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CONSTITUTIONAL RIGHTS AND JUDICIAL REVIEW OF LEGISLATION IN A DEMOCRACY: THE EXAMPLE OF SECTION 1 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

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CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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SUMMARY

With the advent of the *Canadian Charter of Rights and Freedoms*, Canadian courts assumed the unprecedented role of deciding when to overturn democratically enacted laws which they deem in conflict with constitutional rights. According to Section 1 of the *Charter*, guaranteed rights may be subject to reasonable limits which are prescribed by law. These reasonable limits must be demonstrably justified in a free and democratic society. The courts may consider challenged legislation unconstitutional and void if Section 1 is not satisfied.

The vague open textured language of Section 1 has necessitated the development of certain tests by the Court in order to determine if a challenged law is actually a reasonable limit on a guaranteed right. Thus the Court's interpretation of Section 1 is central to the outcome of a case. This study focuses on how the courts (mainly the Supreme Court) have interpreted Section 1 and the consequent limitations theory which has developed in Canada.

The development of limitation theory in Canada will reflect the judicial struggle to attain a balance between rights enforcement and majoritarian democracy. This struggle between activism and restraint is not dissimilar to United States limitations theory which will be explored comparatively.

The implications of the judicial approach to limitations theory will then be analyzed within the context of the contemporary legitimacy debate. The controversy of appointed judges overturning laws enacted by democratically elected officials has been long debated in the United States. Since the enactment of the *Charter*, the Canadian judiciary has been faced with a similar controversy. Defining the scope of open textured rights and the interpretation of Section 1's vague concepts have exposed the judiciary to much academic criticism. The legitimacy debate in the United States will be closely examined followed by an analysis of its application to the Canadian context. The unique Canadian perspective will be set out.

It will be concluded that the legitimacy controversy in the United States and even more so in Canada is mitigated by several factors. For example, within the Canadian context the Supreme Court's practical approach to limitations theory is an important factor. Judicial efforts to strike a balance between activism and restraint set out in Part One of this study (despite many inconsistencies) in addition to the various institutional factors, explored in Part Two of this paper, will serve to present the judicial role in rights adjudication as a necessary and vital component of a healthy system of checks and balances.

RÉSUMÉ

La *Charte candienne des droits et libertés* a donné aux cours de justice canadiennes le pouvoir d'invalider des lois adoptées par des représentants du peuple élus démocratiquement par lui. Un tel rôle suscite la controverse aux États-Unis depuis près de deux siècles; controverse qui était, jusqu'en 1982, moins vive au Canada puisque le rôle des tribunaux se limitait à apprécier la constitutionnalité des lois uniquement par rapport au fédéralisme. Pour le reste, la souveraineté parlementaire l'emportait et les cours de justice canadiennes ne jouaient pas un rôle majeur en matière de protection des droits et libertés face aux lois.

La constitutionnalisation de la *Charte* en 1982 a placé le Canada dans une position similaire à celle des États-Unis, dotés depuis bien longtemps d'un *Bill of Rights*. La Cour suprême du Canada fut soudainement confrontée à sa nouvelle mission de protéger les droits et libertés fondamentales et d'imposer des limites aux pouvoirs législatifs et exécutifs, fédéraux et provinciaux.

À la différence du *Bill of Rights* américain, qui ne contient pas de disposition limitative générale, la *Charte* en contient une. C'est son article premier, qui se lit comme suit:

> "La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer, dans le cadre d'une société libre et démocratique."

Selon cette disposition, une loi qui porte atteinte aux droits et libertés garanties par la *Charte* sere déclarée nulle et inopérante si sa justification ne peut "se démontrer dans le cadre d'une société libre et démocratique". L'article premier est donc au coeur de l'adjudication constitutionnelle canadienne en matière de droits fondamentaux et l'autorité qui a la tâche de l'interpréter et de l'appliquer acquiert de ce fait une influence considérable

sur les lois et les politiques de notre pays. Ajoutons qu'en vertu de l'article 24(1) de la *Charte* un tribunal peut octroyer réparation à la victime d'une violation des droits ou libertés que la *Charte* consacre; il peut en outre déclarer inopérante toute règle de droit qui y contrevient, cette fois en vertu de l'article 52 de la *Loi constitutionnelle de 1982.*

Il en résulte que d'équilibre institutionnel du Canada a profondément changé. Les cours de justice s'y sont politisées dans le sens que le règlement des litiges peut requérir de mettre en balance des intérêts sociétaux opposés, à savoir certains objectifs législatifs d'une part et les droits ou libertés revendiquées par l'individu ou le groupe d'autre part. De plus, le caractère assez vague et imprécis de la disposition limitative a obligé les cours de justice, au premier chef la Cour suprême, à élaborer leurs propres critères de limitation raisonnable aux droits et libertés de la *Charte*. C'est là une tâche délicate et qui s'apparente à celle de la Cour suprême des États-Unis qui, bien qu'en l'absence d'une disposition limitative expresse, a eu à élaborer des standards jurisprudentiels du même genre. Cette nécessité d'interpréter le libellé très général de l'article premier de la *Charte* a exposé la Cour suprême a beaucoup de critique de la conception qu'elle se fait du rôle du pouvoir judiciaire.

Puisque l'article premier n'est pas clair quant à l'extension qu'un droit ou une liberté doit recevoir ni quant à la façon de déterminer quelles restrictions à ce droit ou liberté sont en fait raisonnables dans une société libre et démocratique, c'est la Cour suprême qui en décide et qui établit les règles du jeu. Si elle opte par exemple pour des standards de rachat ou de sauvegarde très exigeants, elle complique la tâche des gouvernants qui auront du mal à établir que les conditions de la disposition limitative sont satisfaites. Un pouvoir judiciaire "activiste", exercé par des juges non élus qui se permettent de mettre en balance des intérêts sociétaux opposés et, le cas échéant, d'invalider les lois des représentants du peuple, est souvent vu comme empiétant sur la fonction législative.

À l'opposé, la retenue judiciaire implique un rôle politique moindre. Interpréter et appliquer l'article premier avec déférence pour les choix politiques facilite la tâche des

gouvernants de démontrer la validité constitutionnelle des mesures qu'ils adoptent. La retenue judiciaire est certes plus conforme aux valeurs démocratiques majoritaires que ne l'est l'activisme. Mais un niveau élevé de retenue est aussi fort criticable puisqu'il fait perdre à des droits par ailleurs dits fondamentaux leur efficacité. Or la constitutionnalisation de ces droits fut elle aussi décidée démocratiquement, non pas par les juges mais par les autorités politiques. Ces droits représentent les valeurs fondamentales de la nation et de la démocratie elle-même. Le droit de vote, la liberté d'expression et les droits judiciaires, pour ne nommer que ceux-là, sont essentiels à une société démocratique fondée sur la primauté du droit. S'ils ne sont pas suffisamment protégés par le pouvoir judiciaire, pouvoir qui doit être impartial et insensible aux caprices majoritaires, la constitutionnalisation des droits et libertés n'atteint plus son objectif. Au surplus, le principle démocratique n'est pas que le principe du respect de la volonté de la majorité. Le respect des droits de l'individu, de ceux des groupes minoritaires et le rejet de "la tyrannie de la majorité" sont aussi des éléments essentiels d'un État démocratique.

La dichotomie activisme/retenue judiciaires, évoquée précédemment, illustre bien la difficulté d'arbitrer entre valeurs concurrentes au sein de la société. En fait, ni l'une ni l'autre de ces deux attitudes n'est complètement vraie ni complètement fausse. Les droits et libertés de la *Charte* méritent protection mais le processus démocratique aussi, processus qui donnera lieu à des atteintes aux droits d'individus ou de minorités pour le bien-être de la collectivité dans son ensemble. Certaines atteintes sont nécessaires au bon fonctionnement de la société et personne ne peut être toujours gagnant. L'exercice, par un individu, de ses droits pourra entrer en conflit avec les droits des autres et avec l'intérêt général de la société légitimement défendu par certaines politiques législatives. Ainsi, bien que les valeurs véhiculées par la *Charte* soient primordiales, ce ne sont pas les seules valeurs dans la société.

En d'autres termes, un activisme judiciaire pur et constant déséquilibrerait notre système démocratique, de la même façon qu'une totale retenue judiciaire rendrait la *Charte* inefficace. Au-delà du caractère logiquement contradictoire de ces deux positions, les réalités de notre société commande un équilibre entre la prédominance des droits et libertés

et celle de la légitimité démocratique.

Pareil équilibre pourrait se traduire par une franche reconnaissance du fait qu'en matière de droits et libertés le contrôle judiciaire de l'action législative oblige inévitablement le juge à excéder son rôle traditionnel et à faire des appréciations de "policy", ce qui ne doit pas être considéré comme illégitime mais bien plutôt comme inhérent à sa fonction de gardien de la Constitution. Cela revient à dire que la conception de la séparation des pouvoirs à laquelle la souveraineté parlementaire nous a habitués doit être renouvelée. En revanche, l'équilibre à atteindre peut aussi exiger que les droits et libertés cèdent le pas à certains impératifs législatifs sans qu'il faille en conclure que la viabilité de la *Charte* est mise en cause. La prise en compte de tous les aspects de la démocratie, et non seulement de son aspect "volonté de la majorité", devrait mieux refléter cette unique combinaison de tradition libérale et de tradition communautaire qui caractérise le Canada.

L'article premier de la *Charte* est l'instrument de ce nouvel équilibrage. Une disposition limitative représente un compromis politique en ce qu'elle reconnaît que les droits et libertés, même s'ils sont libellés en termes abstraits et absolus, ne le sont pas en réalité. Alors que la première phrase de la disposition limitative de la *Charte* "garantit les droits et libertés qui y sont énoncés", la deuxième autorise que des restrictions raisonnables leur soient apportées "par une règle de droit". Le bien de l'individu et celui de la collectivité sont donc tous deux pris en compte. En ce sens, l'article premier ouvre la voie à une part d'activisme judiciaire et à une part de retenue judiciaire et il tempère l'aspect dichotomique de ces deux positions.

Ce mémoire analyse la façon dont la Cour suprême du Canada, commes celle des États-Unis, a tenté d'établir un équilibre entre la protection des droits et libertés d'une part et la reconnaissance du rôle des institutions démocratiques dans la gouverne du pays d'autre part. C'est par l'analyse de l'article premier de la *Charte*, de son interprétation et des divers critères élaborés par la Cour suprême que nous ferons cet examen et la jurisprudence américaine, qui a eu en la matière une influence certaine sur la jurisprudence canadienne,

nous servira de base de comparaison. En dépit des différences historiques et institutionnelles entre les États-Unis et le Canada, différences auxquelles nous nous attarderons, il est évident que les deux pays ont été confrontés à la même nécessité de chercher un équilibre entre la protection des droits et libertés et le respect des choix démocratiques. C'est le sujet de la première partie de ce mémoire.

La légitimité de ces tentatives d'équilibrage et plus largement la légitimité du contrôle judiciaire de constitutionnalité feront l'objet de la deuxième partie de notre étude. Vu que le débat a cours depuis longtemps aux États-Unis, nous l'analyserons en premier lieu dans le contexte de la société américaine. Nous procéderons d'abord à l'examen de deux écoles de pensée, "interpretivism" et "non-interpretivism", écoles associées respectivement à la retenue judiciaire et à l'activisme judiciaire. Nous passerons aussi en revue diverses théories sur le rôle de la Cour suprême en matière constitutionnelle, qui tentent de concilier démocratie et contrôle judiciaire de constitutionnalité. Les différentes perspectives que l'on peut choisir pour juger qu'une "interprétation" constitutionnelle est valide ou pas et la façon dont elles affectent la perception de la légitimité du rôle de la Cour retiendront aussi votre attention. Après avoir examiné, toujours en contexte américain, la question de la séparation des pouvoirs et la théorie des poids et contrepoids ("checks and balances"), nous analyserons le problème de la légitimité du contrôle judiciaire de constitutionnalité, cette fois en contexte canadien. Le caractère particulier du Canada et de ses aménagements institutionnels nous amènera à conclure à la légitimité du rôle de la Cour suprême en matière de protection des droits et libertés et à l'inopportunité de transposer au Canada l'intégralité des débats américains à ce sujet. En dépit de certaines incohérences et de plusieurs difficultés auxquelles la Cour suprême du Canada a eu à faire face dans son interprétation et son application de la *Charte*, en particulier de son article premier, nous conclurons qu'elle a rempli son rôle dans le respect d'une saine conception de l'équilibre institutionnel de notre pays.

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LIST OF ABBREVIATIONS

A.G.	Attorney General
A.Q.	Advocate's Quarterly
Alta.L.R.	Alberta Law Review
B.C.	British Columbia
B.C.C.A.	British Columbia Court of Appeal
C.A.	Court of Appeal
Can. Bar. Rev.	Canadian Bar Review
C.C.C.	Canadian Criminal Cases
C.de D.	Cahiers de Droit
C.H.R.C.	Canadian Human Rights Commission
Can.Hum.Rts.Y.B.	Canadian Human Rights Yearbook
C.J.	Chief Justice
Can.J.Pol.Sci.	Canadian Journal of Political Science
C.R.	Criminal Reports
C.R.R.	Canadian Rights Reporter
D.L.R.	Dominion Law Reports
Eur.Ct.of Human Rights	European Court of Human Rights
Eur.Ct.H.R.	European Court of Human Rights
E.E.C.	European Economic Community
E.H.R.R.	European Human Rights Reports
F.C.	Canada Federal Court Reports
J.	Justice
L.J.	Law Journal
M.C.L.R.	Media and Communications Law Review
Man.L.J.	Manitoba Law Journal
Man.L.R.	Manitoba Law Review
Man.R.	Manitoba Reports
M.V.R.	Motor Vehicle Reports
N.J.C.L.	National Journal of Constitutional Law

N.R.	National Reporter
N.W.T.R.	Northwest Territories Reports
N.Y.	New York
N.Y.U.	New York University
Ont.C.A.	Ontario Court of Appeal
Osgoode Hall L.J.	Osgoode Hall Law Journal
Ottawa L.Rev.	Ottawa Law Review
Pub. Law	Public Law
P.L.	Public Law
Queen's L.J.	Queen's Law Journal
R.du B.	Revue du Barreau
R.du B.Can.	Revue du Barreau Canadien
Ref.	Reference
R.G.D.	Revue Générale de Droit
R.J.Q.	Recueils de Jurisprudence du Québec
R.J.T.	Revue Juridique Thémis
R.S.C.	Revised Statutes of Canada
S.C.L.R.	Supreme Court Law Review
S.C.R.	Supreme Court Reports
U.B.C.	University of British Columbia
U.B.C.L.Rev.	University of British Columbia Law Review
U.N.B.L.J.	University of New Brunswick Law Journal
U.S.	United States
W.W.R.	Western Weekly Reports

INTRODUCTION

In the protection of human rights, the Supreme Courts of the United States and Canada hold the power to overturn laws enacted by democratically elected officials. Although the United States has been dealing with this controversial role since the time of *Marbury v. Madison*[1], the Supreme Court of Canada, until 1982, mainly dealt with constitutional questions relating to federalism: the division of powers between the federal government and the provinces. Parliamentary supremacy was the rule, and consequently the courts did not play a central role in the protection of individual rights.[2]

The 1960 *Canadian Bill of Rights*[3] was concerned with protecting individual rights yet remained applicable only in the federal sphere, and was not a constitutional instrument. The Court rendered legislation inoperative in very rare cases, such as *R. v. Drybones*[4] and generally exhibited great reluctance in its review of legislation affecting human rights.[5] Thus, in 1982, the Canadian federal government entrenched a bill of rights within the constitution, our very own *Canadian Charter of Rights and Freedoms*. This event placed Canada in a similar situation as that of the United States with its longstanding *Bill of Rights*. The Canadian Supreme Court was suddenly faced with the prospect of enforcing limitations on legislative and administrative powers in its role as guardian of certain fundamental guarantees.

Unlike the *American Bill of Rights*, which contains no limitations clause, the *Canadian Charter* was bestowed with Section 1, a general limitations clause which reads as follows:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

This clause, along with the direct authority for the courts to provide remedy and declare legislation in violation of rights inoperative (contained respectively in Sections

24(1) of the *Charter* and s. 52 of the *Constitution Act 1982*), changed the institutional balance of the political structure in Canada.[6]

This is so because the Supreme Court has assumed the unprecedented role of defining the scope of open textured *Charter* rights in addition to deciding when to overturn laws which it deems in conflict with the constitution. According to Section 1, legislation will be considered unconstitutional and void if it cannot be "demonstrably justified in a free and democratic society". Thus, Section 1 of the *Charter* is pivotal to the outcome of rights adjudication in Canada, and he who carries the weight of interpreting and applying its directives can yield much influence over the laws and policies of our country. This is why it is argued that the *Charter* has essentially politicized the judiciary.[7] The courtroom has become, in effect, a political arena, where the adjudication of disputes culminates into the balancing of societal interests; specifically legislative values versus the rights of the individual or group claiming an infringement.

The vague and imprecise nature of the limitations clause has placed the Court in the precarious position of establishing its own criteria on reasonable limitations. This task is similar to that of the United States Supreme Court which, in effect, has "judicially legislated limitations" in the absence of a limitations clause. The necessity of interpreting the general provisions of Section 1 has further left the Court open to much criticism relating to the proper role of the judicial function.

Since Section 1 is unclear on the extent to which a right should be defined and how to determine which limitations are, in fact, reasonable in a free and democratic society, the Court, in establishing such criteria, is center stage. For example, judges, by creating and following stringent standards of review, make it difficult for the government to defend their limitations. Such activist judicial review involving appointed judges weighing policy interests and possibly overturning the laws of elected representatives, is often viewed as judicial trespass on the legislative function.

Judges, it is said, choose the interpretation of the ambiguous *Charter* provisions which best reflect their policy choices. The controversy arises from the difficulty of reconciling such judicial review with popular views of democracy and the rule of law which states that the laws governing our lives must be produced by a democratically accountable legislature[8] (one which has been elected by the majority of the population).

Judicial restraint, on the other hand, limits the judicial role in the policy-making sphere. Interpreting and applying Section 1 in a more deferential manner facilitates the government's attempt to establish the constitutionality of a provision. Although majoritarian democratic values are better preserved through such restraint, a high degree of deference is also subject to criticism characterized by the 1960 *Canadian Bill of Rights* experience. Without judicial activism, it is argued, fundamental rights are stripped of force. Constitutional rights are after all enshrined values which have also emanated from the democratically elected government. These rights represent the chosen fundamental values of the nation and democracy itself. The right to vote, freedom of expression and judicial rights, to name a few, are essential to a democratic society based on the rule of law. If they are not sufficiently protected by an institution impartial to majoritarian whims (the judiciary), the constitutional document falls short of its intended purpose.

Furthermore, the democratic principle represents more than just majoritarianism. Tolerance of individual and minority rights or the absence of "tyranny of the majority" are also essential elements of a democratic state. All members of a collectivity, at some time or another, play the role of the individual or minority. Thus, *Charter* rights are designed to protect us all, as a collectivity, to provide a check on the governmental institutions and ensure that the supreme values of the nation are instilled into our legislation. Judges from this perspective are enforcing the rule of law when upholding constitutional rights, not enforcing their own personal values and policy decisions.

The dichotomy of judicial activism and restraint reflected in the preceding comments portrays the difficulty of mediating between competing values in society. Yet, the approaches on the judge's legitimate role respectively reflect a very "black and white"

assessment of the situation. In reality, neither approach is wholly wrong or right. *Charter* rights are deserving of protection, but so is the democratic process which will inevitably infringe certain individual or minority rights when legislating for the collectivity as a whole. Certain limitations are necessary in order for society to function and no one can be the winner all of the time. An individual, exercising his rights, will come into conflict with the rights of others, and the general interest of society represented by legislative policy. Thus, although *Charter* values are primordial, they are not the only values in society.

In other words, a solely activist judiciary would upset the balance of our democratic system just as an overly deferential court would render the *Charter* inoperative. The realities of our society require striking a balance between rights enforcement and legislative democracy, regardless of their seemingly paradoxical nature.

A more balanced approach could recognize that judicial review of legislative action in the preservation of human rights does inevitably expose the judge to normative discussions on policy (in violation of their traditional legalistic role) without dismissing their legitimacy as constitutional guardians. Rather, the Court can be seen as engaging in a healthy system of checks and balances which necessitates a degree of violation of the separation of powers. A balanced approach could also support the view that rights sometimes must give way to the legislative function (which also serves to protect important values in society including those enshrined in the *Charter*) and this does not necessarily destroy the viability of the *Charter*. A balanced view could support all aspects of democratic theory, not just majoritarianism. It could also better reflect the unique combination of liberalist and collectivist traditions in Canada.

Section 1 of the *Charter* is a recognition of such realities and reflects this essential balance. In fact, the limitations clause represents a political compromise recognizing that rights and freedoms set out in unqualified, often abstract, terms cannot be absolute. While the first phrase of Section 1 asserts the force of *Charter* rights, the latter part of the limitations clause allows for "reasonable limitations" prescribed by law. The individual

and the collectivity are both accounted for as is the need for a degree of judicial activism and a degree of judicial restraint. Furthermore, this section tempers the dichotomy between rights and legislative limitations suggesting a balanced approach to rights adjudication. For example, Section 1 recognizes not only the primordial value of *Charter* rights, but also that legislatures representing collective values may reasonably limit rights, as a competing legislative enactment may also reflect and protect the needs of a free and democratic society. It also portrays that the Court's enforcement of rights (which may override law) also represents a free and democratic society. Such a society requires that liberties be protected in addition to majoritarian values.

The united concepts of a "free" and "democratic" society are indicative of this reality. The free individual and the democratic collectivity are both recognized and joined together. After all, the collectivity is made up of each and every individual. What is implied is that both rights and reasonable limits stem for the same value system of the nation, a nation based on the concepts of freedom and democracy. Both are thus measured by these same standards.[9] This negates the vision of judicial enforcement of rights and legislative democracy as stark opponents, mutually exclusive. It rather suggests that a balance must be struck to accommodate both notions to ensure our society remains free and democratic.

This study is intended not to overly simplify the controversial function of rights adjudication. It rather sets out to examine how the Supreme Court, like its American counterpart, has attempted to achieve some balance between its vital role as guardian of constitution rights, and the elected legislature's democratic role in deciding the nation's policy. The judicial role, under the *Charter*, will also be explored within the context of the theoretical legitimacy debate. In the first part of this study, Section 1 of the *Charter* and its subsequent interpretation will be closely examined for its evolving analysis will reflect the Court's attempt to achieve this difficult balance. The modulation of Section 1, according to various criteria established by the Court, will be the focus. Limitations theory in the United States will also be studied as a base of comparison. The influence of American judicial theory on limitations will be evident. Similarities and differences in

approaches regarding various rights will be set out paying attention to institutional and historical divergence. It will be evident that both countries have been striving to achieve a balance between judicially enforcing rights and legislative democracy through limitations theory.

