriptive traction in the context of a two-stage rights analysis adopted for reasons associated with the institutional context of allocation to stages altering burden of proof. We can only hope that Webber is minded to offer further argument geared to that actual institutional context in future work, or his argument does not achieve as much as it might.

Constitutional theory on rights limitation has all too often abstracted too far from institutional considerations. I have recently argued this point in relation to comments on proportionality analysis that fail to recognize changes effected to the very meaning of the doctrine by the dynamic behaviour of political and judicial actors that arises in response to the doctrine and the behaviour of other actors.[30] Although various pressures on academics developing theoretical accounts encourage them to develop abstract theories — and I would acknowledge my complicity in this, having myself written abstract theory — what would actually be more significant in Canadian and other contexts would be the development of a larger body of institutionally-connected theory. Webber's book offers some interesting and

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[28] The part of his argument, however, focusing on constitutions as having content that is negotiable over time, would be worthy of separate discussion beyond the space limits of the present review. It is true that over time some constitutional norms may be altered through practice. However, to conceive of the constitution in overly amendable terms is quite simply to cease thinking of a constitution at all. But I leave a fuller discussion of that argument for another day elsewhere.

[29] Bradley W. Miller, "Justification and Rights Limitations" in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 93.

[30] See Newman, "Review of *Contested Constitutionalism*," *supra* note 5.

innovative claims and is a welcome contribution to theoretical discussion, but it ultimately illustrates yet again the need for constitutional theory to move in these institutionally-oriented directions.

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