Furthermore, in order to comprehend whether such a "legitimate" balance can or has been achieved, a discussion of judicial review in relation to legitimacy arguments will be necessary. The second part of this study will focus on the implications of such legitimacy arguments. The contemporary legitimacy debate in American society will first be examined as the United States has long been faced with this issue. Two schools of thought, interpretavism and non-interpretavism, closely related to the notions of judicial activism and restraint, will be analyzed first. Different theories will be explored on the suitable role of the Court in constitutional adjudication, theories which attempt to reconcile judicial review in a democracy. Attention will be focussed on the varying perspectives concerning what is valid legal "interpretation" in the constitutional context and how this affects one's perception of the Court's legitimacy in its present application of limitation theory. An analysis of separation of powers and checks and balances theory will follow. Finally, the legitimacy debate in the Canadian context will be discussed by comparison. Evidence of the unique Canadian perspective and various institutional factors will establish the Canadian Supreme Court's legitimate role in rights adjudication, and the limits to importing the American debate. Despite the inconsistencies or difficulties encountered by the judiciary in its interpretation and application of the *Charter*, it will be furthermore concluded that the manner in which the Court has handled its role (especially under Section 1) is respectful of a healthy system of checks and balances.

PART ONE: LIMITATIONS

I. THE BIRTH OF SECTION 1: THE BALANCE BETWEEN JUDICIAL AND POLITICAL POWER

The political debates surrounding the entrenchment of the *Canadian Charter of Rights and Freedoms* reveal much concern about the appropriate balance between judicial and political power. In fact, the main question focussed on who was best equipped to protect the interests of Canadian citizens: the legislature or the courts.[10]

Critics of rights entrenchment insisted that the legislature was the appropriate body for rights protection and the fostering of social justice, not a constitution interpreted by the courts. One worry was that the *Charter* would increase the political power of unelected unaccountable judges at the expense of the provincial legislatures. Even *Charter* supporters within governmental circles remained concerned about judicial limits on parliamentary sovereignty.[11]

Central to this discourse was the appropriate nature of limitations on rights and the inclusion of Section 1 in the *Charter*. A limitations clause represented a compromise, an attempt to strike an adequate balance between the protection of individual rights and the legitimate power of the legislative bodies. Rights could not be absolute.[12]

Certain commentators did not see the necessity of an explicit limitations clause. They looked to the American experience, where in the absence of a limitations clause, limitations on rights have been developed and interpreted by the courts. This evidently was unacceptable to the provincial drafters who demanded explicit limitations qualifying enumerated rights, should a bill of rights be entrenched into the constitution. The legitimacy of limiting rights had to be explicitly provided for.[13]

At issue then was the form and scope of such a limitations clause which could reconcile the interests in the *Charter* with the legislators' promotion of other non-enumerated collective values. The balance between the judicial and legislative role was the

focus. Attention was paid to international human rights instruments such as the European Convention on Human Rights which includes specific limitations in the actual enumeration of rights **[arts 8-11].**[14] This option was rejected for a more general limitations clause cited apart from the abstract rights.[15] The existence of Section 1 does, however, conceptually reflect the influence of this international instrument.

Early drafts of the limitations clause expose a struggle to maintain a degree of legislative supremacy. Fear of judicial supremacy resulted in clauses striking a balance in favour of extreme judicial deference to legislative policy. For example, an early draft of Section 1 stated that the guaranteed rights were "subject only to such reasonable limits as **are generally accepted** in a free and democratic society".[16] Furthermore, Section 1 in the federal government's October 1980 draft of the *Charter* became:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government."[17]

Interest groups and legal activists bent on strengthening *Charter* rights claimed such wording would serve to emasculate such rights, thus repeating the 1960 *Canadian Bill of Rights* experience. "Generally accepted" implied that any accepted or already established limitation could be deemed reasonable with little, if any, onus of proof on the government. Furthermore, the addition of "in a parliamentary system of government" would narrow any comparison, excluding non-parliamentary systems such as the United States, and would come to represent the concept of parliamentary supremacy.[18]

Thus, through compromise, the final draft would strike a more even balance between court enforced rights and legislative limitations (as discussed earlier). "Generally accepted" was, of course, replaced with "demonstrably justified", reasonable limitations were to be "prescribed by law", and no mention was to be made of a parliamentary system. The burden of proof was now clearly laid on the government's shoulder.[19]

Each of these standards will soon be explored in an analysis of the Supreme Court's evolving interpretation of Section 1. We will first examine several preliminary principles of inquiry set out by the Court which underlie the very application of Section 1. Attempts to balance activism and restraint will be reflected in this section and even more so in the Court's treatment of Section 1.

II. PRELIMINARY PRINCIPLES OF APPLICATION - ACTIVISM OR RESTRAINT?

A. Defining Rights

In *Quebec Association of Protestant School Boards c. P.G. Québec*, it was established that Article 1 applies to all the rights set out in the *Charter* since it is a universal limitation clause.[20] It may also apply even to those rights with internal limitations.[21]

The analysis of the validity of a measure, however, is divided into two distinct stages, evident in *R. v. Oakes*[22] and confirmed again in *Ford c. P.G. Québec*[23] . The first stage consists of determining if there has indeed been a restriction on a right. This involves an initial definition of the right (or rights) in question. If no restriction is found, the analysis stops. But if the court determines that the right has been violated, Section 1 will apply, this being the second stage of analysis.[24]

Many of the rights are stated in abstract or unqualified terms. At the first stage of inquiry, the Supreme Court has stated that the rights should be subject to a purposive analysis and be given as generous a meaning as possible. For example, in *R. v. Big M. Drug Mart*, Judge Dickson stated,

> "The court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter et. al. v. Southam Inc.* this court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The

> meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee, and securing for individuals the full benefit of the *Charter's* protection."[25]

It must be noted that although in *Hunter v. Southam*[26] and *Big M. Drug Mart*, a purposive approach is seen as equivalent or at the very least consistent with a generous definition, Professor Hogg points out a paradox or anomaly.

A purposive approach may or may not always allow for the widest possible definition. At the very least a purposive analysis should be conducted to include a vast majority of circumstances. Yet, it also implies a contextual analysis of the right to ascertain its purpose which as Dickson C.J. stated in *Big M. Drug Mart* should not "overshoot" or extend beyond the purpose of the right.[27] A wide and generous interpretation, as also proposed by Dickson C.J., may imply a more extensive meaning than a purposive analysis would allow. Thus a contextual purposive analysis may not always correspond to a wide definition as it may serve to narrow the meaning of the right.[28] (This will be evident in the Court's exclusion of certain types of behaviour as beyond the purpose of a right or unworthy of protection, in addition to the Court's "contextual analysis" of limitations later discussed.)

Furthermore, in order to respect the generous interpretive role, it would be necessary to avoid analyzing the criteria of Section 1 concerning the reasonableness or justification of a restriction at this preliminary stage of inquiry (for it could serve to narrow the scope of the right itself). In addition, the actual framework of the *Charter* separating

Section 1 from the rights themselves suggests that definitional exclusion within the substantive provision itself is unnecessary, and could deprive Section 1 of its utility.[29]

Despite the Court's stipulation to define rights widely in accordance with the requisite two stage analysis (leaving the analysis of limitations to Section 1), the Court has, at times, resorted to definitional limitations. One example resides in the cases *Reference re: Alberta Public Employee Relations Act*[30], *Public Service Alliance v. Canada*[31] and *Saskatchewan v. Retail Wholesale and Dept. Sale Union*[32], where the majority of the Court decided that freedom of association did not include the right to strike circumventing an Section 1 analysis.

Furthermore, Section 2(d) was also declared not to include a right for workers to bargain through a union of their choice in *Professional Institute of the Public Service of Canada*[33]. In *Lavigne v. O.P.S.E.U.*, the Court also held that the freedom to associate did not extend to include the freedom not to associate suggesting the same approach for other rights.[34] Members of the Court also suggested, in this case and others, that certain interests may be deemed too trivial to warrant *Charter* protection.[35] Such reasoning occurred in *R. v. Jones* where Justice Wilson stated that the limitation on religious freedom presented in this case was too trivial to be considered a violation of Section 2(a).[36]

Even relating to the democratic right to vote, the Court has concluded that Section 3 does not include a guarantee to equal apportionment, unlike the one man - one vote rule established in the United States by the Warren court.[37] (to be later discussed) The equality rights, as well in *Andrews*[38] and *R. v. Turpin*[39] were originally defined only to protect "discrete and insular minorities" from governmental discrimination, although this standard has recently been changed (to be discussed later).

The interpretation of freedom of expression in *Irwin Toy* and *Keegstra* has excluded physically violent forms of expression from Section 2(b) protection.[40] In addition, *Irwin Toy* exhibited a reliance upon definitional reasoning in its analysis of the purpose and effects of a measure, a content based content neutral distinction at the definitional level.

It was stated that enactments aimed specifically at expression based on content infringe Section 2(b), whereas those affecting expression incidentally to attaining some other purpose necessitate the petitioner's demonstration that the affected expression implicates the core values protected by Section 2(b): truth, democracy, and self fulfilment, in order to receive *Charter* protection[41] (before any Section 1 analysis takes place).

The Court has evidently not been consistent regarding its own rules on the general application of Section 1. This is partly due to the Court's recognition that offering open textured rights, a generous interpretation does not necessarily imply that every conceivable interest will be covered. As mentioned, a purposive analysis requires certain limits. Additionally, the Supreme Court of Canada, by employing definitional limitations on rights, has also reflected increased judicial restraint and deference (although definitional limitations are still the exception). Such definitional type exclusions are, in fact, a manner in which the courts can avoid a Section 1 analysis and the visibly inherent balancing of political interests.[42] Definitional limitations are also more in line with traditional legal reasoning and the interpretation of statutes.[43] In reality, however, the Court, at this definitional stage, is still balancing societal interests in its decision to exclude certain activities from *Charter* review (a Section 1 type analysis yet less visibly so).[44]

Professor Hogg has stated that definitional limits could be useful by reducing the Court's political intrusion and in promoting activism, for it could lead to a less deferential Section 1 analysis in other cases.[45] (as we will see, the latter factor has not occurred)

What is the practical effect of employing external limitations as opposed to internal ones? After all, one could say it is purely a question of semantics as the result of both approaches would be the same. For example, should one define the right narrowly and eliminate the need for Section 1 justification, the limitation survives. Finding the limitation reasonable under Section 1 would accomplish the same goal. However, the difference lies in the fact that relying too much on internal limitations reduces the opportunity for judicial review by narrowing the scope of the right. This eliminates *Charter* protection from many areas of life. However, a wide interpretation, and subsequent justification at least ensures

that the laws regulating these interests may be subjected to future judicial scrutiny, even if initially they were upheld under Section 1.[46]

These two approaches thus have practical consequences for the balance between *Charter* activism and restraint. For example, the latter approach widens the scope of the *Charter* and may increase the amount of cases, while the former immediately shuts off many cases from review by the courts.[47] However, it must be understood that even a purely external analysis of limitations, regardless of the larger number of cases open to judicial scrutiny, will not necessarily result in judicial activism. The Court, in its Section 1 analysis, may still systematically defer to the legislatures.

Another practical reason for keeping the two stages of inquiry distinct was expressed in *Andrews c. Law Society of British Columbia* concerning the burden of proof.[48] In *Charter* matters at the first stage the petitioner has to prove the factual existence of a restriction on a *Charter* right in a credible fashion. At the second stage relating to Section 1, there is a shift in the onus of proof onto the government to justify the limitations, or rather to display its reasonableness by the standard of "preponderance of probability applied rigorously".[49] A Section 1 type analysis at the first stage, within the substantive provision itself, runs contrary to the workings of the burden of proof. The petitioner in such a case could have to demonstrate that the restriction is not reasonable, a heavier burden of proof then intended.[50] This also has implications for the debate between activism and restraint, as it could result in greater deference to the government.

In reality, at this first stage of inquiry, the Court, aside from occasionally employing definitional limitations, has also made it more difficult than originally intended for a petitioner to prove the factual basis of their complaint, while the government's burden has been softened in many respects. The court has made it rather difficult to actually establish a case. Beatty has pointed out that "the Court has shown a strong aversion to *taking judicial notice of facts* essential to a claim".[51] As well, in spite of the Court's ruling in cases like *Hunter v. Southam* and *R. v. Big M. Drug Mart* stating that the petitioner must only prove the law threatens his constitutional right, regardless of whether

he has actually suffered the deprivation, the Court has increasingly demanded a higher standard.[52]

Where the government is concerned, however, the Court has agreed to take judicial notice of social, political, or economic elements.[53] The rules of proof have been softened concerning the admission and presentation of legislative facts (e.g. the *Brandeis* brief).[54] Additionally, the Court has increasingly shown considerable deference to the government regarding the justification of limits, actually easing their burden of proof. This will be evident in the following sections.

B. State Action

Another factor relating to the preliminary stages of inquiry has exempted many cases from judicial review and a Section 1 inquiry (limiting the scope of *Charter* inquiry and rights protection). The state action doctrine (also applied in the United States) relying in part on Section 32 of the *Charter* has removed from the scope of judicial review and *Charter* protection many areas considered as "private law".[55]

> 32(1) This *Charter* applies
> (a) to the parliament and government of Canada in respect of all matters within the authority of Parliament.... and
> (b) to the legislature, and government of each province in respect of all matters within the authority of the legislature of each province.

Section 32 has been interpreted to mean that there must be an adequate level of government action involved to warrant any review by the Court. This, however, is not always easy to determine. For example, in *New Brunswick Broadcasting v. Nova Scotia*[56], the Court ruled that the *Charter* did not apply to inherent privileges of the assembly based on their constitutional status but also on the wording of Section 32. Judge Lamer stated that "legislative assembly" was not encompassed in the word "legislature".[57] Other judges, such as Cory, stated that the *Charter* should apply, for the assembly is the operative part of the legislature.[58] Judge Sopinka, however, demonstrated the possibility of another form of reasoning and the implications it could have for *Charter* application.

He interpreted the words "within the authority of the legislature" as meaning that issues will fall into Section 32 and warrant *Charter* protection as long as the legislature has jurisdiction to legislate in such a matter. Such reasoning could result in subjecting all matters of public, private, statutory or common law to judicial review (due to the extensive jurisdiction of the legislature).[59] The majority, of course, did not adopt this line of reasoning.

The Court's strict application of state action has also removed from review many judicial rules relating to the private interactions of citizens. For example, common law rules of property, contract and tort relating to private individuals, and not to the state, are excluded. The *Charter* only applies when the legislative or executive branch of government are directly involved. Thus, large areas of Canadian law are excluded from review. Where the state's connection to the dispute relies on the judicial application of a rule in a dispute, the issue is held to be beyond *Charter* boundaries.[60] For example, the Court in *Dolphin Delivery*[61] would not review tort laws regulating picketing. As well, in *McKinney*[62] mandatory retirement rules in employment contracts between public universities and their employees were excluded.

One reason for limiting the scope of the *Charter* based on the public private sphere relates to the classical liberal notion that certain areas of life such as family, the marketplace and personal issues, should be private, exempt from state intrusion and left to individual interests. Thus, the Court's involvement in the private sphere beyond the level of the individual vs. state interference may also be seen as an intrusion according to liberalist conceptions.[63]

Nevertheless, limiting the scope of the *Charter* and judicial review based on state activity has not resolved the inherent difficulty in deciding application issues. As Joel Bakan has stated,

> "The incoherence of any imagined line between state and non-state activity in a modern administrative society has ensured that the Court has been

> unable to provide clear predictive guidance as to what sorts of activities lie within the purview of the *Charter*."[64]

An example of this difficulty, which also reflects the Court's liberalist stance on private matters, is the case of *Young v. Young*[65], where the petitioner challenged the Divorce Act's stipulation that judicial custody and access orders be decided "in the best interest of the child" (this being a test adopted from common law rules). Drawing the line on review presented a problem in the face of conflicting private / state elements.[66] Legislation was in issue, along with a common law rule in the presence of a very private familial dispute. L'Heureux-Dubé resolved the issue by stating

> "the mere fact that the state plays a role in custody and access decisions in formalizing the circumstances of parent child interaction does not transform the essentially private character of such interchanges into activity which should be subject to *Charter* scrutiny."[67]

The judicial order would thus not be exposed to *Charter* review.

The Court, as well, (unlike the practice under the *European Convention*) has also rejected claims challenging Canadian law relating to extradition, reasoning that there is not a sufficient degree of state action. The real threat, they claim, actually arises from foreign law. Only in very extreme cases will the Court review the order under Section 1 even though the claim is really based on a Canadian law.[68]

It is clear that the manner in which the court has defined applicability, through strict state action doctrine, has reflected another form of increasing judicial restraint and deference. This, along with other deferential mechanisms, may reflect the Court's desire to achieve a balance between activism (and restraint and possibly to eliminate an overload of cases).

C. Prescribed by Law

Another hurdle which must be crossed before a stage 2 Section 1 analysis concerning the reasonableness of the limit can take place relates to the requirement in Section 1 that limits must be "prescribed by law". Due to the generality of this statement, the Court has had to define when a limit will satisfy this criteria. In doing so, the court has been inspired by the jurisprudence of the *European Convention* whereby the term "prescribed by law" is employed in similar, yet internal limitation clauses which qualify various rights.[69]

It must be established that the limit is attached to a law, and that it has been presented with sufficient clarity and precision. The first element has been interpreted to include limitations contained in secondary or delegated legislation: statutes and regulations.[70] It also may include court ordonnances,[71] or those rendered by administrative tribunals,[72] or investigative commissions[73] as well as common law.[74] The European court has established all of these inclusions as well within the term law.[75] Administrative directives, even if they are authorized by statute, are not "prescribed by law".[76] Furthermore, a restriction emanating strictly from a police officer and not from any law will not be acceptable, as occurred in *R. v. Therens*[77]. In this case, the evidence of breath sample was excluded with no Section 1 inquiry because the restriction on the right to legal counsel emanated from the behaviour of the police seeking a breath sample and not from a particular law.

The second requirement, that the law be sufficiently clear and precise, has also been inspired by the jurisprudence of the European court in its interpretation of the *European Convention*. For example, in *Sunday Times v. The United Kingdom*[78], the Court stipulated two conditions: that the law must be adequately accessible and that there must be sufficient precision to enable a citizen to regulate his conduct. However, *Sunday Times*, *Silver v. United Kingdom*[79], as well as *Barthold v. Federal Republic of Germany*[80], all acknowledged that the regulation may have a degree of imprecision as one cannot always demand absolute certainty in a law.

In Canada, similarly, the Supreme Court has required a degree of clarity and precision regarding the contested disposition in order for it to be considered "prescribed by law".[81] Thus the court has insisted in cases such as *Luscher v. Deputy Minister Revenue Canada*[82] and *Red Hot Video Ltd*[83] that an overly vague standard will not suffice. Yet like the European court, the Canadian Court has ruled absolute precision is not necessary. As long as the law provides an "intelligible standard" according to the judiciary, the government may proceed to justify it under Section 1[84] (regardless if the law is subject to various interpretations as in *Osborne c. Canada*[85] or has a discretionary element[86]). Absolute discretionary power, however, will not satisfy the intelligible norm standard.[87] The Court has thus shown reticence in applying the prescribed by law norm strictly (evident in the "intelligible norm standard"). Consequently this norm has not presented a serious obstacle for the government.

Furthermore, the Court has become even more deferential in its attitude towards vagueness. In *R. v. Nova Scotia Pharmaceutical Society*, the Court stated that legal vagueness need not, and rarely will, circumvent a Section 1 analysis as it can be sufficiently dealt with during the application of the proportionality test. (specifically under the minimal impairment component). Vague laws can also be dealt with as violations of fundamental justice under Section 7.[88] Thus, the Court has gradually made it relatively easy for the government to satisfy this criteria, allowing them the opportunity to justify the limitation under Section 1.

III. DEFINING SECTION 1 - COMPETING PRESSURES

It has been mentioned that Section 1 was intended to assert rights while still leaving some latitude to the legislatures to further their policy goals. The Supreme Court's analysis of the limitations clause will indicate its difficulty in establishing a balanced approach to rights adjudication. It will be evident that despite the constant reiteration of the *Oakes* formula (to be outlined), the Court has been rather erratic in its approach to limitations theory. This is due in part to the nature of the limitations clause itself in addition to other factors.

Section 1 is phrased in such open-ended terminology (even more so than the similar clauses in international conventions). The terms "prescribed by law" does not offer a definition of what is to be considered law. Stating that limits must be "reasonable" also provides little guidance as to what reasonable is and "demonstrably justified in a free and democratic society", aside from placing the onus of proof, presents terms which can be defined in many different ways.[89]

Thus, Section 1 does little more than provide an authorization to limit rights without really indicating how and when. Its inclusion has, however, prevented the American absolutist argument which asserts that the silence of the *Bill of Rights* on limits indicates that no limitations on constitutional commands are proper when the court finds the two in conflict (to be later discussed).

Yet aside from this authorization, the generality of Section 1 has not relieved the Court from the task of establishing its own criteria to define the scope of limitations. Since Section 1 has provided little resolution on how to achieve an appropriate balance between rights and limitations or what would actually be an appropriate balance, the Court has been left much leeway on the degree of severity to apply to governmental limitations. This has often left the court divided in their approach of the issues relating to Section 1, reflecting the dissenting ideological views of the judges on the state's role in society. This tension between liberalist and collectivist thought is central to the balance between activism and restraint, but has resulted in an inconsistency in the Court's approach over time.[90]

External pressures have also affected the Court's interpretation of Section 1's open-ended terminology. The extreme flexibility of Section 1 has perhaps left the court more susceptible to such outside forces. For example, the 1960 *Bill of Rights* experience put pressure on the Supreme Court to assert their role as guardian of constitutional rights more vigorously. Yet, the Court's additional desire to maintain legitimacy in the face of potential academic criticism at first resulted in avoidance of Section 1. Eventually the Court interpreted Section 1, yet disguised the policy-making implications of rights adjudication behind a mask of formalism. What resulted was the *Oakes* criteria (to be

examined) a highly formalistic test imposing rather severe standards. Further academic criticism as to the legitimacy of the Court's activist role in a democracy, and the realities of their institutional capacity then resulted in an evolution of the initial criteria into a more deferential approach. The latter seemed aimed at establishing some balance between the judicial and legislative functions. This more balanced approach, however, has not yet portrayed the requisite coherence or consistency in criteria as seemed originally intended by the Court. The following sections will outline the Court's evolving interpretation and application of Section 1.

A. The Interpretation of Section 1 - The Early Cases

Once the preliminary stages of inquiry have been dealt with, the government must proceed to the second stage of analysis where it bears the onus of proving that limitation which is prescribed by law, is "reasonable" and "demonstrably justified in a free and democratic society". These standards have required judicial interpretation, yet in the first few *Charter* cases, for example, *Skapinker*[91], *Protestant School Boards*[92], *Hunter c. Southam*[93], *Singh*[94] and Reference re: Section 94(2) of the *Motor Vehicle Act*[95], the Court did not establish a framework or test for the Section 1 analysis.

Since Section 1 directly affects the allocation of authority between the legislature and the judiciary, this is not surprising. Furthermore, the balancing of interests under Section 1 and its inherently political nature could naturally provide some discomfort for the judiciary accustomed to traditional methods of legal reasoning (and intent on guarding its legitimacy).

Despite the bypass of the Section 1 analysis, the unanimous Court did, however, reveal certain initial points on their intended approach to rights adjudication. The Court implied a more activist position than previously applied with the *Canadian Bill of Rights*.

For example, in *Skapinker*, the first *Charter* case, although the Section 1 stage was not reached, the Court asserted its legitimacy in reviewing legislation and declared its

function under Section 1 vital to the protection and reinforcement of democratic values. The Court supported the principle of progressive interpretation as opposed to one that is narrow and technical.[96] It also, in *obiter*, alluded to the fact that the government was required to produce a sufficient evidence to justify a violation of rights.[97] In *Protestant School Boards*, the Court asserted that Bill 101 not only infringed upon Section 23, it was a denial of the very basis of the right and thus unreasonable. The Court refused to allow such a "denial" of a right to even be justifiable under Section 1.[98]

The case of *Hunter v. Southam* struck down the search and seizure provisions in the *Combines* investigation act for violating Section 8 of the *Charter*. This case was also revealing of the Court's initial activist approach to rights adjudication, although a Section 1 analysis was overshadowed by a balancing within the internal limits attached to Section 8 itself. Chief Justice Dickson also took an activist position by declaring that the *Charter* must receive a broad and purposive interpretation by the judiciary who he declared is the "guardian of the constitution". This approach, he stated, is necessary to fulfil the constitution's function, "to provide a continuing framework for the legitimate exercise of governmental power".[99] A generous interpretation, according to the Chief Justice, is required in order to ensure that individuals receive the widest protection the *Charter's* rights and freedoms have to offer. He affirmed that the *Charter* must be capable of growth and development to meet new situations.[100]

In Re *Singh* and the *Minister of Employment and Immigration*, the Court was extremely activist in the field of social policy, declaring unconstitutional the procedures for refugee status in the 1976 *Immigration Act*. A breach of Section 7 was confirmed by the Court, who stated that the Immigration Appeal Board failed to provide an oral hearing to claimants before an appeal request was denied. The government was unable to justify the limitation under Section 1 even though United Nations praise of the refugee system, and the cumbersome burden of an excessive amount of hearings were demonstrated.[101] Wilson J. stated, in this case, that utilitarian considerations and arguments of administrative convenience would be unacceptable justifications in a Section 1 analysis.

> "The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in Section 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles."[102]

It is interesting to note that this case had an enormous impact on government, social and economic policy (creating a terrible backlog of over 120,000 refugee immigration cases).[103] Yet, it also pertained to Section 7, a judicial right which later on (as will be evident), would become a factor warranting activism. Despite the Court's usual expertise concerning judicial rights, this case, due to its grave socioeconomic implications, has led to criticism of the Court's role in reforming social policy of this kind.

Although the Court did not yet establish, in this case, particular criteria for the application of Section 1, Judge Wilson stressed that constructing the standards for Section 1 is of "enormous significance" to the *Charter's* operation. Such standards must not be too high to restrict legitimate government action, nor too low resulting in the emasculation of the *Charter*.[104] The approach to Section 1, she stated, must in all be true to the commitment of upholding *Charter* rights, foreshadowing of her liberalist activist stance in later cases.

The decision in *Reference* re: Section 94(2) of the *Motor Vehicle Act* also reflected an activist Court. It was unanimously decided that a provision which made driving a car with a suspended license an absolute liability offense subject to imprisonment, violated Section 7 of the *Charter*. Regarding Section 1, Justice Lamer indicated that a violation of Section 7, fundamental justice, could only be justifiable under Section 1 in the most exceptional circumstances such as "natural disasters, the outbreak of war, epidemics, and the like".[105] Furthermore, arguments of public policy or administrative expediency under Section 1 would be unacceptable in this case unless in the presence of the aforementioned circumstances.[106]

The internal limit attached to Section 7 was a factor precluding any successful justification under Section 1 in a case where such exceptional circumstances did not exist.

Under Section 1, Lamer J. did examine less drastic means available to the government, although general criteria for Section 1 were not established.[107]

The attitude of the Court towards Section 7 portrayed an activist interpretation of a provision which was originally intended to focus on procedural due process.[108] Section 7 (fundamental justice) was given substantive meaning, expanding the Court's role in interpreting the constitutionality of statutes (similar to the United States substantive due process). Justice Lamer, in doing so, rejected any originalist arguments, stating rather that legislative history, although admissible, is not conclusive to *Charter* analysis. Its provision must be permitted to grow and evolve.[109]

The first case to mention criteria for the balancing of interests under Section 1 was *Big M. Drug Mart*, a case involving a challenge to the federal *Lord's Day Act*. The Court held that the Act did infringe on freedom of religion because it rendered obligatory religious observance.[110] Chief Justice Dickson then turned to Section 1, establishing certain guidelines relating to governmental objectives and proportionality.

> "At the outset, it should be noted that not every government interest or policy objective is entitled to Section 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized, then it must be decided if the means chosen to achieve this are reasonable - a form of proportionality test. The Court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question."[111]

Dickson C.J., however, did not analyze the proportionality criteria, stating that the governmental objectives presented did not warrant a Section 1 analysis. The Court did pronounce the invalidity of the measure based on the objective alone (a rare occurrence). Dickson C.J. stated that the argument based on the practical nature of choosing a common day of rest followed by the Christian majority would not satisfy the objective test. He stated it is "no more than an argument of convenience and expediency, fundamentally

repugnant because it would justify the law upon the very basis upon which it is attacked".[112]

B. *R. v. Oakes* - The *Oakes* Test

It was the case of *R. v. Oakes*[113] which actually defined the criteria for the application of a Section 1 test, expounding on the elements set out in *Big M. Drug Mart*. A comprehensive framework for the analysis of the reasonableness of a measure was established.

In this criminal case, the validity of a federal legislative disposition, specifically Section 8 of the *Narcotics Control Act* was contested. The challenger claimed the reverse onus clause in Section 8 of the Act violated the judicial right of the presumption of innocence in Section 11(d).

Chief Justice Dickson first clarified the question of the burden of proof. The burden, he said, rests "with the party seeking to uphold the limitation" and the standard which should be imposed is to be "a very high degree of probability".[114] He furthermore stated:

> "The standard of proof under Section 1 is the civil standard namely proof by preponderance of probability... Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase *demonstrably justified* in Section 1 of the *Charter* supports this conclusion."[115]

As well, he stated that evidence required to prove the constituent elements of a Section 1 inquiry must be "cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit".[116]

> "A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be *cases where certain elements of the Section 1 analysis are obvious or self-evident*".[117]

Dickson C.J. stated in *Oakes* that Section 1 should be read to impose a stringent standard of justification. He explained that the Section 1 injury is premised on the understanding that the impugned limit violates constitutional rights and freedoms.[118] Furthermore, the Court must be guided by the values and principles essential to a free and democratic society, values which are "the genesis of the rights and freedoms guaranteed by the *Charter*".

> "Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the *Charter* was originally entrenched in the constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."[119]

The Court has not often defined the terms "free and democratic society". However, when it has referred to these terms, it has done so asserting respect to the individual and tolerance in society as did Chief Justice Dickson in *Oakes*[120].

The entire justification of the measure in question must pass what Dickson C.J. refers to as the ultimate standard of being in accordance with a free and democratic society. This concept has been considered by the Supreme Court in the study of the legislative objective and in the analysis of proportionality.[121]

In practice, the Court has analyzed the concept of a free and democratic society in two ways. The history of a law has been examined in order to demonstrate its duration and its roots in democratic tradition.[122] The norm in question has also been compared to those in other democratic regimes (through bilateral and multilateral comparisons).[123]

This component appears textually in the limitation clauses of the *European Convention* as well, and has been defined and applied in a similar fashion.[124]

Furthermore, the actual test set out by Dickson C.J. to justify a limit as reasonable and "demonstrably justified" was highly formalistic and stringent. It required an examination of the governmental objective of the restriction in question and a three part proportionality test, designed to scrutinize the means used to attain that objective.

An objective, he stated, could not be "trivial or discordant with the principles integral to a free and democratic society". A law restricting a right or liberty can be considered reasonable and justifiable if it pursues a social objective "sufficiently important to warrant overriding a constitutionally protected right or freedom... at a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important".[125]

The second criteria, that of proportionality between the means and the objective was designed as follows:

> "Second, once a sufficiently significant objective is recognized, then the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves a "form of proportionality test": (*R. v. Big M. Drug Mart Ltd.*). Although the nature of the proportionality test will vary depending on the circumstances, in each case, the courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: (*R. v. Big M. Drug Mart*). Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom and the objective which has been identified as of "sufficient importance".
>
> With respect to the third component, it is clear that the general effect of any measure impugned under Section 1 will be the infringement of a right or freedom guaranteed by the *Charter*, this is the reason why resort to Section

> 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."[126]

The Court went on to accept the objective, aimed at eliminating drug trafficking by easing the process of conviction, yet rejected the measure based on the means aspect of the test. The Court stated that Section 8 did not satisfy the rationality test. Dickson C.J. said, "there is no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking".[127]

C. Analysis of the *Oakes* Test

The test established in *Oakes* is characterized by great severity (or high scrutiny) making it difficult to justify a law which restricts a right or freedom. Thus, the test corresponds to a high degree of judicial activism asserting the priority of *Charter* rights over competing claims.

Furthermore, the test set out in *Oakes* was formulated in a very certain and logical manner giving it an air of extreme formalism. It was defined apart from and without reference to particular facts and various possible situations. Positioned as strictly legal reasoning, it was a test to be applied to all contexts.[128] It is obvious that the Court striking an activist note would attempt to disguise any normative or value laden aspects of its role, and this was the manner in which it attempted to do so. This uniform test could allow the Court the activist role it had failed to fulfil with the Canadian *Bill of Rights*, devoid of the appearance of judging the wisdom of the elected legislature's policy.[129]

Yet, what resulted was a test devoid of substantial content. For example, the test did not account for varying circumstances and interests (although reference was made to this in the third part of the proportionality test). It did not provide for any manner in which its level of scrutiny could be alleviated to accommodate the different situations which could arise.[130] Thus the uniformity of such a test was doomed to failure. Such activism without any adjoining criteria for modulation was unrealistic as well, considering the necessity of maintaining a balance between the judicial and political roles, faithful to the ideal of a healthy system of checks and balances. After all, this was the intended purpose of the Section 1 clause itself. Furthermore, such a test could be subjected to much criticism when its mask of formality was removed.

Dickson C.J. did, however, make one statement which foreshadowed what was to come. He briefly accounted for the possibility of variation in the proportionality test depending on the circumstances, but he did not mention how.[131] In spite of the uniform activism on the face of the test, this does suggest that the Court did wish to leave itself some room to manoeuvre. However, the mention of flexibility without any requisite criteria left a larger void.

It can be suggested that the extreme generality of the test itself reflects the Court's intent to allow for future variations and flexibility. If this is so, the initial criteria seem quite misleading. Perhaps, the Court was still avoiding a commitment to a more specific approach, thus leaving much open for consideration in future cases. The avoidance of a Section 1 approach before *Oakes* could indicate this.

Yet, regardless of the Court's intention, the face of *Oakes* is extremely activist and uniform. This presented a difficulty for future application evident in the following criticisms. A further analysis of its criteria will exhibit the extreme manipulability of the test and its inherently political nature, despite its formal clothing. The difficulties inherent in the *Oakes* test will shed light on the Court's approach following *Oakes*.

1) The Objective

The first part of this test, assessing that a governmental objective be sufficiently important, actually fails to indicate what might qualify as a sufficiently important objective which is pressing and substantial, or exactly how to determine this. The question, thus, arises: from whose perspective must the purpose be sufficiently important to qualify as a reasonable limit on a *Charter* right? Chief Justice Dickson seems to imply that the objective's importance be assessed from the perspective of the government[132] (just as minimal impairment was to be assessed in later judgments).

Recently, however, the Court has, at times, engaged in a more contextual oriented analysis assessing the legitimacy of the objective in light of values underlying the *Charter*, and the circumstances of the case in relation to societal factors.[133] This test, however, has not led to any obstacle for the government. In fact, the objective test has not been applied in any severe manner by the Court. The laws examined since *Oakes* have been found to satisfy the conditions of this criteria, with minor exceptions such as *Big M. Drug Mart* where its rejection was primarily based on federalist grounds and *R. v. Zundel* where no pressing objective was found to justify the spreading of false news.[134]

The Court has also declared that the theory of the changing objective, practised in the United States, is to be rejected in Canada. Thus, the government cannot invoke an objective other than that pursued by the law at the original moment of adoption.[135] Generally, however, this has not increased the difficulty of the test, as a very general formulation might include past and present purposes alike.[136]

The Court has generally been deferential regarding evidence required to justify a governmental objective. Borrowing from Chief Justice Dickson's statement in *Oakes* that certain facts may be "obvious or self-evident", the Court has often presumed the importance of the objective without requiring further evidence.[137] The standard has even been changed at times requesting "a legitimate legislative objective" as in *Black c. Law Society of Alberta.*[138] As well, in *Andrews v. Law Society of British Columbia*, the Court implied that the standard applied by *Oakes* regarding the objective is "too stringent to be

applied in all cases".[139] In addition, the Court has accepted objectives based on administrative efficiency contrary to the judgement in *Singh*.[140]

Perhaps, the wide range of objectives acceptable to the Court is due in part to the fact that Section 1 is not restrictive in its objectives. It provides no list of legitimate governmental objectives which can be invoked to justify a limitation. This is contrary to the limitation dispositions in other human rights instruments like the European Convention. However, in the latter document, the listing of acceptable objectives in reality does not operate in a restrictive manner, as they are general enough to include all types of governmental objectives.[141]

In reality, the Court has not focused to any great degree on the merits of the objective, or in the development of further criteria to establish sufficiency in importance. This is probably due to the implications of overturning a law on this basis for it could be seen as tantamount to second-guessing the elected government's choice of policy, rather than just scrutinizing the means employed to attain the goal itself.[142] This could expose the Court to accusations of unduly violating the separation of powers ideal, overstepping their legitimate boundaries. As well, most governmental objectives on the face at least present what can be considered legitimate or substantial policy goals.

This first step of analysis, although not determinant in itself, does nonetheless contribute to the possibility of manipulating the outcome of the proportionality test (contrary to the objective face of the test). For example, in determining the objective of a measure, it will be evident that a law can have many possible objectives, general and specific. Furthermore, the manner in which the Court formulates the objective will have an effect, not only on its degree of importance but also on the proportionality test. An objective formulated in a very general statement such as the prevention of harm to society, will seem more important and be all inclusive. Yet at the same time, it could have grave consequences for the minimal impairment test for the more general the objective, the easier it will be to think of less drastic means to achieve the goal. However, if the Court, in its discretion, chooses a more specific objective (such as a statement of the law itself), the

proportionality test becomes less stringent for it will be more difficult to think of less restrictive means to achieve the narrowly defined objective.[143] Thus, the formulation of the objective may serve to influence the degree of judicial activism or restraint. It may serve as a device to manipulate the outcome of a case. As well, it will be possible to state the purpose of a measure in such a way as to influence the rationality between the measure and the objective (the rational link test).[144]

2) The Proportionality Test - Rational Connection

The proportionality test, or examination of the means is the most crucial (due primarily to the minimal impairment test). Should the Court rule a law unconstitutional under Section 1, it will do so under examination of the means. In doing so, the Court may be perceived as interfering less with the popular will than would entail questioning the government's policy objectives.[145] It will be evident, however, that this test, due to minimal impairment, has the capacity to alter the balance between the legislative and judicial functions in a great way. This three part test, devoid of factual context, has a repetitive nature, and is subject to a degree of manipulation.

The rational connection test, the first of the three-levelled test, is not very demanding, and rarely decisive, although in cases such as *Oakes*, and later *Andrews c. Law Society of British Columbia*, the analysis was limited to this first part of the test.[146] There are other cases where no rational link was found (and the law was pronounced inoperable). Yet, the Supreme Court still went to the analysis of minimal impairment.[147] This attracts criticism for if a measure is found to have no rational link with the objective, it is difficult to imagine the means as a minimal impairment to the guaranteed right.[148] Generally, however, this test is not difficult to satisfy.

The rational connection test is extremely deferential, similar to the lowest scrutiny test applied by the United States Supreme Court.[149] Considering the stringent nature of minimal impairment and the cumulative nature of the proportionality test, this criteria may lack utility.

Furthermore, the Court has actually handled this component of proportionality with extreme deference. Although *Oakes* implies the necessity of internal rationality (aside from a logical connection between the means and objectives), the majority of the Court has not adopted this position.[150] Previously in *Oakes*, Dickson C.J. held more stringent requirements. He decided that the rational connection test was not satisfied because possessing a small amount of narcotics could not reasonably lead one to conclude on the offense of trafficking. The measure in question had implied it could and it therefore lacked internal rationality. The Court has also relaxed the "carefully tailored and designed" standard which originally in *Oakes* required examining whether the means were over or under-inclusive. Since *Edwards Books*, the Court has demanded little more than a "minimal rationality" standard.[151] Simply demonstrating that a measure forwards legislative objectives, which is almost always the case, seems to be sufficient. This relaxed standard has been applied in all contexts including those of a criminal nature.[152]

Additionally, this component, like that of minimal impairment, may be subject to manipulation, for, as mentioned earlier, the formulation of the objective will usually determine the outcome of this test. Generally, when the Court strikes down a law, it will rely more effectively on the second component of the test, that of minimal impairment (the most stringent requirement).

3) Minimal Impairment

The second criteria, minimal impairment, inspired from American and European jurisprudence, is the most severe applied in a strict sense and is thus the most decisive.[153] As a central element of the proportionality test, it has been most affected by the Court's evolving interpretations (as will be documented). The following criticisms offer some insight as to why the Court has been forced to alter its nature in subsequent cases.

Primarily, this element implies that only necessary restrictions to rights and freedoms are permitted, which is contrary to the terms of Section 1 allowing "reasonable limits". This is in contrast to the limitation clauses in the European Convention which

textually require "necessary limitations" (a term which has nevertheless been alleviated by the courts to allow for "reasonable" limits, inherent in the doctrine of the margin of appreciation, later inspiring the Canadian court).[154]

It is ironic that the Canadian Court, in *Oakes*, implies "necessity" with no criteria directing the modulation of severity when Section 1 stipulates reasonableness. This is especially true since the practice of the European courts and the levels of scrutiny analysis in the United States could have indicated the difficulties inherent in this type of reasoning. In fact, minimal impairment operates very much like the strict scrutiny test in the United States which will inevitably lead to the invalidation of the measure in question. Yet, strict scrutiny there applies only in certain circumstances depending on the right infringed and the nature of the classification.[155]

Minimal impairment implies only necessary limits for the following reason; there may be many "reasonable" ways to attain an objective, yet there will always be a less restrictive means to be found (especially if the objective is too broad), one that is absolutely necessary to achieve the objective. This is exacerbated by the fact that most legislation is over-inclusive or under-inclusive to a certain degree. This reasoning rules out other "reasonable" avenues to achieve the objective. Thus, applying this criteria as it is presented in *Oakes* (demanding the one least restrictive means) could lead to the invalidation of many reasonable legislative enactments, leaving absolutely no margin of appreciation to the government.[156] Only absolutely necessary limits could survive.

Once a less restrictive means is shown to exist elsewhere, for example, the legislature's judgement may be overruled, regardless of how reasonable the means to attain their objective may have been:

> "Il est presque inévitable que la cour indique au législateur les pistes à suivre lorsqu'elle estime qu'il n'a pas employé les moyens legislatifs les moins dommageables pour atteindre une fin donnée. En effet, pour affirmer qu'un moyen n'est pas approprié, il faut nécessairement démontrer qu'il en existait un autre plus adéquat qui permet de rencontrer l'objectif legislatif visé."[157]

Consequently, this has a great impact on the balance of power between the elected legislature and the judiciary. In a democracy, the government elected by the people has the responsibility and authority to make laws and enforce measures. The judiciary is appointed, and thus not democratically empowered to make policy or substitute legislative choices.[158] It is a delicate balance to maintain considering that the Court does have a mandate to protect constitutional rights. The paradox is evident.

Minimal impairment applied, as expressed in *Oakes*, strikes a balance far in favour of judicial power. Combined with the Court's initial ruling advocating a generous definition of rights, the narrow construction of Section 1 in Oakes leaves little room for legislative deference. This scale of activism without variation amounts, inevitably, to second-guessing legislative choices, for the law can be too easily struck down in all cases.

Minimal impairment is quite rigorous and difficult to apply. There are, in fact, various ways to attain an objective, and the legislature cannot always be expected to determine in advance which measure will be held to be the least restrictive by another's opinion, such as the judiciary. There is thus a subjective element inherent in such an analysis (despite its formalist attire). Judges themselves may disagree on what is least restrictive. It entails a normative discussion, a cost-benefit analysis. The institutional capacity of the Court to adequately balance competing demands or political interests also comes to mind. In many cases, the limited interests heard by the Court clouds the potential societal consequences, which may be better assessed by the legislature. Such untempered judicial involvement in the political arena may be seen as threatening the legitimacy of the judicial function, which is centered on impartiality.

Furthermore, the examination of the means can entail the same political consequences as actively applying the objective test, even if the latter on its face seems more politically intrusive. As mentioned, the outcome of minimal impairment often depends on how the judge defines the objective (narrowly or in a broad fashion). Judges may disagree on the formulation of the purpose when assessing the means, resulting in varying conclusions. Minimal impairment is thus subject to manipulation, depending on

the type of purpose formulated. The least restrictive means test is thus not truly separate from the purpose itself. It is intertwined with the objective and has thus a political or subjective element.[159]

Minimal impairment, as expressed in *Oakes*, also has bearing on the federal aspect of Canadian society, as it could lead to forced uniformity in measures among the provinces. For example, a legislature might be forced to take cognizance of all the measures adopted by others which may appear less restrictive, fearing that should it differ in its approach, its laws will not survive minimal impairment. This has been subject to criticism especially in a federal system like Canada. It allows for very little (or no) variation or specificity in the solutions adopted by various provincial legislatures in their spheres of competence.[160]

The difficulties in the *Oakes* test are apparent, particularly since it offered no criteria to modulate its rigidity. Certain rights, situations and scenarios in reality may not warrant such a high scrutiny (such as commercial freedom of expression). Regarding rights such as judicial guarantees, and political freedom of expression, a rigorous test of minimal impairment is often necessary, acceptable and non-threatening to the judiciary's legitimacy. Yet, with *Oakes*, there is no distinction to account for less extreme cases when deference to the legislature is the most valid approach[161], unlike the levels of scrutiny test in the United States which operates according to the nature of the right, or the motives of classification.

For the aforementioned reasons, the Supreme Court has essentially allowed for a modulation in severity of the minimal impairment test in subsequent cases, as we shall see in the sections to come. A more deferential approach regarding alternative means has ultimately evolved, based on various criteria set out by the Court.

4) Proportionality Between the Effects of the Measure and the Objective

The third criteria of proportionality weighing the effects of the contested measure on the plaintiff against the legislative objective is truly the only contextual element of the

test. It assesses the subjective effect on the plaintiff and the particular circumstances.[162] This component has, however, remained insignificant.

This criteria has often been criticized due to the nature of the order of the test. Since it is applied after the criteria of minimal impairment, it has been seen as useless and redundant. It is difficult to imagine how a measure, which has been viewed as pursuing an important objective by the least restrictive means possible, will not satisfy this last criteria, which is less demanding than the former.[163] In addition, any case where the measure does not live up to the proportionality of its effects, after satisfying the other criteria, leads us to believe that the objective was not important enough to limit the right. This implies that the objective criteria was not well applied. Authors such as Hogg and Woehrling see this criteria as a duplication of the previous analyses, serving no decisive effect.

> "L'étude de la jurisprudence de la cour suprême confirme que la troisième critère de proportionalité ne joue aucun rôle vraiment utile. Il est toujours invoqué de facon purement décorative, pour confirmer les conclusions qui découlent déjà de l'application de l'un des deux premiers critères de proportionalité."[164]

> "Son application est en fait un rituel."[165]

The limited usefulness of this component of proportionality gives the test a rather superficial quality. The integrity of the *Oakes* test itself is put under attack when its components lack substance. It becomes just formal attire devoid of legal content.

However, it has also been suggested that the neglect of this component is due less to its lack of utility than to its subjective implications.

> "Although it has been suggested that this neglect is the result of redundancy or that the Court treats comparisons between effects and objectives as an appendage to the least restrictive means test, there is at least one more compelling explanation for this trend. On its face, the requirement that courts evaluate and compare the adverse effects of a measure with the importance of the objectives it seeks to promote pushes at the margins of the judiciary's institutional role. This last arm of the *Oakes* test calls for the

> legitimacy of constitutional review most clearly into question. Although it is grouped with the other parts of *Oakes* which are designed to evaluate the means chosen to realize selected policy goals, it is more properly an invitation for courts to pass judgment on the wisdom of legislative choices. Accordingly, it is not surprising that courts displaying deference to the legislature as a result of a concern regarding their institutional role should avoid comparisons between effects and objects."[166]

It is rather interesting to note that recently in the case of *Dagenais v. Canadian Broadcasting Corp.*[167], a case relating to the issuance of publication bans under the common law, a legislated discretionary authority, the Court reformulated this last component of *Oakes*. The court stipulated that the salutary effects of the measure should be measured against the deleterious effects to the right. This suggests a modification of the *Oakes* proportionality test which originally required the demonstration that the importance of the objective outweigh the deleterious effects of the measure. Lamer J. stated in *Dagenais* that the test should require "the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms". Thus, the importance of the objective is not sufficient to justify the measure at this level of the test, for the positive effects must also outweigh the deleterious ones.[168]

Recently, in *R. v. Laba*[169], a criminal case overturning a reverse onus clause, Sopinka J. stated that the proportionality test had been modified in *Dagenais* and repeated the aforementioned change.

Although the revised criteria seems to intensify the test by rendering it more difficult for the government, not much has really changed. For example, the assessment of deleterious effects on a right would involve defining the salutary effects anyway, regardless of the reformulation of the test.[170] In addition, in *Dagenais*, and *Laba*, this criteria did not serve much purpose regardless of its modification. As usual, the outcome rested on the minimal impairment test which the government failed to meet in both cases, rendering this last criteria quite useless.[171] It is the minimal impairment test which has

actually sparked the most confusion and its varying application will be examined throughout the following section.

D. The Modulation of *Oakes* - The Evolving Interpretation of Section 1 Criteria After *Oakes*

The judgments after *Oakes* (as alluded to) indicate either a reconsideration of its initial activist stance, or just a natural evolution of a test subject to much variation. Regardless of the position one takes, the Court's evolving interpretation of Section 1 criteria portrays a concerted effort to achieve some balance in the allocation of authority between the judiciary and the legislature. The Court's concern with its own legitimate function in a democratic society will certainly be evident. This concern has actually aided the Court in adjusting to a function respectful of a healthy system of checks and balances.

The attenuation, or rather evolution of the minimal impairment test, due to its initial severity, has been the most crucial factor in the post-*Oakes* jurisprudence. The Court has become very divided in its approach to this component. Nevertheless, various criteria have been established to allow for some modulation in its severity. Some, however, seem to be in contradiction with earlier activist judgments. The flexibility of minimal impairment complements the deferential direction of the Court's attitude regarding the preliminary stages of inquiry preceding our Section 1 analysis. Yet, the erratic nature of the Court's approach towards the criteria of minimal impairment indicates that the Court has been uncertain on how to apply the *Oakes* test.

1) Judicial Uncertainty - Case Examples

Immediately after *Oakes*, various cases reflect the Court's reticence in applying *Oakes*. This is probably due to the difficulties in the test, described in the previous sections and the policy implications of its application. The Court has resorted, at times, to definitional limits contrary to its initial rulings and to an internal rank ordering of the

interests covered by the right, and has occasionally avoided use of the minimal impairment component of the proportionality test.[172]

R. v. Jones, a case questioning the constitutionality of certain truancy provisions of Alberta's School Act, is a perfect example of the Court's division on the application of *Oakes*. It also reflects an evasive attitude towards minimal impairment and a break with previous activist rulings.[173]

Jones, a pastor, was educating his own children. He was charged for refusing to seek the appropriate exemption for his children, who otherwise were required to attend a public or approved private school. In response, he claimed, a violation of Sections 7 and 2(a) of the *Charter*. He stated that his liberty to raise his children his own way was hindered, and that he was prevented from proving the "efficiency" of the religious education he was providing, as the statute limited the proof to a certificate from the authorities.

What is interesting about this case is the contradictory manner in which the judges approached Section 1. Judge LaForest did not find a violation of Section 7. He noted an infringement on Section 2 yet qualified this violation by stating that the infringement constitutes "a minimal or peripheral intrusion on religion".[174] Although he did not definitionally exclude the matter, he supported a rank ordering of the type of interests protected by the right (a contextual type analysis). He focused more on the internal aspect of the right (a stage 1 analysis), rather than leaving this to an external justification. Classifying the infringement as one of minimal importance, he went on to say that the absence of the particular restriction "would create an unwarranted burden on the operation of a legitimate legislative scheme".[175] LaForest J. did not refer to the objective or the rational connection criteria in *Oakes*. He only referred to *Oakes* in citing that, at times, no evidence is required to prove a Section 1 justification.[176]

Furthermore, while he examined efficient instruction in other provinces, he stated that by instituting changes, the Court would create a more cumbersome administrative

structure. In deferring to the legislature, he expressed that, "some pragmatism is involved in balancing between fairness and efficiency".[177] He furthermore defended the provinces' autonomy in choosing their own administrative structure, except when such a structure is manifestly unfair. LaForest J. thus did not apply the minimal impairment of *Oakes*, but rather relied on a deferential argument of pragmatism and administrative efficiency which, in reality, are closely related to a defense of convenience and expediency.

It is important to note that this is in contrast to earlier rulings such as *Big M. Drug Mart, Singh,* and *Motor Vehicle Reference* (the last two cases referring, however, to Section 7 - fundamental justice) which indicated that arguments of administrative convenience and expediency would not be accepted by the Court (or only in exceptional circumstances). Accepting such a defense also has the effect of lowering the standard of proof for the government articulated in *Oakes.*

The outcome of Justice Laforest's justificatory analysis is not surprising considering the manner in which he approached the definitional stage. Recall that although he finds a violation of Section 2, he classifies it as a minimal infringement, implying that there is almost no violation. (or a less important one) We see the beginnings of a contextual approach (advocated in later cases) which rather than approaching the right from a broad or abstract manner is more intent on considering the specific context in which the claim has arisen to determine its seriousness. LaForest J. actually rank orders the issue involved within the right. This prepares for a rather minimal scrutiny of the restriction uncharacteristic of the uniformity of *Oakes*. The formula of *Oakes* is not even applied. The outcome of this rank ordering is equivalent to that which would have occurred with a complete definitional exclusion. Through this rank ordering, LaForest J. actually applies a type of internal limitation which determines the outcome of the external analysis. This is similar to the United States contextual approach regarding certain rights and discriminatory classifications which, due to their low ranking, receive minimal scrutiny and eventually are upheld (a rational link type test). Others receive a high scrutiny, similar to the minimal impairment test in *Oakes*, and are almost always overturned. (This will be examined more in depth)

Oakes, however, requires the three part proportionality test in all cases, not an alternative use of its criteria. Yet the reality of its application in *Jones* and subsequent cases will reveal that the Court, at times, just requires a rationality aspect when, for example, it "applies" the minimal impairment test in a very deferential manner. At other times, the Court applies maximum scrutiny through a least restrictive means approach, rendering the rational connection test rather void.[178]

Justice LaForest's direction in *Jones* was not, however, shared by Justice Wilson. In her dissent, she employed a wide definition of liberty (based on United States jurisprudence) to find a violation of Section 7.[179] Wilson J. concluded with the government's failure to justify the restriction.

Wilson J., as well, was critical of the judgment of LaForest J., who she found did not apply the minimal impairment test as *Oakes* prescribed. The government, she stipulated, did not discharge its burden.

> "They have offered no argument as to why precluding an accused from adducing evidence of efficient instruction is necessary to achieve the province's objective of ensuring adequate instruction for its children.... The government adduced no evidence to establish that having the parent apply for a certificate was the least drastic means of ensuring that their children were receiving efficient instruction. The legislature, for example, could clearly have given the education authorities the power to inspect on their own initiative."[180]

Wilson J., unlike some of the other Justices, has reflected the opinion that when conducting a Section 1 analysis, *Oakes* should be applied. Her intention perhaps lies in preserving the integrity of the test itself.

Wilson J. did not, however, treat the Section 2(a) claim with the same degree of activism. Contrary to previous Court rulings requiring a wide definition of the right, and unlike her broad definition of Section 7, she employed a definitional reasoning. She concluded that the limitation on Jones' religious freedom was too trivial to be in violation of Section 2(a). "Even assuming that this legislation does affect the appellant's beliefs....

legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion."[181]

The case of *Dolphin Delivery*[182] is also insightful of the Court's immediate reaction to *Oakes*. In this case, the majority dismissed the case, holding it outside the scope of the *Charter's* application, although the issue of secondary picketing was found to be a protected form of expression.

The Court declared that the *Charter* did not apply to issues between private parties based on the common law (thus excluding many cases from *Charter* protection). McIntyre J. stated that if this were not the case, he would have upheld the restriction at issue as a reasonable limit under Section 1. Once again, there was disagreement between the Justices on the application of Section 1, with Wilson J. criticizing McIntyre J. for the level of generality he employed in his discussion of Section 1.[183] *Oakes* was sidestepped again in this case.

2) Identifying Criteria for Deference - *Edwards Books*

It was the case of *R. v. Edwards Books*[184] which actually approached the issue of Section 1, yet not the way *Oakes* seems to have intended. This case was crucial for it added certain elements to the analysis. These elements modified or perhaps clarified to a certain degree the manner in which the Court would handle the most crucial component of *Oakes*, the minimal impairment test. In its discussion of *Oakes*, the Court treats the criteria as flexible guidelines rather than as rigid doctrinal standards.

The Court, in this case, expounds on the need for legislative deference in certain cases in order to strike a balance between judicial and legislative authority. It allows for a modulation of severity in the application of *Oakes*' least restrictive means test (which could not remain uniform in all cases). Yet, it does not clearly define the criteria for modulation. This case also reflects the Court's willingness to accept certain considerations in its Section 1 analysis which initially were excluded.

Edwards Books dealt with the constitutionality of an Ontario Sunday closing law. The law in question, The Retail Business Holidays Act, required closing on Sundays. By exception, it did, however, allow certain small enterprises, limited to seven employees (which for religious reasons closed on Saturdays) to operate their businesses on Sunday. The Court had to determine if this under-inclusive measure applying to only specific enterprises who observe the Sabbath on Saturday was a reasonable restriction to the freedom of religion of those who could not profit from this exemption.

Dickson C.J., for the first time since *Oakes*, conducts an analysis of Section 1. He reiterates the *Oakes* criteria, yet modifies its earlier activist stance. For example, he takes the opportunity to affirm the following:

> "The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement, the Court has been careful to avoid rigid and inflexible standards."[185]

Dickson C.J., in the opening statement of this quote, repeats what he briefly stated in *Oakes*, yet failed to explain in that case. He then refers to the Court's deferential attitude after *Oakes* leaving himself adequate leeway to defer to legislative judgment. Dickson C.J. seemed well aware that a uniformity in the application of the *Oakes* test would be unrealistic due to the variety of circumstances which could arise. In this particular case, for example, the Court was faced not with a criminal matter as in *Oakes*, but rather with legislation of a commercial or socioeconomic nature. The Chief Justice made it very clear that in such matters, the law would not have to be perfectly adjusted to resist judicial examination, giving much leeway to the legislature in the regulation of industry. He states that "legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the *Charter*".[186]

Dickson C.J. determines easily that the objective is of a pressing and substantial nature: to provide a common pause day to protect workers and families.. "from a diminution of opportunity to experience the fulfilment offered... and from the alienation of the individual from his or her closest social bonds".[187]

In the examination of the means, he furthermore concludes that the rational connection test is satisfied despite the law's under-inclusiveness.[188] Additionally, Dickson C.J. expressed that regarding such regulatory legislation "simplicity and administrative convenience are legitimate concerns for the drafters of such legislation".[189] Once again, as in *Jones*, the Court considers such factors contrary to Chief Justice Dickson's own judgement in *Big M. Drug Mart*.[190]

Thus, in the examination of minimal impairment, although it was shown that other provinces practice a complete Sabbath exemption system, Dickson C.J. implies that this criteria must be applied taking into account the need to preserve the efficiency of the contested disposition. Consequently, even if there exists a less restrictive means impairing the right less, it would have to allow the government to achieve its objective of providing workers with a uniform day of rest as efficiently.[191] It is worthy to note that the alternative means of a complete Sabbath exemption is automatically unable to achieve the objective "as efficiently", or with equal expediency and convenience. The extreme deference implied by the consideration of such criteria is thus evident.

Furthermore, Dickson C.J. articulates that regarding such socioeconomic legislation this deferential stance is appropriate given the nature of the interests affected. Thus, he states that a lower scrutiny should be applied when the government's purpose is to protect constituencies that seem especially needy. He introduces an anti-disadvantage principle, a theme implying that *Charter* analysis should be balanced to fall on the side of the less advantaged.

Dickson C.J. states,

> "in interpreting and applying the *Charter*, I believe that the Court must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as it object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees, in securing a Sunday holiday, are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the legislature for determining that the protection of the employees ought to prevail."[192]

Thus, despite the rights infringement, he recognizes that the legislature is also in the business of protecting the interests of the less powerful. For example, Dickson C.J. states that by allowing larger retail operations to be open on Sunday, many employees in less powerful positions than their employers will not benefit from a common pause day (to share with their families and friends). He implies that the balance the government strikes between competing values in such situations should be respected. No doubt, this affords a balance between legislative and judicial authority, both responsible for protecting values. Thus, when faced with legislation protecting the disadvantaged, the Court indicated it would modulate its application of minimal impairment to a lower severity, applying less of a burden on the government. In reality, the "least restrictive means" test of *Oakes* is not truly applied in this sense.

The Court's reasoning also represents a more collectivist Canadian ideology, recognizing that the state protects interests as it mediates between competing pressures. This is unlike the individualist liberal philosophy portrayed in *Oakes* which positioned the state as antagonistic to individual rights. It is true, however that *Oakes* pertained to a criminal matter where the state may be seen as more opposed to the individual. The reality is that both of these traditions exist in Canada, unlike in the United States where liberalist theory is the underlying theme of the *Bill of Rights*.

In order to lower the level of judicial scrutiny, Dickson C.J. actually modifies the formulation of minimal impairment and applies a different test. Rather than analyzing if the means impaired the right as little as possible, he examines whether the means impair the right as little as "reasonably" possible. Thus, instead of determining if there is a less restrictive means, the Court asks if there exists some "reasonable alternative scheme" which would allow the province to achieve its objective with fewer detrimental effects on freedom of religion.[193]

The severity of the standard employed in *Oakes* is reduced from one of necessity of means to that of reasonableness. Dickson C.J. states that the Sabbath exemption in this law "represents a satisfactory effort on the part of the legislature".[194] Furthermore,

Dickson C.J. states that the standard of reasonableness of the means is to be determined from the perspective of the legislature itself.

> "In balancing the interests of retail employees to a holiday in common with their family and friends against the Section 2(a) interests of those affected, the legislature engaged in the process envisaged by Section 1 of the *Charter*. **A reasonable limit is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose.** The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line."[195]

It is, thus, not surprising that Dickson C.J. concludes that the minimal impairment component is satisfied. He furthermore gives little significance to the third portion of the proportionality test, quickly determining that the infringement is not disproportionate to the legislative objectives.[196] After determining the objective's importance and considering the reasoning employed in the minimal impairment analysis, this last test was not detrimental to the analysis.

Justice LaForest also emphasizes the need for judicial restraint in reviewing commercial legislation. He states that the law would be valid even if no exemption existed. He does not specifically follow the *Oakes* criteria for he focuses more on whether the infringement is substantial enough to violate Section 2.[197] Yet, his comments do offer insight on the possible variation of *Oakes*, particularly minimal impairment (the most crucial element). He articulates that the legislature must be given adequate leeway to respond to competing pressures. The *Charter*, he states, must be applied by the Courts realistically, taking into consideration the context of the particular situation at hand, not in an abstract uniform manner (as *Oakes* seemed to suggest).

> "Given that the objective is of pressing and substantial concern, the legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated, and not on an abstract theoretical plane. In interpreting the constitution, courts must be sensitive to... "The practical living facts" to which a legislature must respond. That is especially so in a field of so many competing pressures as the one here in question.

> By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the *Charter* established the opposite regime. On the other hand, having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the right of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected."[198]

Justice LaForest furthermore articulates that the legislature must have a margin or room to manoeuvre (*marge de manoeuvre raisonnable*) in order to achieve their policy goals. Due to competing interests, such policy cannot satisfy everyone simultaneously. The concept LaForest J. employs, *marge de manoeuve*, seems to be inspired by the jurisprudence of the *European Convention on Human Rights*. The European Court applies a national "margin of appreciation" employing a deferential attitude (respecting the state's sovereignty) towards certain matters involving regulation and competing interests.[199]

LaForest J. indicates that the criteria of *Oakes* must be applied with variation depending on the nature of the interest, and the legislative scheme at hand, a more contextual approach. Additionally, he implies that efficiency is a factor to consider when examining the means to attain an objective for he states that even if less restrictive means do exist, they may interfere more with the goal the legislature seeks to advance.[200] Thus, depending on the interest at hand, minimal impairment may modulate in severity according to the factor of efficiency.

Such legislation involving competing pressures, LaForest J. claims, also brings us to question the institutional capacity of the Court who lacks sufficient knowledge of such matters. This implies that the level of judicial scrutiny is also contingent upon the Court's degree of expertise in various areas (a concept applied by the European Court). Stringent standards are thus appropriate when the Court has the capacity to accomplish the task well. LaForest J. advocates an approach which stikes a balance between the judicial and legislative roles.

> "In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. Of course, what is reasonable will vary with the context. Regard must be had to the nature of the interest infringed and the legislative scheme sought to be implemented. In a case like the present, it seems to me, the legislature is caught between having to let the legislation place a burden on people who observe a day of worship other than Sunday or create exemptions which, in their practical workings, may substantially interfere with the goal the legislature seeks to advance and which themselves result in imposing burdens on Sunday observers and possibly on others as well. That being so, it seems to me that the choice of having or not having an exemption for those who observe a day other than Sunday must remain in essence, a legislative choice. That, barring equality considerations, is true as well of the compromises that must be made in creating religious exemptions. These choices require an in-depth knowledge of all the circumstances. They are choices a court is not in a position to make."[201]

Justice Wilson's dissent in this case portrays, once again, her dissatisfaction with the evolving interpretation of the *Oakes* test. She reflects a staunch liberalist belief that *Oakes* should be applied rigorously as it was originally formulated. Wilson J. conducts her *Charter* analysis emphasizing individual autonomy and minority rights over legislative majoritarian decisions. She criticizes the law at issue and the exemption it sustains, claiming that a legal system must be grounded in principle to have integrity (quoting Dworkin). Middle ground legislative schemes such as this one are thus not appropriate, she states, for they lead to "checkerboard legislation" creating a "compromised scheme of justice". She would not have upheld the law as it stood, due to the quasi exemption, which she claims should have applied comprehensively to all retailers closed on Sundays.[202]

3) Analysis of Deferential Criteria - Difficulties in Application

Despite the variations in reasoning amongst the members of the Court, the majority did discern certain factors which could invoke a more deferential application of minimal impairment. These criteria for deference merit further analysis.

It was first indicated that a less rigorous judicial control can be applied concerning socioeconomic legislation (involving competing interests) without, however, basing the

factor on the nature of the right at issue. The notion of socioeconomic laws as criteria for invoking deference is very general. A commercial or regulatory element may be connected to a vast array of legislation along with various other elements. Furthermore, the analysis of this criteria seems to be disconnected from the particular right violated or the circumstances surrounding its infringement. The notion of competing groups or interests is established. However, competing societal interests may be found to exist concerning all legislation. It too is not a clear indicator.

The Court also articulated that a contextual anti-disadvantage principle will often be characteristic of such regulatory laws, a factor which will merit a more relaxed application of minimal impairment. This principle, referring here to "disadvantaged persons" signifies the Court's recognition of the legislature's concurrent role in protecting rights. The Court indicates that it may use this principle as a basis for deference, so as to remain an institution set on the protection of less advantaged minorities, the purpose of the *Charter* itself (rather than a body which rolls back legislation dedicated to this purpose). The weight of this criteria, however, was not ascertained by the Court.

The anti-disadvantaged principle is stated in conjunction with socioeconomic legislation with no indication of its applicability to other circumstances (e.g. criminal matters). Furthermore, the term "disadvantaged" can be defined to include an individual (persons) or "groups" (as later appears in the case of *Irwin Toy*) creating confusion as to what distinctions should be made. As well, disadvantage may appear on both conflicting sides of the issue at hand depending on how it is defined, and from whose perspective it is viewed. Competing notions of disadvantage in a single case complicate the application of this deferential criteria. For example, a contested law may protect a "disadvantaged group" and at the same time create "disadvantage" for those contesting the law.

Regarding regulatory legislation, the manner in which the Court would alleviate the least restrictive means test was established. The standard was to be one of reasonability; means which impair the right as little as reasonably possible from the perspective of the legislature. In the determination of such reasonability, arguments of pragmatism and

efficiency could be accepted. Also implied was the notion of judicial institutional capacity regarding laws of socioeconomic nature and the Court's lack of expertise in the mediation of such interests. The Court did not, however, mention any criteria or rights which would warrant or invoke a closer scrutiny. The nature of the rights themselves were not touched upon in the analysis. Thus, in reality, the case indicated how the Court will modulate the severity of the *Oakes* criteria. Yet, essentially, it was not clear enough as to when the courts will apply the stringent test of minimal impairment as opposed to the deferential version[203] which actually amounts to a requirement of rationality of the means rather than the "least restrictive".

The generality of the criteria set out in *Edwards Books* for the modulation of Section 1 and the consequent difficulty of applying it consistently are reflected in *Ford c. P.G. de Québec*[204]. The Supreme Court refused to apply the less rigorous test of *Edwards Books* to certain dispositions of the *Charte de la langue française* of Quebec. The measures in question pertained to commercial matters, specifically the regulation of the language of commercial signs. The challengers claimed that they violated liberty of expression, and were incompatible with the right to equality. The Court applied the criteria of proportionality strictly examining the necessity of the means in issue, although the case concerned commercial freedom of expression. This is perhaps due to the availability of less controversial and more effective means to promote Quebec specificity. In addition, the law, although of a social economic nature, did not have the purpose of protecting the disadvantaged or minority rights in Quebec.

What is clear is that although the variance in the application of minimal impairment and legislative deference was established in *Edwards Books*, specific criteria for modulation in severity of control were not ascertained. Rather, only certain guidelines were given which could be applied on an ad hoc basis.

Following *Edwards Books*, cases such as *United States v. Cotroni* exhibited the deferential attitude regarding the nature of the proportionality test, and its ad hoc application. Despite the fact that the original formula of *Oakes* was not reformulated, the

Court, once again, did not apply its criteria as stated. The Court, rather, stressed the flexible nature of "reasonable limits", and a balancing of interests approach based on the particular context of the case.[205] The contextual approach advocated is in contrast to the abstract nature of a uniform severe application of the proportionality test in *Oakes* (specifically the least restrictive means test).

Regardless of the existence of other means less restrictive, the Court decided that the particular context of the case and the nature of the interests involved demanded a more flexible approach. This case, however, did not deal with socioeconomic legislation involving competing pressures as did *Edwards Books*.

It was a case questioning the constitutionality of extraditing a man, Cotroni, to the United States, for crimes committed in Canada. It was argued that the extradition laws violated Section 6 (mobility rights) of the *Charter*. The less restrictive means available entailed prosecuting Cotroni in Canada. LaForest J., however, stated,

> "The difficulty I have with this approach is that it seeks to apply the *Oakes* test in too rigid a fashion without regard to the context in which it is applied. It must be remembered that the language of the *Charter*, which allows "reasonable limits" invites a measure of flexibility."[206]

He indicated that the application of the *Oakes* test will vary in function of the circumstances at issue, notably according to the nature of the interests involved, as stated in *Edwards Books*. The flexible approach articulated involved a contextual analysis in which "the underlying values (of the *Charter*) must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature".[207]

This type of analysis advocated did not specify if certain rights would receive a more stringent standard, nor did it specify exactly what is meant by "the nature of the interests" which was a factor to be considered in determining the level of severity in both cases. In *Edwards Books*, it seems to refer to issues of a commercial nature, involving competing pressures, not really determining at which point to draw the line in defining a

case as such. *Cotroni* does not define which interests can consistently invoke deference. Relying on the "nature of the interests" also encourages a rank ordering of activities within the right. As mentioned before, the case did, in fact, reflect a rank ordering of the interests covered by the right, similar to United States analysis. Extradition, although deemed in violation of Section 6, was said to lie at the outer edges of the core values underlying the right.[208] This definitional internal ranking thus led to a deferential application of minimal impairment.

Furthermore, the two cases were opposing in nature, *Cotroni* involved criminal legislation, not commercial legislation. Yet, a deferential approach was still taken. It seems that the Court, while establishing that a deferential stance was often necessary, did not really follow any consistent approach or criteria by which the deferential attitude could be adjusted.

Furthermore, the approach in *Cotroni* abandons a truly formalistic analysis and invites the Court into a policy oriented discussion. Yet, by deferring to the legislature, the Court protected itself from the recriminations associated with trespassing onto legislative territory. The difficulty, however, lies in the dissenting nature of the Court and its inability, at this point, to actually determine specific coherent guidelines or criteria as to when the Court will modulate the criteria of proportionality. The lack of a comprehensive doctrine also tends to attract criticism regarding the Court's legitimacy, invoking the lack of impartiality and legalistic reasoning inherent in an ad hoc approach to the modulation of the *Oakes* criteria. The implications of the legitimacy argument will be later examined.

4) *Irwin Toy* - Clarification of Criteria?

The Supreme Court, evidently concerned with striking a balance between the judicial protection of rights and legislative democracy, articulated the need for variation in the application of the *Oakes* criteria. Yet, it was the case of *Irwin Toy* which attempted to clarify certain criteria affecting the degree of judicial scrutiny.[209] The court affirmed and expounded on certain elements discussed in *Edwards Books*.

In *Irwin Toy*, the petitioners contested the dispositions of the Consumer Protection Act of Quebec, which prohibited radio and televised publicity intended for children under 13 years of age. The regulation attacked was of a commercial nature, and the right invoked was commercial freedom of expression. The measure was validated as the criteria of minimal impairment was applied in a deferential manner.

> "In sum, the evidence sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising... while evidence exists that other less intrusive options reflecting more modest objectives were available to the government... this court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups."[210]

In its assessment of the means, the Court also articulated criteria indicating when the Court would be severe and when judicial scrutiny would be alleviated (deferring to the legislature).

> "Thus, in matching means to ends and asking whether rights or freedoms are impaired, as little as possible, a legislature mediating between the claims of the competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. In *Edwards Books, supra*, Chief Justice Dickson expressed an important concern about the situation of vulnerable groups.
>
> > In interpreting and applying the *Charter*, I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its objective, the improvement of the condition of less advantaged persons.
>
> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as the courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislatures'

> representative function. For example, when "regulating industry or business, it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy". (*Edwards Books*)
>
> In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in Section 7 to 14 of the *Charter*, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions: see the *Sunday Times v. United Kingdom* (1979), 2 E.H.R.R. 245 at p. 276. The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources..."[211]

Irwin Toy affirms the principles established in *Edwards Books* yet distinguishes between two types of cases, or rather two criteria which indicate when the *Oakes* test - especially minimal impairment - will be applied fervently and when the Court will defer to the legislature. When the government is mediating between the claims of competing groups, for example, "when regulating industry" or when it legislates for the benefit of the vulnerable or disadvantaged "groups", the Court will lower its level of scrutiny and grant the legislature a margin of appreciation. However, by comparison, when the government is the "singular antagonist" of the individual whose right has been infringed, a rigorous application of minimal impairment as expressed in *Oakes* will be necessary. The nature of the interests involved determines the level of severity.

The Supreme Court does, however, mention specific rights which will merit this higher scrutiny. For example, a violation of the judicial guarantees, Sections 7 to 14 of the *Charter*, will trigger activism on behalf of the Court. Thus, in the area of criminal law, where the government is positioned as singular antagonist to the individual, a stricter standard will be applied.

Dickson C.J. implies (by using the example of judicial rights) that the severity of judicial scrutiny in the application of the minimal impairment criteria may operate by the nature of the right as well, since the nature of the interests involved will relate to the type of right in issue. Such an approach indirectly converges with that of the United States, where certain rights, including judicial rights, will receive a higher level of scrutiny.[212] The Supreme Court of Canada, however, has resisted the hierarchy of rights approach present in the United States. Similarity with the United States can also be noted concerning judicial deference in regulatory matters. The United States since *U.S. vs. Carolene Products*[213] has deferred to the legislatures on such issues and has been lenient regarding violations of commercial freedom of expression, at first denying such matters First Amendment protection and later demanding a less stringent justification than with other forms of expression.

Furthermore, the Court declares that their expertise regarding, for example, the area of judicial rights will be a factor invoking activism. Institutional capacity seems to be of great concern to the Court. This has provoked authors to question why the Court cannot rather develop the expertise it needs to adjudicate all *Charter* claims effectively.[214] It is contended that judges' concerns of legitimacy counteract such suggestions. Practically speaking, the Court seems intent on striking a balance between activism and restraint, respectful of the legislature's valid and effective role in creating protective and progressive legislation for Canadian society.

The Court's more liberalist activist stance towards criminal law is not surprising. The Court does possess great expertise in this area, where the state has traditionally been regarded as adversarial to the individual accused (the government represents the interests of the community against him).[215] Furthermore, the Court's role as protector of liberty fits well into the equation, as the state can yield and abuse power through its criminal law. An activist stance by the Court in this area converges well with the liberal aspect of the *Charter*, by protecting the rights of those in the greatest danger of losing them at the hands of the state.[216] As well, the impartiality of the Court is questioned less in this area than when social and economic policies are at the forefront.

It has thus been noted that the legitimacy of activism in criminal law is far less contested. Aside from the Court's ability to deal effectively with such cases, often such activism questions the activities of prosecutors, judges and police rather than the legislature itself.[217] As well, when a legislative provision is attacked, there is only one federal statute at issue (rather than various provincial schemes) making the activist use of minimal impairment in criminal law non-contentious regarding the issue of provincial legislative autonomy and specificity.[218]

It is evident that the purpose of the Court's variation in scrutiny, allowing for legislative deference rather than a uniform severity in scrutiny was to exhibit respect for the allocation of power between the courts and the democratically elected government.

The criteria established, however, may, at times, be conflictual and lead to confusion in the appropriate application of Section 1. For example, *Irwin Toy*'s reference to laws which aid disadvantaged "groups" (rather than persons) as a criteria for deference may create some discrepancy in analysis. In the area of judicial rights and criminal law, the singular antagonist theory warranting heightened scrutiny may be present, yet the law may also be characterized as protecting vulnerable or disadvantaged groups in society.[219] The case may include various conflicting factors or interests and involve the infringement of several rights.

In addition, it is not always easy to discern when the government is mediating between competing claims of groups for scarce resources or when it is acting as the singular antagonist. Categorizing the case is actually contingent on the perspective the Court chooses in its analysis of the circumstances of each particular case. For example, most criminal laws also involve competing interests in society, and, thus, the government, not only can be viewed as the singular antagonist, but also as mediating between various groups. The individual perspective of the accused may thus conflict with other societal factors in the classification of the case, affecting the consequent level of judicial scrutiny to be applied. Criminal laws prohibiting hate propaganda also reflect the mediation between the opposing interests of those intent on expressing their views and individuals or

groups in society who are the object of such hate (groups who may also be classified as disadvantaged). In general, many criminal laws from those combatting drugs, drunk driving, to rape shield laws reflect the individual accused's rights versus the vulnerable interests in society the laws are formulated to protect.[220]

This difficulty will be evident in the Court's subsequent analysis of *Charter* cases, particularly in the area of criminal law examined in the following sections. Furthermore, the confusion inherent in applying the criteria established often seems to result in a more ad hoc decision-making. A gradual internal ranking within various rights, similar to that of the United States system, will also be evident.

Since the Court's re-evaluation of the *Oakes* criteria in cases such as *Edwards Books*, the Court's approach has been increasingly deferential and divided. Studies conducted by various authors, such as Morton, Russell and Withey have indicated that, compared to the initial, more than 50% success rate for early *Charter* claims, since 1986 this has dropped between 25 and 30%.[221] (Most cases have dealt with legal rights and the criminal justice system.) In addition, the Court has become increasingly divided with an escalating amount of dissenting judgements.[222] Studies done by Gibson and Elliot also show an avoidance of Section 1 analysis itself.[223] The Court has evidently approached *Charter* claims cautiously, with concern for balancing judicial and legislative power by avoiding Section 1 altogether or by deferring to legislative judgement in its Section 1 analysis.

It seems that the Court inextricably bound to the policy arena under the *Charter* has nevertheless secured for itself added legitimacy by defining itself as an institution respectful of a system of checks and balances. Activism, rather than applied with uniform severity, is invoked by limited factors based on functional expertise giving more than adequate leeway to the democratic process. Whether the Court has done so in a coherent or consistent fashion is another story altogether.

E. Post-*Irwin Toy*

1) Deference Regarding Socioeconomic Policy and Competing Interests

The Court's attitude regarding socioeconomic policy (which has been given a wide definition by the Court) has been quite deferential following *Irwin Toy*. A wide margin of appreciation has been given to legislative policy, crossing the lines of the particular rights. This has prevented any proactive stance by the Court on the distribution of resources in society. In the process, the Court has continuously relied on internal limits in the form of definitional limitations, and rank ordering of interests within the rights themselves, an internal rather contextual analysis, radically different from the Court's earlier stance on the primacy of the Section 1 justificatory analysis. The general nature of the socioeconomic criteria has evidently led the Court to create more comprehensive doctrine within the particular rights (rather than within Section 1 itself).[224]

(a) Internal Limitations

Cases such as *McKinney v. University of Guelph*[225] affirm this trend towards deference in socioeconomic matters portrayed in *Edwards Books* and *Irwin Toy*. It also reveals the gradual reliance on internal limitations. In *McKinney*, the Court examined the validity of certain Ontario measures requiring mandatory retirement of University professors at the age of 65. The challenge of these measures focussed on the equality provision, Section 15(1), alleging a violation based on age discrimination.

The Court considered such a violation justifiable in virtue of Section 1 of the *Charter*, refusing to apply minimal impairment as set out in *Oakes*. Although less restrictive means were shown to be available, the Court deferred to legislative judgment. For example, the abolishment of mandatory retirement in other provinces was pointed out, demonstrating the existence of less restrictive means.

Judge LaForest relied on certain criteria apparent in *Irwin Toy* to justify this deferential approach to minimal impairment. He particularly emphasized that the distinction between socioeconomic policy and the criminal justice area would have great

bearing on the Court's action. In doing so, he mediates between the Court's role as constitutional guardian and legislative democracy.

Furthermore, while indicating that the issue of mandatory retirement involved the necessity of arbitrating between concurrent interests, he also emphasized the Court's lack of expertise in this area, a criteria warranting deference.

> "They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch as *Irwin Toy*... has reminded us. This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system, where the Court's knowledge and understanding affords it a much higher degree of certainty.
>
> In performing their functions of assuring compliance with the constitutional norms in these amorphous areas, courts must, of necessity, turn to such available knowledge as exists, and in particular, to social science research... The court of appeal, in its judgment, has helpfully described the difficult problems of evaluating these works and the extent to which the judiciary should defer to legislative judgment in determining issues of minimal impairment of a constitutional right when evidence rationally supports the legislative judgment."[226]

After discussing the contentions of both parties, Judge LaForest further stated:

> "In the face of these competing views, it should not be altogether surprising that the legislature opted for a cautious approach to the matter. The legislature, like the Court, was faced with competing socioeconomic theories, about which respected academics unnaturally differ. In my view, the legislature is entitled to choose between them, and surely to proceed cautiously in effecting change on such important issues of social and economic concern. On issues of this kind, where there is competing social science evidence, I have already discussed what *Irwin Toy* has told us about the stance the Court should take. In a word, the question for this Court is whether the government had a reasonable basis for concluding that the legislation impaired the relevant right as little as possible, given the government's pressing and substantial objectives."[227]

Once again, the Court stipulates that regarding such policy, the means need not be "necessary" or the least restrictive in achieving the objective, as "minimal impairment"

originally implied, but rather, their "reasonable" nature is sufficient. Furthermore, the Court defers to the legislature in its choice of what is "reasonable". As long as the government had a reasonable basis for its choice, the measure is acceptable.

In addition, Judge LaForest conducts a rather contextual analysis within the equality provision which results in an internal ranking of the interests covered by the right. Within the right, the infringement is thus classified, determining to a certain extent the degree of judicial scrutiny to be applied under Section 1, the external justificatory analysis. (The two stages of inquiry are thus not kept distinct). In doing so, LaForest J. implies that the severity of the minimal impairment test will also depend on the motive of classification as a criteria (discrimination based on age meriting a lower scrutiny).

His approach strikes great resemblance with American jurisprudence which relies on an internal ranking system in order to determine the appropriate level of judicial scrutiny. The United States has modulated its scrutiny under the 14th Amendment based on the motive, or type of classification, race, for example, receiving the highest level of activism, as opposed to age which receives minimal scrutiny.[228] The three levels of scrutiny analysis will be further discussed.

Judge LaForest, allowing for deference in this case, similarly implies, under the title "nature of the right", that age is a "less suspect" grounds for classification than race, sex or religion.

> "Section 15(1) of the *Charter* specifically mentions age as one of the grounds of discrimination sought to be protected by that provision, and there is no doubt, as I have clearly indicated, that such discrimination, like the other categories mentioned, can constitute a significant abridgment to the dignity and self-worth of the human person. It must not be overlooked, however, that there are important differences between age discrimination and some of the other grounds mentioned in Section 15(1). To begin with, there is nothing inherent in most of the specified grounds of discrimination, e.g. race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. There is a general relationship between advancing age and declining ability (referring to the *Harvard Law Review*)... This hardly means that general impediments

> based on age should not be approached with suspicion, for we age at different rates, and what may be old for one person is not necessarily so for another. In assessing the weight to be given to that consideration, however, we should bear in mind that the other grounds mentioned are generally motivated by different factors. Racial and religious discrimination and the like are generally based on feelings of hostility or intolerance. On the other hand, as Professor Ely has observed,
>
> "The fact that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws that comparatively advantage those between, say, 21 and 65 vis-à-vis those who are younger or older."[229]

The principles of *McKinney* were later confirmed by other mandatory retirement cases such as *Stoffman c. Vancouver General Hospital*[230]. The Court did, however, remain divided in its vision of Section 1's application; Judge Wilson, insisting that mandatory retirement provisions were not a minimal impairment to equality and L'Heureux-Dubé J. stating that forced retirement constituted an arbitrary means not rationally connected to its objective of maintaining academic excellence. Nevertheless, the cases of *University of Alberta v. Alberta* and more recently *Bell v. Canadian Human Rights Commission* and *Cooper v. Canada* have all upheld *McKinney*[231]. Generally, they have affirmed deference regarding socioeconomic policy, and within equality, age as a less suspect grounds of discrimination.

The Court, within the equality rights provision, has also demonstrated a reliance on definitional internal limits, rather than relying on the Section 1 analysis, and developing the criteria required for its application. The definitional exclusion exhibited, for example, in *Andrews* and later in *Turpin* and *Ref. Re. Workers' Compensation Act* portrays the Court's deferential reaction of curtailing the scope of the protection itself.[232] For example, in *Andrews*, where the citizenship condition for the practice of law was deemed unconstitutional,the Court also established that non-enumerated grounds of discrimination will only be considered "analogous" and merit Section 15 protection if they involve a discrete and insular minority who has traditionally been disadvantaged and a victim of prejudice. The Court has, in fact, stated that the "overall purpose of Section 15 is to remedy or prevent discrimination against groups subject to stereotyping, historical

disadvantage and political and social prejudice in Canadian society", taking into account the larger social context[233] (a contextual analysis).

Since the criteria to qualify as a discrete and insular minority are difficult to define and satisfy, a vast amount of equality cases, regardless of the importance of the interests involved or the unfairness of the distinction, have been excluded by this contextual definitional analysis.[234]

The criteria of the discrete and insular minority has incidentally been borrowed from the United States where since *U.S. vs. Carolene Products* it has been the criteria used to determine the necessity of heightened judicial scrutiny.[235] In *Andrews*, however, it was used not to determine scrutiny at the justificatory level as in the United States but rather as a definitional barrier, ironically so considering the role of Section 1 of the *Charter*. The practical results may not differ to a great degree, however, since in the United States most distinctions will not meet the level of high scrutiny and inevitably be subject to minimal scrutiny (resulting in the law's validity). The conclusion is the same as which occurs when the exclusion comes at the definitional level (escaping constitutional protection) with the exception that the scope of Section 15 is limited in the latter case.

Moreover, it is interesting to note that the group anti-disadvantage principle emerges again in *Andrews* yet not as a criteria for deference regarding minimal impairment. Instead, it is used definitionally creating boundaries for Section 15 protection (rather than leaving the analysis to Section 1).

Very recently, however, the Court has radically altered this approach in the trilogy cases of *Egan v. Canada, Miron v. Trudel*, and *Thibaudeau v. R.*[236] In these cases, the Court has highlighted a more formal understanding of equality while still focusing on various distinctions and analyses within the right. These cases have rejected the idea that discrimination is limited to the concept of vulnerable "groups" or a pre-existing group context of disadvantage ("discrete and insular minorities"). They have instead defined discrimination more as the mistreatment of individuals on the basis of group stereotypes

by failure to treat the person based on the individual qualities of nature, choice, or merit.[237] What resulted was the widening of analogous grounds to include sexual orientation and marital status. Invoking Section 15 requires finding a "distinction" resulting in disadvantage, based on an irrelevant personal characteristic with some judges advocating that relevancy be measured in relation to the functional values underlying the legislation.[238] The character and history of the group are not the vital aspects anymore.

This approach does have its difficulties. For example, in *Egan*, a case challenging the denial of old age spousal allowances to gay and lesbian couples, Judge LaForest decided that the legislative distinction was supported by its relevancy to the fundamental heterosexual values of the legislation. He thus implied that simple coherence between legislative intent and the distinction structured into the law may result in the denial of the claim. This rather circular reasoning does little to actually address the issue itself and was rejected by the majority of judges as confusing the Section 15 and Section 1 analysis as well.[239]

This case did result, however, in the expansion of analogous grounds and Section 15 protection particularly to include sexual orientation as a grounds for discrimination. However, the Court's reasoning and the resulting deferential attitude towards this socioeconomic type of legislation led to the dismissal of this claim at the Section 1 level (refusal to extend benefits). For example, despite the discrepancies inherent in this law, and the lack of governmental evidence produced to justify the violation, the Court states that in such socioeconomic matters parliament needs "reasonable room to manoeuvre", citing *McKinney*[240]. The Court portrayed extreme deference in the application of minimal impairment as the case involved the allocation of scarce resources to competing interests. The Court emphasized the fiscal constraints inherent in such legislation.

> "The government must be accorded some flexibility in extending social benefits and does not have to be proactive in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all."[241]

Egan and other cases thus also reflect how the Court's deferential stance towards regulation has inevitably resulted in an unwillingness to interpret rights as more than negative liberal freedoms[242] (the concept of the individual versus state intervention).

For example, in the case of *Native Women's Association of Canada*, the Court refused to interpret free expression as imposing a positive obligation on government to provide the necessary funding to assure equal participation in constitutional reform discussions.[243] The Court has traditionally implied that free expression will be used to combat negatively imposed constraints. Although in *Haig v. Canada* the Court did imply that in certain cases it might impose a positive obligation, it still refused to do so in this case.[244]

Trakman, in addition to other academics, have articulated that such an approach diminishes the potential power of the *Charter* to redress inequalities and to actually make a difference in society.[245] Some see the *Charter's* positive statement of rights as opposed to the Bill of Rights' negative formulation of its guarantees, as warranting a more positive, proactive stance.[246]

The refusal to interpret rights as imposing positive obligations on the state to extend benefits, services, or to provide other conditions does mirror the Court's deferential analysis of Section 1 regarding matters of a socioeconomic nature involving the allocation of societal resources. It seems that the Court, motivated by concern for its own legitimate exercise of power and the appropriate balance between legislative and judicial authority, has not behaved proactively in order to remove itself from decisions of expenditure which interfere with the government's allocation of resources. The Court has ironically also extended this notion to various cases of criminal concern relating to judicial rights. This is evidenced in *R. v. Prosper*, where the Court, motivated by fiscal concerns, stated that Section 10(b) is not violated by failure to provide free legal advice to the poor.

> "The fact that such an obligation would almost certainly interfere with government's allocation of limited resources by requiring them to spend public funds on the provision of a service, is, I might add, a further

> consideration, which weighs against this interpretation." (referring to interpreting the provision proactively)...
>
> "The proper allocation of state resources is a matter for the legislatures. In its choice of measures, a legislature may prefer to fund victims of crime rather than accused persons... etc."[247]

(b) The Contextual Approach - E.g. Free Expression

The Court has also increasingly relied on a contextual approach towards limitations theory (already alluded to in cases such as *Cotroni*), which in reality has diluted the reliance on the criteria or distinctions set out in *Irwin Toy* (and Section 1 itself). This approach has served to reinforce more the lack of clarity and decisiveness of the general criteria, modulating judicial severity. Yet, its emphasis on the particular context of the infringement in determining the level of judicial scrutiny does provide a more in depth (less abstract) approach than that which is offered by the general criteria previously set out for the modulation of Section 1. This approach may, however, lead to a rigid categorization of infringements based on the particular judicial analysis.

The contextual approach has actually led to internal ranking or a hierarchy of infringements within particular rights. It reflects the Court's emphasis on the development of limitations theory within the rights themselves, a factor which has watered down the criteria for the application of Section 1 set out in *Oakes* (specifically the proportionality test). "Contextualizing" regardless of the stage of inquiry in which it is conducted often predetermines the level of severity attached to minimal impairment[248] (diminishing the reliance on Section 1 justification). It confuses the definitional and justificatory analyses. This approach does, nevertheless, seem to support the purposive analysis advocated by the Court.

Furthermore, it often complements a wide definition of rights (e.g. free expression), yet at times the contextual analysis may be at odds with a generous interpretation, leading to definitional type exclusions, or a narrowing of the right through a predetermined low ranking.[249] *Andrews* and *Turpin*, examining the larger social, political and legal context

to determine inequality and its definitional exclusions to equality are contrary to a wide definition. *Cotroni* also provides an example, as extradition was said to lie at the outer edges of the core values protected by Section 6.

Although the Court, since *Oakes*, has been more inclined to examine cases taking into account contextual aspects, such an approach was actually formally advocated by Judge Wilson in the case of *Edmonton Journal*[250]. In this case, provincial legislation restricting the publication of certain information obtained in matrimonial proceedings was found to violate freedom of expression and was deemed unconstitutional under Section 1.

Wilson J. stated that the *Charter* should be applied to individual cases using a "contextual" rather than an abstract approach:

> "One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts, and therefore more conducive to finding a fair and just compromise between the two competing values under Section 1."[251]

Under this approach, the Court has concentrated on the right itself, examining the context of the infringement and ranking the values or interests protected by the right. The infringement is thus categorized as meriting a certain level of justification or judicial scrutiny increasingly similar to limitations theory in the United States. The freedom of expression cases provide the greatest example of the contextual approach.

Since freedom of expression (along with voting) is inexorably linked to the promotion and protection of the majoritarian democratic process itself (by allowing for the flow of opinions into the marketplace of ideas), judicial activism in this area may not be as contentious. It seems that the Court has ranked interests in this area to emphasize or

direct its activism towards those types of expression which are truly central to participation in the democratic process (such as political expression).[252]

This right has generally been interpreted to have different values depending on the context. The internal ranking within the right has become more evident in the cases following *Edmonton Journal*. Interests have been ranked by their proximity to the core values underlying the right.[253]

The Court has defined these as those seeking truth in the marketplace of ideas, democracy or other participation in the political process, and individual achievement of spiritual or artistic self-fulfilment.[254] Originally, in *Irwin Toy*, a demonstration of the proximity to such core values was necessary to establish an infringement concerning content-neutral distinctions. Now, this core value theory has been extended to rank protected values regarding content based restrictions as well.[255] Although it allows for the wide protection of content based expression, excluding only violent forms, many values are deemed distant from the core values of Section 2(b). As a result, they do not merit much protection or activism at the Section 1 stage. Consequently, the proportionality test, specifically minimal impairment, will be conducted in deference to the legislature.

For example, expression which fosters hatred due to race or religion fails to promote freedom of expression principles. Restrictions on such expression, deemed distant from the core values, will be easier to uphold. Cases such as *Keegstra* and *Saskatchewan Human Rights Commission v. Bell* are examples.[256] It is noteworthy to mention that laws restricting such expression are also protective of disadvantaged or vulnerable groups.

In addition, commercial expression, such as advertising or expression that is considered economic by nature, is deemed distant from the core, making infringements on such types of expression potentially easier to justify.[257] The socioeconomic theme is used, but in connection to the right at the definitional stage, rather than just in the examination of the law itself.

In the *Prostitution Reference* case, Section 210 of the *Criminal Code*, prohibiting a person from communicating or even attempting to communicate with a person in a public place for the purpose of prostitution was found to violate Section 2(b), yet held justifiable under Section 1.[258] Chief Justice Dickson, following a contextual approach, classified the expression as sex with an "economic" purpose. He stated: "It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression."[259] Thus, Dickson C.J. on proceeded, in his Section 1 analysis, to apply the *Oakes* criteria in a deferential manner. For example, regarding minimal impairment, he asked "can effective, yet less intrusive legislation be imagined", using the element of efficiency to dilute the aspect of what is "less restrictive". Dickson C.J. stated that it was not the role of the Court "to consider what legislation might be the most desirable".[260]

Wilson J. dissented on the matter. She insisted that the means were not sufficiently tailored to the objective and that the minimal impairment test was not satisfied. According to Wilson J., the provision was too broad or overinclusive. It allowed people to be arrested possibly for communicating in a manner not prohibited by the *Criminal Code*, entailing serious repercussions.[261]

R. v. Butler followed the contextual reasoning of *Prostitution Reference*. The Court in this case discussed the validity of an obscenity law (Section 163(8) of the *Criminal Code*). The Court agreed that the obscene material did attempt to convey expressive meaning, and thus, violated Section 2(b). Sopinka J. first defined the government objective broadly, as preventing harm associated with obscenity, offsetting the claim that the state was acting as moral custodian and regardless of the fact that it was not demonstrated that parliament enacted the provision to prevent harm. He avoided the accusation of accepting the rejected shifting purpose doctrine by linking the original subjective intent of parliament to avoid moral corruption with the general objective of prevention of harm to society.[262]

He then applied the contextual approach, discussing whether the obscenity had any relation to the Section 2(b) core value of individual self-fulfilment. Evidently, such a

discussion is inherently subjective and the Court classified the activity as sex with an "economic" purpose. This, they stated, "does not stand on an equal footing with other kinds of expression which directly engage the core of the freedom of expression values".[263]

Consequently, minimal impairment was approached deferentially regardless of the vague imprecise nature of the legislation. This test was further diluted by Sopinka J.'s comments that the nature of the issue does not lend itself to further precision. "In this light", he states, "it is appropriate to question whether, and at what cost, greater legislative precision can be demanded."[264] Furthermore, the notion of deference to legislation designed to protect vulnerable groups was touched upon, as the Court referred to the serious problems of violence against women in its discussion of the inadequacy of alternative measures.

Although "economic" forms of communication have received a low ranking and a minimal scrutiny similar to the United States, the Court has still expressed resistance to "the categorical application of minimal scrutiny" which results from the levels of scrutiny approach applied in the United States; where "Although they technically fall within the protection of constitutional provisions, interests receiving such a low ranking turn out to be practically indistinguishable from those that have been definitionally excluded from constitutional protection".[265]

The Court has expressed reservation in adopting any inflexible approach. For example, Dickson C.J. stated in *Keegstra*, in a discussion of hate propaganda and Section 2(b) values, "I do not wish to be taken as advocating an inflexible "levels of scrutiny" categorization of expressive activity.... To become transfixed with categorization schemes risks losing the advantage associated with this sensitive examination of free expression principles, and I would be loath to sanction such a result".[266] As well, McLachlin J. in *Edmonton Journal* advocated a case-by-case analysis.[267]

(c) Institutional Expertise

Nevertheless, a core value theory will usually lead to a predictable outcome of scrutiny as in the United States. There are, however, examples where the Court has been less than deferential in matters where the interests received a low ranking, such as in *Edmonton Journal*, and *Rocket v. Royal College of Dentists*[268]. Yet in these particular cases there was another factor which may explain the outcome; the criteria of expertise and institutional capacity inspired by the European Court. Such expertise was originally associated with matters involving violations of judicial rights in criminal cases (recall *Irwin Toy*). The Court does, in fact, possess expertise concerning the publication of court proceedings and professional regulation and has thus been relatively activist in matters of professional interest.[269]

In *Edmonton Journal*, discussed earlier, although the expression involved (disclosure of the details of a matrimonial dispute) was deemed not as valuable as expression, for example, in a political context, the Court still found that the provincial law did not satisfy the proportionality test. This case is an exception to the usual deference, probably due to the Court's expertise in the area of publication of court proceedings.

The case of *Rocket v. Royal College of Dentists* concerned restrictions on advertising in the Ontario dental profession. The regulation was found to violate Section 2(b) and could not be justified under Section 1. McLachlin J. relied on the contextual approach set out in *Edmonton Journal*. She stated that commercial expression such as advertising is economic in nature and thus not central to the core values of freedom of expression. As a result, "restrictions on expression of this kind might be easier to justify than other infringements". In her words, "not all expression is equally worthy of protection, nor are all infringements of expression equally serious".[270] She did, however, resist a rigid or predictable level of scrutiny test characteristic of the American model, although such internal ranking increasingly resembles that model. For example, she advocated that a Section 1 analysis lends itself to a sensitive case-oriented approach.[271]

Although the purpose of regulating advertising to maintain a high standard of professionalism was legitimate, and the rational connection test satisfied, the Court

concluded that the regulation was too broad and did not pass minimal impairment. The Court's decision was ironically less than deferential in a matter of economic concern, deemed less central to the core values of expression. Yet the Court did possess a high degree of judicial expertise.

The Court has displayed a degree of activism in other professional licensing cases as well (unrelated to expression), overturning the laws in question due to the availability of less restrictive means. Examples are *Andrews v. Law Society of B.C.* and *Black v. Law Society (Alberta)*[272]. It must be noted that these cases, along with the aforementioned expression cases, have dealt with a social or economic issue (and may be classified as socioeconomic in nature). Nevertheless, they have been subject to a higher scrutiny, diminishing the value of socioeconomic criteria as a reliable indicator for deference when faced with judicial expertise. The latter criteria seems to provide an exception to the usual deference applied in these cases. Institutional expertise has, in these cases, motivated the Court to conduct a more searching inquiry, notwithstanding the socioeconomic element.

Generally, however, the Court has been quite deferential regarding social and economic policy. However, judges have increasingly focussed their analyses of limitations within the right, developing tests and theories similar to those of the United States (especially regarding free expression). This in turn has further served to clump the analysis of the right and Section 1 together.[273] Evidently, the generality of the "socioeconomic" and "competing interests" criteria have left the Court filling in the gaps definitionally (within the substantive provision).

(d) Coinciding Elements

Furthermore, the distinction between socioeconomic legislation associated with competing interests and protecting the disadvantaged, and the singular antagonist theory itself is unclear. The same case may incorporate a socioeconomic element in addition to a singular antagonist perspective. A case may always involve competing interests, whether it is socioeconomic in nature or not. In addition, the law may protect the disadvantaged

yet still position the government as singular antagonist. It is difficult to discern which factor should prevail when various elements coincide. It is also confusing when the Court concentrates on the right itself, or engages in internal ranking to determine judicial scrutiny for it seems to diminish the reliance on Section 1 and on other established criteria examining the nature of the legislation. Some of the cases previously discussed resolved through a contextual analysis also incorporate various other elements, depending on the perspective one takes. The cases of *Keegstra* and *Taylor* will serve further to exhibit these difficulties.[274]

In *Keegstra*, the Court discussed whether Section 281.2(2) of the *Criminal Code*, the offence of willfully promoting hatred against an identifiable group was unconstitutional (contrary to Section 2(b)). In addition, Section 11(d) was implicated. A reverse onus was placed on the accused which required him to prove a truth defence, violating the presumption of innocence. The criminal defendant, *Keegstra* was a high school teacher who taught his students that Jews had evil qualities.

The Court unanimously held that Section 2(b) and Section 11(d) had been violated, but remained divided on upholding the infringements under Section 1. Dickson C.J., speaking for the majority, held that both restrictions were justified.

Dickson C.J. kept to the spirit of *Irwin Toy* by extending the protection of Section 2(b) to this content-based restriction, regardless of its undesirable nature. He then proceeded to justify the violation of Section 2(b) through a contextual approach, ranking the type of expression at hand. He ranked the content of the expression by its proximity to the core values underlying the right (which in *Irwin Toy* were used just to establish an infringement concerning content neutral legislation). In doing so, he modulated the scrutiny attached to the Section 1 test based on the context of the right itself and its relation to the particular infringement, rather than relying on other criteria.

> ..."The interpretation of Section 2(b) under *Irwin Toy* gives protection to a very wide range of expression. Content is irrelevant to this interpretation, the result of a high value being placed upon freedom of expression in the

> abstract. This approach to Section 2(b) often operates to leave unexamined the extent to which the expression at stake in a particular case promotes freedom of expression principles. In my opinion, however, the Section 1 analysis of a limit upon Section 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity. It is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of Section 2(b)."[275]

In his endorsement of the contextual approach, Chief Justice Dickson applied a deferential Section 1 test to the low ranking expression. He articulated that a limitation on a category of expression which strays some distance from the spirit of Section 2(b) would be easier to justify. His analysis emphasized the necessity of flexibility in a Section 1 analysis. Dickson C.J. also implies that a "free and democratic society" in Section 1 includes other *Charter* rights, finding that expression relating to hate propaganda is contrary to the *Charter* values of equality (Section 15) and multiculturalism (Section 27).[276]

Furthermore, in his analysis of minimal impairment, Dickson C.J. deferred to the legislature, concluding that the existence of alternative measures fighting hate propaganda (although less intrusive on the right) did not make this criminal offence an unreasonable violation under Section 1.

One can see the often predictable Section 1 outcome resulting from the contextual ranking of values within the right. Yet, there are also other elements at play here which might have led to a different conclusion of the Section 2(b) violation. For example, the case involved a criminal offence. From this perspective it can be seen as positioning the government as a singular antagonist against the individual accused, thus invoking a more activist approach. The contextual approach seems to conflict with and dilute this point of view. In addition, this case also involved competing interests and a law protecting vulnerable groups. These factors compliment Chief Justice Dickson's analysis of the danger of hate propaganda and the deferential outcome of his contextual approach, yet are at odds with the aforementioned activist criteria. Certainly, one can see the difficulty in

using the *Irwin Toy* criteria to distinguish cases in order to determine the appropriate level of scrutiny. They are not clear indicators, as they often coincide, creating contradictory approaches.

For example, Justice McLachlin, in her dissent, stated that the Section 2(b) violation could not be justified under Section 1, implying that the nature of this offence required a more activist stance;

> "S. 319(2) of the *Criminal Code* catches a broad range of speech that prohibits in a broad manner, allowing only private conversations to escape scrutiny. Moreover, the process by which the prohibition is affected, the criminal law, is the severest society can impose and is arguably unnecessary given the availability of alternative measures."[277]

Furthermore, this case also involves a violation of a judicial right, Section 11(d). Recall that the Court articulated in *Irwin Toy* specifically that a law infringing judicial rights exemplified the circumstances of the government as singular antagonist of the individual, and thus required a more searching inquiry under Section 1. Chief Justice Dickson, however, deferred to the legislature on this infringement in line with his deferential stance pertaining to Section 2(b). He relied on the importance of not undermining parliament's objective in order to justify the reverse onus clause.[278] Minimal impairment was thus not applied in its activist form. The fact that this law mediating between competing interests served to protect vulnerable groups by preventing hatred of minorities seemed to be crucial to the outcome.[279] Thus, this deferential criteria directly coincided with singular antagonism.

McLachlin J., in dissent, once again, insisted on a more activist approach in line with the singular antagonist criteria (demonstrating the varying perspectives applicable in a case containing contradictory elements). According to her, the reverse onus could not be justified under Section 1. She stated that the presumption of innocence is a central force in criminal law such that only a "countervailing state interest of the most compelling kind" could have justified the violation.[280]

Cases such as *Canada v. Taylor* also demonstrate how the Court may apply a contextual analysis of Section 2(b) culminating in a deferential approach to Section 1 criteria, when the government is actually in the position of singular antagonist.[281] In *Taylor* a particular party had distributed cards encouraging people to call a number which played recorded messages containing hate propaganda against the Jewish people. Although ordered to stop, *Taylor* and his party did not cease their activities, resulting in a contempt order and the imprisonment of *Taylor*. The Supreme Court held that Section 2(b) was violated, but upheld the human rights legislation in question under Section 1.

The difficulty and confusion in approach prevailed again in this case. Dickson C.J. stated (as in *Keegstra*) that the law infringed upon a type of expression which was harmful to other *Charter* values central to a free and democratic society (Section 15 and Section 27).[282] Understandably, this law was protective of a minority group and did involve a low ranking hateful expression (prompting Dickson C.J.'s deferential approach). Yet, the government's action could also be interpreted as that of a singular antagonist requiring an activist approach. For example, McLachlin J., in dissent, took a more activist stance concluding that the provision was too broad. In her opinion, the right was less than minimally impaired.

The following section will further outline the inconsistent application of the singular antagonist criteria in the area of criminal justice, perhaps due, in particular, to the conflictual array of criteria. It will be clear that even in an area of law deemed by the Court as their area of expertise, an area less subject to criticisms based on legitimacy, the Court has given adequate leeway to the legislative function.

2) Singular Antagonism and Criminal Justice - Activism or Restraint?

The activist intentions of the Court in the criminal justice field have been justified by judges' expertise in such matters considered their domain. Even before the distinctions expounded in *Irwin Toy*, earlier cases such as *Motor Vehicle Reference* reflected the Court's willingness to actively review substantive elements of Section 7's "fundamental

justice". This was based on the Court's self-perceived role as guardians of the justice system. Moderation of such activism lay in the Court's self-imposed boundaries. For example, it was stated that the principles of fundamental justice "are to be found in the basic tenets of our legal system". In other words, the requirement of substantive justice would not be applied in the "realm of general public policy". The latter area was distinguished from the justice system where the Court possesses inherent competence to asses the validity of laws.[283]

In *Societé des Acadiens*, the Court claimed, with respect to language rights (previously receiving a wide review) that judges "should approach them with more restraint than they would in construing legal rights".[284] Finally, in *Irwin Toy*, this view culminated in the stipulation that where the government was positioned as singular antagonist to the individual primarily in the area of criminal justice, an activist review (a stricter Section 1 analysis) would take place.

Although the Court has been relatively more activist in the criminal justice area, there are discrepancies in the use of the singular antagonist theory. As just previously expressed, singular antagonism may arise in a case in addition to various other elements which are associated with a deferential approach.

In fact, there are always competing interests in a case, a factor which the Court in *Edwards Books* and *Irwin Toy* associated with socioeconomic legislation as a basis for a deferential application of Section 1. Within the criminal justice area, such societal interests at odds with those of the accused are at the very foundation of the challenged legislation. Often these interests represent those of disadvantaged or vulnerable groups in society, requiring such legislative protection. Thus, although violations of judicial rights, for example, do position the government as singular antagonist of the individual accused, there are other vulnerable interests at play, a factor which the Court articulated as a deferential criteria. Recall that the Court stipulated previously that it would not roll back legislation protecting such vulnerable groups. Although this was expounded in relation to socioeconomic legislation, it cannot be isolated to such cases only. Often, the divided

opinions of the judges reflect these discrepancies in the Court's earlier distinctions. A more liberal view of the state is supportive of an extreme application of the singular antagonist approach, whereas a less liberalist viewpoint will point out the collective needs of certain interests in society and the legislature's protection of such needs against the harm caused by criminal action.[285]

The Court has stated that it would be more activist in the criminal justice area, especially regarding judicial rights. The Court, in *Irwin Toy*, stipulated that a stricter application of minimal impairment may be triggered by the type of right implicated, judicial rights taking priority. This implies, to a certain extent, a hierarchy of rights approach (typical of U.S. limitation theory) despite the Court's verbal rejection of such an approach. In addition, when the Court, in a particular case, gives such primacy to the rights of the accused over the rights of others, it implies that the equality dimension is less protected. As one author puts it, protecting criminals may deny others more vulnerable the equal protection of the law.[286]

The Court's activist intentions in the criminal area seem to correspond more with a liberalist perspective. Cases such as *Hunter v. Southam*, *Motor Vehicle Reference*, the pivotal case of *Oakes*, *Morgentaler*, and, of course, *Irwin Toy*, demanding a strict application of the *Oakes* test in the criminal justice field are exemplary. As mentioned earlier, the expertise of the Court, and the premise that activism in this area is less susceptible to criticisms based on the legitimacy of the Court's role in a democracy seemed to be important factors. As two authors state:

> "Everything that goes into the making of a democratic and therefore worthwhile state by its nature inevitably represents a limitation and hindrance on police and state powers, and the ability to pursue criminals."[287]

The idea is that it is not merely the protection of criminals or the accused at issue, but rather, that all citizens in a democratic state benefit from the *Charter's* legal rights.

> "In other words, the *Charter's* legal rights are the rights of all citizens. Their scope will be delineated by courts in the context of criminal cases because those accused of crime have a powerful, albeit selfish, motive to litigate such issues. But in doing so, those accused of crime really act as surrogate litigators for the entire community."[288]

Such a perspective of the protection of criminal rights is based on certain liberal values enshrined in the *Charter*, focusing on state power as antagonistic to the rights and freedoms of its citizens. It, however, falls short of acknowledging that other more direct competing interests in society, mentioned earlier, are also at play. These are the interests vulnerable to crime, which require the protection of the legislature. From this perspective, the government is not the antagonist, but rather the guardian of other important values.

Consequently, the latter view is what causes the singular antagonist theory, as an activist criteria (for a strict Section 1 test) to falter at times. As well, from this perspective, it is evident that the Court has not been completely relieved, even in the criminal field, of the academic criticism associated with an activist approach.

It is important to note that the use of Section 1 can be tenuous at times regarding certain judicial rights. Certainly, Section 1 has been central in justifying legislative limitations and in overturning legislation based on the singular antagonist perspective. However, concerning rights with built-in qualifiers such as Section 7 and 8, the Court, at times, has found difficulty in finding a law unreasonable at the definitional stage only to then find the measure to be a reasonable and justifiable limit on *Charter* rights under Section 1. Likewise, when the law is considered reasonable at the first stage, Section 1 may seem unnecessary. Thus, the Court has, on occasion, upheld the law without the use of Section 1, or found it unreasonable at the definitional stage, and thus unjustifiable in a rather weak Section 1 analysis.[289] When the Court conducts a balancing of societal interests within a right such as Section 7 (the onus resting on the applicant) it diminishes the focus on Section 1 itself. Such reasoning may still, however, present a challenge to legislators (especially regarding Section 7's fundamental justice).[290] Regardless of whether the balancing of interests takes place at the definitional stage or in a Section 1

analysis, the Court may still be seen as questioning the legislature's judgment especially regarding substantive issues.

However, direct infringements may often be the result of police or other official conduct not rooted in a particular statute. Thus, activism in this area (e.g., exclusion of evidence) may largely be related to the action failing the "prescribed by law" preliminary requirement and does not always touch upon a Section 1 analysis.[291] This has avoided discussions which may be perceived as second-guessing or questioning legislative judgement.

In fact, while the majority of cases (up to 90%) have related to legal rights, most of these cases involve a challenge to officials and administrators not to legislators themselves (e.g., cases involving the right to counsel, warrantless searches, etc.).[292] This has instead provided a check on executive action in the enforcement of criminal law. Yet, even so, the Court has exhibited a moderate activism relating to such issues by admitting evidence at times based on a good faith exception to the exclusionary rule, or as in *Tremblay*, based on the vulgar behaviour of the accused.[293] Generally, the Court has excluded evidence obtained in violation of the accused's rights as "the admission of it in the proceedings would bring the administration of justice into disrepute", (s. 24(2)).[294]

Even when the Court has invalidated criminal laws, many have been procedural in nature, well within the realm of judicial expertise.[295] Thus, the Court's action in the area of criminal justice has often presented less of a challenge to the substantive policy of legislators.

The role Section 1 has nevertheless played in the criminal justice area is rather interesting and reflective of the ongoing conflict between liberal and collectivist views of the state, just previously explained. The inconsistent application of the singular antagonist theory mirrors this conflict, for the Court has continuously swayed between invoking a singular antagonist approach culminating in a stricter proportionality test, and deferring to legislative judgement considering other societal interests. Concerning the latter approach,

the Court has, in such cases, applied minimal rationality standards and has thus refrained from applying the minimal impairment test as it previously advocated it would.

This is not to imply that the Court has not been more activist in the criminal field comparatively speaking, for it has. Yet, the judiciary has, regarding certain issues and rights, retreated from its liberalist stance. It has often failed to invoke the singular antagonist criteria to justify activism, preferring to protect other vulnerable interests in society.[296] Some concrete examples must be given to demonstrate the Court's mixed reaction to protecting the rights of the accused, and particularly its use of the singular antagonist criteria when Section 1 is invoked.

(a) Legal Rights - Jurisprudence - General Activism

The Supreme Court of Canada, like the United States Supreme Court, has considered the rights of the accused of primary importance. It has even, regarding certain areas, been described as surpassing the activism of the Rhenquist, Burger and Warren Court.[297]

For example, the Court has made privacy the core of Section 8, stressing the necessity of a warrant, prior judicial authorization, in order to conduct a search or seizure similar to the United States.[298] However, Section 8 has also been widely defined and protected since *Hunter v. Southam*, beyond that of the United States' Fourth Amendment concerning, for example, electronic and video surveillance, and the manner of execution or entry.[299] In *R. v. Duarte*, the Court rejected the U.S. position concerning participant surveillance.[300] Laforest J. stated that prior judicial authorization is necessary when engaging in electronic surveillance even if one of the parties consents to it.[301] The *Criminal Code* provision authorizing participant surveillance without judicial consent was considered an unjustifiable violation of Section 8 as the police could employ the same techniques with judicial authorization. The evidence was, however, not excluded according to Section 24(2) because the police had acted in good faith. *Duarte* was confirmed by *R. v. Wiggins*[302] and, concerning video surveillance, *R. v. Wong*[303]. The Court has also,

in cases such as *Thompson*[304], refused to follow the United States approach in *Dalia v. U.S.* which allowed secret entry to plant devices without a warrant, if the surveillance itself was authorized.[305] (This leaves the manner of execution and entry to the police.) The Canadian Court will not justify such covert entry, demanding that an authorization list each residence and the type of listening device to be planted.[306]

Furthermore, the Supreme Court has widely defended Section 10(b) requiring that a suspect be advised of his right to counsel and right not to speak upon detention exemplified in cases such as *R. v. Leclair*, *R. v. Brydges*, and *R. v. Elshaw*[307]. The Court has authorized automatic exclusion of incriminating statements and emanating evidence resulting from a breach of Section 10(b).[308] In Canada, detained and arrested people must be advised of this right, detention receiving a wide definition in *R. v. Therens*[309]. In the United States, however, disclosure of the right to counsel (*Miranda*) is only required when there is arrest combined with interrogation under custody in a "police dominated atmosphere".[310] In addition, in Canada, a suspect's right to silence (interpreted under Section 7) has been actively protected. For example, in *R. v. Herbert* and *R. v. Broyles*, the Court ruled that evidence obtained from a detained person through trickery, by an undercover agent or an informant, should be excluded pursuant to Section 24(2).[311]

The Court has also widely interpreted Section 13 of the *Charter* preventing incriminating evidence given by a witness in any proceeding from being used to incriminate that witness in any other proceedings.[312] In *Dubois*, the Court held that a re-trial for the exact same offence can be considered an "other proceeding" resulting in preventing the defendant's testimony in the first trial from being used in the second.[313] In *R. v. Mannion*[314] the Court decided that in addition, the accused's prior testimony cannot be used to cross-examine him at re-trial on the same charge, although the case of *Kuldip* seems to have backed away from this latter ruling.[315] The United States Court has not been so generous in its interpretation of self-incrimination, allowing the accused's prior testimony, in most cases, to be used as part of the prosecutor's case in chief and to be used in cross-examination.[316]

The Supreme Court has additionally applied a high scrutiny regarding issues of criminal intent or *mens rea*, requiring now subjective intent for murder.[317] Section 7, broadly interpreted in *Motor Vehicle Act*, has been effectively used, often in combination with Section 11(d), to overturn various homicide provisions in the *Criminal Code*. In fact, the interpretation of Section 7 has probably presented the largest challenge to legislative action in the criminal justice area.[318] *R. v. Vaillancourt*[319] (requiring at least objective foresight of death) has been followed up by cases such as *R. v. Martineau, R. v. Rodney,* and *R. v. Luxton* which have held that certain *Criminal Code* provisions concerning constructive liability for murder violating Sections 7 and 11(d) were unjustifiable under Section 1.[320] Generally, they reflect that Section 1 is presently not able to save homicide provisions which fail to require subjective foresight of the probability of death.[321]

The Court, furthermore, in the case of *R. v. Logan* held that Sections 7 and 11(d) were violated by provisions allowing convictions of attempted murder based on objective foresight rather than subjective intent.[322] Such laws were found to be unjustifiable under a strict Section 1 test, concluding that objective foresight excessively impairs rights. The Court generally has been quite active concerning Section 7 violations.

Nevertheless, the Court has been viewed, occasionally, as retreating from its liberal stance in the area of substantive criminal law. At times, it has moved away from a focus on subjective fault or culpability regarding certain activities, emphasizing rather the harm to society caused by crime, and the protection of the vulnerable.[323] Perhaps this is due, in part, to criticism of judicial review, even in the area of criminal justice where important societal interests, protected by the legislature, compete with the rights of the accused.

One author comments, for example, in a review of the 1993-94 term:

> "One theme underlies much of the Court's work this term, and that is the evolving view of the Court on the relative importance of subjective culpability and the causing of social harm in assessing criminal blameworthiness. In general, we are witnessing a move away from a focus on individual fault towards more concern with the harmful consequences of crime. This may be a function of a broader trend within the Court,

witnessed over the past decade in constitutional law, and only recently in criminal law: a shift away from a liberal conception of the state."[324]

In *R. v. Creighton* and *R. v. Gosset* the Court accepted the lower requirement for manslaughter; the "foreseeability of bodily harm" rather than demanding objective foreseeability of death.[325] (Manslaughter is not considered a special stigma crime requiring subjective fault. For first degree murder, however, the Court in *Harbottle* maintained the high standard set in *Martineau.*)[326]

The Court has also been deferential to parliament in its recognition of the need for state control of firearms (to protect society).[327] Cases such as *R. v. Gosset, R. v. Felawka, R. v. Hasselwander* and *R. v. Finlay* reflect this.[328] In *R. v. Finlay*, for example, the Court upheld and objective test for careless storage, rather than ruling that the carelessness standard was unconstitutional for lacking an element of subjective fault. The focus in such cases is not on the rights of the accused, but rather on the potential harm to society, recognizing the role of criminal law in protecting the vulnerable against dangerous activities. It imposes a duty on those conducting such activities to take reasonable care.[329]

In *R. v. Naglik*, as well, the Court ruled that the failure to provide necessities to an individual under one's care cannot be considered a special stigma crime.[330] Subjective fault was thus not required, resulting in the provision's validity.

This increasing focus on the harm to society posed by criminal activity and the protection of the vulnerable (discussed in depth in the next section) has not, however, been the consistent approach. The pendulum has, in fact, swayed.[331]

For example, in the recent case of *R. v. Heywood*, the accused's rights were actively defended, resulting in the Court invalidating certain vagrancy provisions designed to protect vulnerable children from sexual predators.[332] The provision was found to be overbroad, restricting liberty more than "necessary", contrary to the principles of Section

7. The Court stated that a violation of Section 7 will rarely be justifiable under Section 1, particularly when the measure is overbroad.

In fact, the majority conducted a very strict Section 1 test, stating that violations of Section 7 can only be upheld under Section 1 during national emergencies and wars.[333] It should be noted, however, that parliament had already adopted a less restrictive provision after the first appeal, before the Supreme Court ruling. Therefore, the Court, in this case, was not, facing the legislature head on.[334]

As alluded to, the Court's activism in criminal law has been less than consistent. In fact, deference has been accorded to legislative judgment in various cases to be discussed marking a retreat from a liberalist standpoint. The Court has often moved away from the idea that legal rights should be actively defended against the state to preserve democracy for all citizens. From this perspective, the Court has shown concern for other competing interests in society protected by legislative policy. Consequently, the Court's reaction reflects concern for its role under the *Charter* and the balance between legislative and judicial power in criminal matters as well (evident in the eratic use of Section 1 criteria). Sensitive to such issues, adequate leeway has been given to the government regarding matters previously declared as warranting an activist reaction.

The Court has thus often acknowledged the legislature's protection of the more vulnerable in society at risk from the harm caused by criminal activity (retreating from the singular antagonist approach). The unclear distinction between singular antagonism and cases involving competing interests or legislation protecting the disadvantaged (associated with socioeconomic matters) becomes evident in light of the following examples.

(b) Legislative Deference in Criminal Justice

The Court has interpreted its Section 1 test to save hate propaganda laws, reverse onus provisions including presumption of sanity laws and prostitution laws.[335] In addition, random traffic stops and roadside breathalyser tests have been defended in the

name of highway safety.[336] Rather than applying a strict analysis of minimal impairment as it claimed it would in *Irwin Toy*, the Court has continuously reiterated the Oakes test, only to apply it in a deferential manner, similar to cases where the government is not considered as singular antagonist to the individual.

To begin with, cases involving statutory presumptions, reverse onus clauses in violation of the presumption of innocence (in Section 11(d)) have not reflected the Court's intended activism, defending instead the interests of fighting crime. Recall that *R. v. Oakes* stipulating the original strict Section 1 test involved a reverse onus clause which was actively struck down. After Oakes, however, before and following the distinctions guiding judicial scrutiny set out in *Edwards Books* and, more specifically, in *Irwin Toy*, the Court has consistently failed to strike down challenged laws involving reverse onus clauses.[337] (subject to few exceptions). Many such laws have been upheld regardless of the existence of less intrusive alternative measures in the form of evidentiary burdens. The Court has also been accepting of arguments of efficiency in its minimal impairment analysis, relaxing the test in a way contrary to its earlier stipulations (inviting criticism).[338]

Only very recently, in the case of *R. v. Laba*, has the Court switched gears to actively protect a Section 11(d) violation in the form of a reverse onus clause.[339] (The Court's inconsistent application of the singular antagonist criteria is thus evident.) The case of *R. v. Genereux* to be discussed also saw the striking down of measures infringing Section 11(d), extreme expertise in this particular matter probably being the motivating factor.[340] The case includes activist remarks consistent with singular antagonism, yet inconsistent with the Court's deferential reaction to the majority of related cases.

In *R. v. Schwartz*[341], not long after Oakes, the accused unsuccesfully challenged a reverse onus provision in the *Criminal Code* which placed a burden on him to demonstrate that he was a certified holder of a restricted weapon. Judge McIntyre held the measure justifiable under Section 1 whereas Dickson J.C. dissented, stating that the right was more than minimally impaired. Judge Laforest, as well, stated that administrative convenience was the basis of this infringing measure and thus it was not acceptable.

Similarly, in *R. v. Whyte*[342], the desire to protect citizens from the adverse effects of drunk driving led the Court to hold justifiable under Section 1 a statutory presumption stating that a person occupying the driver's seat had the care and control, (violating the accused's Section 11(d) rights). Minimal impairment was not conducted severely, in consideration of the serious threat to public safety and the relative importance of parliament's objective. The government's justification did not have to go beyond the importance of the legislative measure. Cases such as *R. v. McNally* followed suit.[343] *R. v. Nagy* also entailing a Section 11(d) infringement, adopted the same deferential approach to minimal impairment considering the escalating problem of break and enters.[344]

The case of *R. v. Chaulk*[345], following that of *Irwin Toy*, directly opposed the distinctions set out in the latter case concerning the level of severity to be applied in a Section 1 analysis regarding such "criminal", "singular antagonist" issues. A minimal rationality standard was applied in place of the carefully designed "component" of the rational connection test. Furthermore, the minimal impairment test was conducted deferentially in consideration of law enforcement efficiency, disregarding the availability of other less intrusive means.[346]

Chaulk involved a challenge to a *Criminal Code* provision pertaining to the presumption of sanity. It contained a reverse onus, placing the burden of proving the defense of insanity on the accused, in violation of the presumption of innocence in Section 11(d). Lamer C.J., writing for the majority, upheld the violation as a reasonable limit under Section 1. Lamer C.J. cited *Edwards Books* and *Irwin Toy* to support his view that parliament was not obligated to choose the truly least restrictive means, and proceeded to determine "whether a less intrusive means would achieve the same objective as effectively".[347] Thus, although the alternative of an evidentiary burden existed, it could obviously not achieve parliament's objective as efficiently. The test applied was whether the means adopted by parliament impaired Section 11(d) "as little as reasonably possible", considerably lowering the government's burden of proof.

The test applied by Lamer C.J. is a far cry from the strict standard applied in Oakes, also dealing with a Section 11(d) violation. What is more is that the Court adopted the deferential approach to minimal impairment, set out in *Edwards Books* and *Irwin Toy*, failing to acknowledge that such an approach was developed in those cases in application to socioeconomic legislation. Examining whether the means impair the right as little as reasonably possible, or whether alternative means are as efficient was never in those cases the type of test applicable to the criminal justice field. On the contrary, *Irwin Toy* specifically articulates that such cases, especially those implicating judicial rights, will receive a strict proportionality test in accordance with the singular antagonist criteria. Even before this, Justice Lamer himself, in *Motor Vehicle*, rejected arguments of administrative expediency which is exactly what "efficiency" implies.[348]

The inconsistency demonstrates the difficulty in applying the singular antagonist criteria as a distinguishing factor warranting activism, when other competing interests exist focussing on the harm criminality poses to society. The legitimacy of overturning protective democratically enacted legislation seems to be of great concern to the Court, affecting their interpretation of Section 1 and the Oakes test. The government, rather than being obligated to prove minimal impairment, has received deferential treatment due to the extreme importance of its duty. Nevertheless, the Court continuously reiterates the standards set out in Oakes, only to apply them in a very different form.[349]

Wilson J. dissented, in *Chaulk*, acknowledging the necessity of applying a stricter standard of review to a case of this nature.

> "In my view, this is not a situation calling for a departure from the strict standard of review set forth in Oakes. On the contrary, the issue on appeal seems to be the quintessential case of the state acting as the "singular antagonist" of a very basic legal right of the accused rather than in the role of "mediating between the different groups" as discussed in *Irwin Toy*. This is, in my view, an appropriate case in which to apply the stricter standard of review on the "minimal impairment" issue."[350]

Judge Wilson stated that the government could achieve their objective by less intrusive means, such as a burden on the accused to adduce evidence marking insanity "a live issue fit and proper to be left to the jury".[351]

Despite Wilson's dissent, the cases of *R. v. Ratti* and *R. v. Romeo* (involving a reverse onus clause pertaining to an insanity defense in the *Criminal Code*) upheld the majority opinion in Chaulk considering the violation of Section 11(d) a justifiable limit under Section 1.[352] This occured despite the existence of less restrictive means.

The case of *R. v. Slavens*, similar to the previous related case of *R. v. Nagy*, also held justifiable under Section 1 legislation violating the presumption of innocence.[353] The Court upheld the infringement under Section 1 due to the interest of society in stopping the increasing occurrence of break and enters. The singular antagonist position was not defended, and once again minimal impairment was not applied according to the original Oakes standard as *Irwin Toy* implied it would be in such matters. The Court, instead, considered whether the means were as reasonable as possible from the legislature's perspective. Efficiency was also a factor considered in upholding the provision, which stated that when an accused is caught breaking and entering, it is proof that he had or intended to commit an offence unless **he** proved otherwise.

Furthermore, the Court has invoked Section 1 to preserve hate laws violating Section 11(d) and Section 2(b), such as occurred in *Keegstra*, previously discussed. Minimal impairment was not applied as the dissent in that case articulated. In addition, a minimal rationality standard was applied in the rational connection test instead of the stricter, carefully tailored approach.[354] The presence of vulnerable opposing interests once again motivated a rejection of the singular antagonist approach.

Prostitution laws challenged in cases such as *R. v. Skinner*, *R. v. Stagnitta,* reference re: Section 193, 195.1(1) C.C. and *R. v. Downey* have been upheld under Section 1 due to the minimal use of minimal impairment.[355] Recall that cases such as the Reference concentrate on "economic" motives and pervasive social evils as factors

motivating deference, rather than viewing the government as singular antagonist to the individual accused. Although a judicial right (invoking the latter approach) was not implicated in this case, such a perspective is still plausible for the government can still be viewed as singular antagonist to the accused in this criminal matter. In any event, the same deferential approach was applied in *R. v. Downey* dealing with a Section 11(d) violation.

In the latter case, the Court concentrated on the interests of society, furthered by the legislative aim (designed to combat the social evil of prostitution) in order to justify the *Charter* violation. The majority thus chose not to follow a liberalist stance. The singular antagonist criteria was not used to invoke a stricter standard of review on the government measure.

R. v. Downey presented a challenge to a *Criminal Code* provision presuming that a person living with, or who is habitually in the company of prostitutes is living on the avails of prostitution, should he not present evidence to the contrary. Cory J., stated that the infringement was minor, applying a relaxed Section 1 analysis. He justified the rationality of the provision based on the importance of the legislative aim (fighting the grave problem of prostitution) applying a minimal rationality test, rather than examining the internal rationality of the measure and the objective. He, furthermore, did not actively apply the minimal impairment requirement.

McLachlin J. dissented, claiming that the Section was overbroad. She applied the rational connection test of Oakes requiring internal rationality, finding that imposing an evidentiary burden on the accused is irrational since living with a prostitute cannot necessarily infer living off the avails. Following *Oakes*, she examined whether the measure was "carefully designed" to detect its overinclusive nature. As well, minimal impairment, in her opinion, was not satisfied, as such a measure violated the right in an overly intrusive fashion.

Similarly, in *R. v. Pearson*, the bail provisions of the *Criminal Code* were upheld under Section 1 despite the reverse onus clause.[356] This case dealt with drug trafficking

charges as in Oakes. Yet, in this case it seems that the societal interest of combatting drugs and reducing repeat offenses let to a deferential minimal impairment analysis in spite of the violation of a judicial right. Once again, McLachlin J. dissented, claiming that the right was more than minimally impaired.

It is evident that the Court has on many occasions abandoned its singular antagonist approach applying a lenient standard of review to criminal cases. Inconsistency becomes more apparent in recent cases such as *R. v. Généreux*[357]. This case focussed on the infringing nature of certain judicial procedures of the general court martial under the *National Defence Act*. Section 11(d) was found to be violated, however, the Court's response to this violation advocated a strict review (as *Irwin Toy* suggests) uncharacteristic of the deferential attitude inherent in the previous reverse onus cases described.

It seems that the judicial process itself was at stake and, thus, the Court's "extreme" expertise in such matters prompted an activist response.[358] Lamer C.J. writes, concerning the Section 1 analysis, that a breach of Section 11(d) could only very exceptionally pass the minimal impairment test:

> "I am of the opinion that a trial before a tribunal which does not meet the requirements of Section 11(d) of the *Charter* will only pass the second arm of the proportionality test in Oakes in the most extraordinary of circumstances."[359]

This is rather inconsistent with the Court's previous deferential judgments. Extreme expertise may have been the motivating force, yet the Court in *Irwin Toy* based its distinctions on the Court's expertise regarding criminal matters and judicial rights in general. One might ask why the Court demonstrated such deference towards previous reverse onus cases. Perhaps, the Court felt extremely qualified in a matter relating to the structure of the tribunal itself even more so than in the previous cases. If so, relying on such a high degree of expertise to motivate activism indicates a diminished reliance on the general distinctions stipulated in *Irwin Toy*. *R. v. Doyle* demonstrated the same activism

as that of Généreux, dealing, as well, with a Section 11(d) violation by a tribunal.[360] The Court, once again, actively applied the Section 1 proportionality test.

Extreme activism was also reflected in the case of *R. v. Seaboyer*[361]. The combination of Section 7 and 11(d) violation was mentioned earlier as a powerful force in the cases discussing the element of *mens rea*. In this particular case, the combined violation resulted in the Court overturning Section 276, the rape shield provision of the *Criminal Code*. This provision prevented the admission of evidence concerning a victim's past sexual history. The Court ruled actively on the side of the accused's rights, emphasizing his right to a full defense at the expense of the victim's protection. The Section 1 proportionality test was actively conducted finding the provision to be overly broad and detrimental to the accused. This controversial finding, although consistent with the singular antagonist criteria, seems nevertheless inconsistent with other deferential rulings in the criminal justice area bent more on protecting vulnerable interests in society.

In the recent case of *R.v. Daviault*, the Court upheld an onus on the accused of proving the defense of extreme intoxication akin to automatism or insanity.[362] The Court did not discuss minimal impairment or alternative means, just citing its judgment in *R. v. Chaulk*. (In addition, however, this case created much controversy in even allowing the expansion of the defense of self-intoxication relating to a serious crime such as rape, disregarding the harm to more vulnerable interests.[363])

The 1994 cases of *R. v. Peck* and *R. v. George* reflect the deferential attitude towards Section 11(d) violations in response to the competing interests of highway safety.[364] *R. v. Peck* involved a challenge to Section 254(5) of the *Criminal Code* which contained a reverse onus, demanding that the accused provide a reasonable excuse to enable him to refuse a breathalyser test. The provision was nevertheless saved under a relaxed Section 1 test based on the pressing nature of the legislative objective concerning the prevention of drinking and driving. The government's burden under minimal impairment was thus substantially reduced by the Court once again, in light of the substantial legislative goal.

The prevention of drinking and driving as a pressing and substantial legislative goal also diluted the Court's analysis of minimal impairment in *R. v. George*. As in the previous cases of *R. v. Whyte* and *R. v. McNally*, in this case the Court upheld, under Section 1, a *Criminal Code* provision presuming care and control of a vehicle when in the driver's seat.

Nevertheless, the most recent case of *R. v. Laba* unpredictably overturned a legislative provision infringing the presumption of innocence.[365] The Court cited the singular antagonist position in its Section 1 analysis, something it has been reluctant to do in the past, with the exception of its dissenting opinions.

R. v. Laba involved a challenge to Section 394(1)(b) of the *Criminal Code*, imposing a persuasive burden on the accused to prove he was the owner of minerals when he sold them. Sopinka J. stated that this was a case involving a fundamental legal right, where the government could be characterized as the singular antagonist of the individual accused. The existence of less intrusive means such as an evidentiary burden was an important factor, unlike in the previous cases discussed (placing, in this case, a higher burden on the government). Suddenly the Court made it clear that the consideration of less intrusive measures would have to be at least examined before a reverse onus law could be considered as justified under Section 1.[366]

Some confusion remains, however, as Sopinka J. reiterates the Oakes test in its original format, yet does not apply it exactly as such. Evidently, he does recite the *Irwin Toy* singular antagonist criteria, and is more stringent than the deferential aforementioned cases. Yet he still does not apply an internal rationality test and he interprets minimal impairment as whether the restriction limits the right as little as reasonably possible rather than as little as possible.[367] Sopinka mentions the reformulation of the third component of proportionality in *Dagenais* (previously explained), yet the case is not affected by this test, minimal impairment being the usual focus.

The interest of highway safety just previously mentioned in relation to reverse onus clauses has also been given primacy over the protection of judicial rights such as Section 9, the right to be protected against arbitrary detention and at times Section 10(b) as well. Section 1 has been invoked and applied deferentially to save violations of such rights, regarding random stopping of vehicles and roadside breathalyser tests. In this area, the Canadian Court has rejected American precedents favouring the accused.[368]

In *R. v. Hufsky*, for example, the Supreme Court upheld a provision allowing random stop checks as part of a program to ensure highway safety.[369] This violation of Section 9 was found to be justified under the deferential Section 1 analysis.

In *R. v. Thomsen*, a Section 10(b) violation was deemed justified under Section 1.[370] It dealt with a *Criminal Code* provision implying that the opportunity to contact counsel would not be given before a roadside test. Furthermore, in the recent case of *R. v. Mitchell*, the Court upheld under Section 1 roadside screening tests in violation of Section 10(b), deferring to parliament's intention.[371]

The case of *Ladouceur* is most revealing of the Court's deferential treatment of Section 1 in cases containing a singular antagonist element, coupled with the competing interest of highway safety.[372] In this case, the police officer stopped the accused's vehicle randomly to check for required documents, finding that his license was suspended. The stop, however, was not part of an organized program as in *Hufsky* but rather "a roving random stop". The Court rejected American jurisprudence such as *Delaware v. Prouse*[373] which disallowed such random type stops, stating that although a Section 9 violation had occurred, the provincial highways legislation allowing arbitrary detention was justified under Section 1 (the Court, focussing on the interests of safety). The case of *R. v. Wilson* also justified an arbitrary random vehicle stop under Section 1 citing the case of *Ladouceur*.[374]

The Court, however, has been stricter when random stops involve warrantless searches of vehicles violating Section 8 of the *Charter*, as occurred in *R. v. Mellenthin*[375].

Random stops violating Section 8 or 9 are justifiable under Section 1 when they are conducted in the interest of highway safety. However, if a vehicle is stopped solely based on the suspicion of a police officer who wishes to examine the contents of a vehicle and not for the purpose of highway traffic enforcement and safety (a purpose considered a justifiable detention under the statute) the Sections 8 and 9 violations are not justifiable. Furthermore, the evidence may be excluded under Section 24(2). Such was the result in the recent case of *R. v. Montour.*[376]

The Supreme Court of Canada has also, at times, declined from adhering to a singular antagonist perspective regarding regulatory matters, in line with a "contextual" type approach towards infringements.[377] Certain opinions in the case of *R.v. Wholesale Travel* reflect this.[378] In addition, although the Court has been relatively activist in relation to warrantless searches violating Section 8, the case of *Thomson Newspapers Ltd. v. Canada* indicated that the Court would be more deferential in matters relating to regulatory inspections.[379] The recent case of *Comité Paritaire* indicates this as well.[380]

The case of *Wholesale Travel* concerned a challenge to a provision of the *Competition Act* in relation to Section 11(d) of the *Charter*. The measure established an offense of false or misleading advertising with the onus on the accused to demonstrate due diligence. Justices Cory and L'Heureux-Dubé cited (at the definitional level) the contextual approach and the prior case of *Thomson Newspapers* to support the opinion that legal rights may have various meanings depending on the context of the infringement, distinguishing between regulatory offenses and "true criminal offenses".[381] They then resorted to a definitional type exclusion by finding no infringement.

Other Justices did not expound on this dichotomy or internal limitation, yet within a deferential Section 1 analysis upheld the provision declaring the offense a significant public welfare regulation which should not be struck down. The Section 1 test did not demand internal rationality. As well, the minimal impairment test focussed on the effectiveness of the reverse onus clause versus other alternatives in attaining the objective,

rather than adhering to a least restrictive approach. Their comments reflect the idea relayed in *Irwin Toy* concerning the deferential attitude of the Court towards protective legislation in society, which in that particular case was connected to allocative socioeconomic regulation and not to matters involving judicial rights. In this particular case, a judicial right was implicated in addition to a protective socioeconomic element, exposing the potential confusion in applying the criteria for judicial scrutiny. Here the singular antagonist criteria was evidently not given prime consideration.

Furthermore, the case of *Thomson Newspapers* previously mentioned concerned a challenge to a provision of the *Combines Investigation Act* which permitted an order requiring a person to be examined under oath, and to supply business records. Although faced with a Section 13 and Section 8 violation, the Court once again did not follow an activist approach, focussing instead on the "regulatory" or public welfare aspect of this offense and the societal interests served by it. (within the Section 8 analysis)

For example, L'Heureux-Dubé J. stated,

> "The purpose of the legislation under attack is not to be overlooked in the balancing to be done under s.8. In the specific context of anti-combines legislation, this purpose is especially important since it strikes a fundamental element of our society, free competition in a market economy. The public interest in the eradication of practices inhibiting free competition must be balanced against the rights of each individual to be free from unwarranted state intrusion into their lives. There is no doubt in my mind that public interest in the freedom and protection of citizens in the market-place prevails over the minimal infringement of the privacy interests of those required to disclose information of an economic nature."[382]

Wilson J., however, dissented advocating more protection for the individual against the use of his testimony, and stricter requirements for the production of documents. Wilson J. refused to acknowledge that legislation authorizing an unreasonable search and seizure could be justified as a reasonable limit under Section 1. In her opinion, minimal impairment was not satisfied.

The case of *Comité Paritaire de l'Industrie de la Chemise v. Potash* confirms a deferential trend regarding judicial rights violations based on regulatory offenses, supporting the distinction between such offenses and true "criminal offenses". Additionally, it expounds on the protective nature of the infringing regulation, towards vulnerable groups in society.[383] As one author states:

> "It (*Comité Paritaire*) also confirms the court's reluctance to extend the liberal paradigm of *Hunter v. Southam* to regulatory contexts and its increased concern about the practical effects its judgments will have on the legitimate activities of the state."[384]

In fact, the Supreme Court was quite deferential to the legislature in this case by ruling that probable cause was not required before regulatory inspections. The case involved the Quebec Act Respecting Collective Agreement Decrees, which allowed parity committees the power to inspect workplaces and hold investigations to ensure that a collective agreement decreed by the legislature to apply to all employees (non-union ones as well) in a specific sector will be implemented properly.

In *Comité Paritaire* parity committee inspectors for the shirt industry responded to an allegation that a sub-contractor of a manufacturer was not paying its employees. The committee proceeded to apply their investigative powers and were challenged by a claim that the ACAD infringed upon Section 8 of the *Charter*. The Court unanimously decided that the searches and seizures authorized by the ACAD were reasonable and did not violate Section 8 of the *Charter*. The court thus responded by employing a definitional exclusion within Section 8 as L'Heureux-Dubé J. and Cory J. did in *Wholesale Travel*. Recall that applying a contextual type analysis at the definitional stage, establishing a dichotomy between regulatory and criminal offenses, led to the conclusion that no violation had occurred.

Since the reasoning took place at the definitional stage (within the right itself) establishing that no infringement had occurred, a Section 1 analysis became unnecessary. Nevertheless, the Court's reasoning within Section 8 contained a balancing of interests, and the use of a specific criteria set out in *Irwin Toy* used in that case to invoke a deferential

stance under Section 1. The Court characterized the ACAD as regulatory legislation created to protect a "vulnerable group" (*Irwin Toy* specifically refers to vulnerable groups), particularly those employees in small businesses with less unionization.[385]

It seems that the Court's contextual type distinctions of infringements within judicial rights has resulted in more deference to the legislative body, and the use of definitional exclusions. It reflects the Court's concern over the legitimacy of their role and a collectivist perspective based on the protective nature of government regulation in society. Additionally, such cases portray the coinciding nature of the criteria for activism and deference even though a Section 1 analysis did not take place.

Generally speaking, it is clear that although the Court has often espoused activism concerning matters of criminal justice (based on a sense of expertise and/or liberal conception of the state) it cannot be accused of usurping legislative power. Clearly, various factors mitigate the Court's intrusion on the legislative domain in this area of law. As mentioned, although the majority of cases do involve legal rights, many cases do not directly challenge legislative goals and often exclude Section 1 considerations. Furthermore, even when laws are directly challenged, the Court has exhibited a mixed reaction to its perception of the government as singular antagonist to the accused.

Even those who may view an activist judicial role in the criminal justice field as democratically intrusive (contrary to the more liberal view described earlier) may rest their fears, for the reality is that the Court has exhibited a moderation of its activism in this area in consideration of other societal values. As discussed, this results from the potential conflicting array of criteria which may support both activist and deferential reasoning, depending on the varying judges' perceptions.

This has led to a rather inconsistent approach to the criteria originally espoused by the Court. Nevertheless, the Court's approach lends support to the view that legislative goals have been given more than fair consideration in an effort to achieve a balance between judicial and legislative authority in constitutional adjudication. Not only has the

Court contributed to this balance by deferring to legislative judgment in matters of societal policy,it has also often tempered its activism in the area of legal rights.

The following section briefly examines the United States experience with limitations on rights, and its similar efforts and concerns with striking a balance between the judicial and legislative role. Although such is established with a different approach and in a different historical context, similarities will be apparent. This will indicate, more or less, the United States influence on Canadian theory, despite the fact that the genesis of Canada's limitation clause was inspired by those of existing international covenants.[386] Limitations theory in Canada has reflected influence from United States as well as European jurisprudence.[387]

IV. LIMITATIONS THEORY - A VIEW FROM THE UNITED STATES

As alluded to earlier, the United States Supreme Court has been struggling for many years to establish a balance between actively enforcing rights and deferring to legislative democracy. Limitations theory in the United States reflects this struggle and has largely influenced the development of limitations in Canada, despite textual and historical differences.[388]

A. Absence of a Limitations Clause

In contrast to the Canadian *Charter* and to international human rights instruments such as the *European Convention* and the International Covenant on Civil and Political Rights, the American Bill of Rights contains no limitations clause. Rights are thus expressed in unqualified terms. The difficulty, of course, lies in the fact that legislation often promulgates objectives and values which may infringe upon guaranteed rights. Unlimited rights are irreconcilable with the normal course of law-making in a democracy.

In light of competing societal values, and the absence of an explicit guideline or provision to head off this "collision of objectives", the Supreme Court of the United States

has employed what can be called "judicial legislation", enabling the Court to uphold laws which have placed limits on the freedoms set out in the Bill of Rights.[389] They have acknowledged that rights cannot be absolute and have thus implied qualifications on the rights in order to accommodate, for example, legitimate restraints on free speech and legitimate distinctions between different groups.

> "For example, a guarantee of "equality before the law" or equal protection of laws must be qualified to accommodate laws which treat special groups specially for legitimate reasons, and a guarantee of "freedom of speech" must be qualified to accommodate laws against sedition, obscenity, fraud, official secrecy, defamation, deceptive advertising, etc."[390]

Nevertheless, laws may often be controversial, and therefore, certain tests and standards have been created and applied by the courts to determine if these laws can be upheld as valid limitations on guaranteed rights. These standards, yet to be discussed, bear resemblance to the evolving standards in Canada. Practically speaking, it seems that the lack of a limitations clause does not create a situation radically different from the position with such a provision.[391] Although an explicit clause does offer some general guidelines and standards, it does not, as the Canadian experience reveals, free the Court from the necessity of establishing often complex tests and criteria to interpret the provision itself.

An explicit clause such as Section 1 does, however, authorize "external limitations" on rights, thus avoiding the controversial absolutist theory which arose in the United States concerning the legality of actually limiting constitutional liberties. The textually based doctrinal argument emphasizes that since constitutional rights operate as fundamental law, the government cannot legally limit constitutional rights[392] (although such a statement may collide with majoritarian democracy).

In *Marbury v. Madison*, the foundational case establishing judicial review, Chief Justice John Marshall argued that when a constitutional right and a congressional enactment are in conflict, the judiciary is obligated to follow the constitution. He stated that denying this conclusion would enable the legislature "to alter the constitution by an ordinary

act".[393] Of course, this argument becomes more tenuous when rights are expanded in meaning by the courts.

"Absolutists" in the United States rely on these arguments to assert that no limitations on constitutional rights are proper, a situation which could not occur in the presence of a limitations clause. Absolitists refute the belief outlined above that rights cannot be absolute. They deny the legality of American courts adopting interpretations similar to those of the European courts which rely on limitation clauses.[394]

Although absolutism does focus on the primordial nature of the constitutional right, many absolutists have, in fact, accepted and devised definitional "limitations" to accommodate the legislative function.[395] This actually results in a situation not dissimilar to the outcome of a deferential justificatory analysis. In fact, a wider definition of the right and a strict standard of review could perhaps better protect the right, yet this would more directly imply that "limits" on rights themselves are acceptable.[396]

This theory, accepting that rights may have definitive limits, leaves as the central task the determination of the content of fundamental rights, considering the justifiable meaning of the right itself. This eliminates any inquiry into the consideration of other societal values unrelated to the rationale of the right (as a Section 1 analysis requires). Thus, there can be no external limitations, as in justifiable laws reflecting other important values. This leads us to conclude that certain laws in relation to that right (although restrictive) may still be considered constitutional for the legislator's action only constitutes a clarification as to the limitations of a fundamental right which exist anyway.[397]

What this demonstrates is a highly definitional approach limiting the scope of the right itself (a situation more compatible with strict constructionism). By concentrating on the formulation of the right and its content, it has overlooked that the actual practical result is a narrower definition of the right, and the acceptance of limitations which are just "not facially directed at suppressing the right". The legal issue becomes whether the challenged law limits the type of conduct the right protects, not whether the government adequately

justifies the limit.[398] It is almost a question of semantics, for in reality definitive limits are a form of limitations, albeit not at the justificatory level. Extreme absolutism, however, may deny many definitional limits thus leading to a different conclusion.

There are, however, some practical considerations espoused by such theorists. They claim that legal justifications may encourage an improper use of limitations. Whereas, firmly establishing a right encourages officials and legislators to be responsive and to find solutions consistent with the boundaries of the right, thus diminishing the social problem. As well, they stress the courts' inadequacy in identifying proper justifications for limitations, particularly when it comes to protecting minorities or dissidents in times of stress (as judges are swayed by the same passions as the rest of the community).[399]

Furthermore, aside from the professed illegality of justificatory limitations, the danger of a law or external limitation weakening the right is emphasized. Professor Hogg touches upon this notion with regards to Section 1 of the *Charter*. He notes that during the public debate preceding the adoption of the *Charter*, there was controversy about the desirability of a limitations clause, as activists felt that it weakened the *Charter* rights. However, he contradicts this argument by finding merit in admitting that rights are not absolute. Section 1, he states, could serve to strengthen rights if it were interpreted as imposing a strict requirement of justification, difficult for the government to discharge[400] (as in *Oakes*). The fact that the onus rests on the government at the justificatory level is also a factor to consider in relation to definitive limits.

It seems to be overlooked by certain theorists in the United States that a demanding test such as the strict scrutiny test, based on a justificatory type analysis like Section 1 imposes, could actually protect a right equally well as declaring a right absolute and only subject to its own scope of existing limits. Aside from strict absolutists who may only marginally accept certain definitive limits, those theorists bordering on a more definitional approach may go too far in ruling out a certain aspect of the right from the protected guarantee (resulting in a "restrictive" law remaining intact). Yet, an initial wide view of the right, and a strict justificatory analysis may have found the law to be an unreasonable

limitation, thus protecting the right more so and at the very least giving it an actual wider interpretation.

Although the theoretical considerations in the United States are quite interesting, from a practical perspective the United States judiciary does, in fact, apply a justificatory type analysis to limitations of guaranteed rights (although definitional limits are more predominant in the United States than in Canada). It does employ a levels of scrutiny test based on the premise that rights are not absolute and must be limited. The "government" (following a state action doctrine) can justify a limitation yet the onus on the government varies with the context, depending particularly on the nature of the right itself and the type of classification at issue. The Court basically must balance concerns: the negative impact of the restriction on the right against the societal goal achieved by it, a balancing of competing interests employed in Canada as well. Thus, even without a limitations clause, the Court may uphold an adequately justified infringement, making policy judgments on the ends, and examining the means employed: a proportionality test.[401]

The absence of a limitations clause has nevertheless provoked the adoption of internal limitations characterized by definitional type exclusions and the internal ranking of interests within the right, predetermining the level of scrutiny.[402] It is a contextual type analysis based on the nature of the substantive right at issue. Although an external limitations clause such as Section 1 seems contrary to definitional limitations and rank ordering within a particular provision, it is evident from the previous section that the Canadian judiciary has increasingly made use of such internal limitations as well.

B. U.S. Influence on Canadian Limitations Theory

It may seem ironic that a country whose *Charter* contains a limitation clause has been influenced in its interpretation of certain criteria by a country whose constitution contains no limitation clause. Yet, in fact, the Canadian Court has been influenced by the tests and interpretations employed by American courts. Consequently, similarities in application and interpretation of *Charter* dispositions may result from this influence even

regarding limitations, despite the absence of a limitations clause in the United States. It is important to note that comparative law can play an important and useful role in general *Charter* interpretation, and the influence of the United States' experience has indeed been recognized by Canadian authors and courts:

> Pour justifier l'utilité et l'opportunité de recourir au droit comparé, les motifs de nature pratique suffiront et ils ne manquent pas. C'est ainsi que la cour suprême Canadienne a souligné a propos du recours au droit constitutionnel des Etats Unis, que ce pays possède une charte des droits et libertés depuis près de deux siècles déjà et que les tribunaux Américains ont par conséquent eu le temps d'accumuler une expérience dans ce domaine que les juges canadiens peuvent utilement mettre en profit.[403]

Judge Estey states this in *Law Society of Upper Canada v. Skapinker*:

> Les tribunaux américains ont presque deux cents ans d'expérience dans l'accomplissement de cette tâche (l'interpretation et l'application des dispositions de la constitution) et l'analyse de leur expérience offre plus qu'un intérêt passager pour ceux qui s'interessent à cette nouvelle évolution au Canada.[404]

The justification of the legitimacy of the recourse to American experience in constitutional interpretation can be based on the argument of "Le contexte d'adoption immédiat". The argument reflects that the *Charter* was not adopted in an intellectual or ideological vacuum, but rather in a context where the existence of certain national or international human rights instruments were known and served as models to imitate or even to avoid a certain area of foreign development.[405] Turp denotes three types of proof demonstrating that a foreign instrument served as a source of inspiration to the writers of the *Charter*: similarity of language, preparatory parliamentary documents, and earlier *Charter* versions.[406] These foreign texts, including the practice and the jurisprudence which interpret and complete them, can help to interpret *Charter* dispositions where they are not clear in order to aid in finding the intention of the constituent. An absence of similarity in text or terminology can often be compensated by the jurisprudence which interpret the workings of the human rights instrument, for a recourse to comparative law may be done taking into account other sources of law susceptible of adding to or of modifying the constitutional text of reference, the main source being the jurisprudence.[407]

The foreign constitution which most inspired the *Charter* is the United States Bill of Rights[408], although the text Section 1 was modeled after international instruments such as the *Internatinal Covenant on Civil and Political Rights* and the *European Convention.* In effect, Canadian courts frequently refer to international and national comparative law, the American jurisprudence being the primary source of comparison in the application and interpretation of the *Charter.*[409] Canadian courts have drawn upon American experience to determine certain rules of interpretation of the *Charter* and to delimit the scope and content of its dispositions. For example, the United States jurisprudence has decided on a large and liberal interpretation of rights and freedoms. The Supreme Court of Canada has twice referred to the same American case, *McColloch v. State of Maryland*[410], in *Law Society of Upper Canada c. Skapinker* and *Hunter c. Southam* to support a principle of a large and generous interpretation of the *Charter* rights.[411]

The recourse to comparative law (international and American) has also found use in determining the direct interpretation and scope of Section 1 itself. The interpretation of the limitation clause is of particular importance. The scope (whether it be wide or restrictive) given to this disposition actually determines the force of the rights and liberties of the *Charter* in the measure where it is Section 1 which defines the restrictions on the rights which are permitted.[412]

The levels or method of scrutiny derived will affect the degree of rights enforcement regardless of how wide the initial definition of the right may be. In the United States the level of scrutiny is based on the nature of the right. As a result, certain rights will not have the same degree of force due to the lower level of scrutiny applied to them. In Canada, although American influence will be evident, the degree of scrutiny does not systematically depend on the nature of the right. There are differences.

American jurisprudence has certainly produced enormous conceptual material aimed at defining limitations on guaranteed rights, particularly the nature and degree of control exercised by the courts regarding restrictive laws. Since these theories all stem from the courts, as the Bill of Rights contains no limitation clause, it is impossible to say that the

Bill of Rights served as a model for Section 1 of the *Charter*. There is thus some hesitation concerning the recourse to American law in the interpretation of Section 1. Yet, the fact remains that the writers of the *Charter* must have known of the American jurisprudence,[413] and Canadian courts have often relied on American jurisprudence for guidance. For example, in *Quebec Association of Protestant School Boards c. P.G. du Quebec*, the Court in interpreting the concept of reasonable limits was influenced by the American theory of "least drastic means".[414] The criteria of minimal impairment later reflects this influence. In *Big Drug M Mart Ltd.*, Judges Dickson and Wilson referred to American cases; *Braufeld v. Brown* and *McGowan v. Maryland* to analyze the importance of the purpose and effect of legislation in determining its constitutionality: "This approach to the relevance of purpose and effect are explicit in the American case."[415] Later, *Irwin Toy* referred to the passages in *Big M Drug Mart*. As well, generally the criteria of the objective and proportionality test interpreting Section 1 reflect American influence. In fact, the *Oakes* test is very similar to specific tests established by the American courts. The Canadian Supreme Court has directly noted the similarity in the case of *Ford v. Quebec* dealing with commercial freedom of expression. The Court referred to the U.S. case of *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*. After reiterating the test established in this case which determines whether a regulation of commercial speech is consistent with the First Amendment, the Court stated:

> "It has been observed that this test is very similar to the test that was adopted by this Court in *R. v. Oakes*, (1986) 1. S.C.R. 103, for justification under s. 1 of the *Charter*."[416]

Furthermore, recourse to the American experience is also relevant in determining what norms are appropriate in a free and democratic society resulting in similar solutions.[417] Additionally, the contextual approach and generally the internal ranking of interests resemble American limitations theory.[418]

A true adoption of the American model does involve a hierarchy of the *Charter* rights and freedoms. Although this has not been established in Canada, it will be evident in this study that the Canadian Court has employed similar concepts to the United States,

in its interpretation of Section 1, whether the recourse is specifically mentioned or not. With the evolution of the *Oakes* test, and the more flexible interpretation of Section 1, the Canadian Court reflects in various cases the American concept that some infringements are more severe than others and that the severity of judicial control may vary allowing for deference to the legislature.[419]

Although there may be a certain affinity which has evolved between our interpretation of Section 1 and the United States criteria in defining and testing limitations, differences do, in fact, persist. In outlining the judicial levels of scrutiny in the United States (particularly concerning the 14th Amendment) in relation to the analysis of Section 1 reflected in the *Oakes* test and recent Canadian jurisprudence, the similarities and differences may be well established. Freedom of expression will later be examined as a source of comparison.

C. The Evolution of Levels of Scrutiny

In the United States, by the mid-nineteenth century, the dominant view held that the Court's role in constitutional interpretation was extremely limited, and any rational decision of the legislature should be respected.[420] Deference to the legislature was applied even to individual rights such as freedom of speech. An example is *Gitlow v. New York* where the Court declared that there is always a presumption of the validity of a statute, and statutes may only be overturned when they are arbitrary or unreasonable.[421]

However, the nineteenth century was also marked by a new approach to limitations theory. This was the concept of economic substantive due process, characterized by a non-deferential judicial review in areas of economic regulation. From 1890 to 1937, the Supreme Court was activist in protecting property rights and contracts. In fact, the use of the due process clause by the Court obstructed economic recovery and reform, blocking Roosevelt's "New Deal" social reform program. Due process was enforced as a guarantee against "arbitrary" deprivation of life, liberty and property stemming from the liberal ideal. By the mid-1930s, however, this view was near demise.[422]

1) Strict Scrutiny

At this time, a new form of judicial review was developed. In 1938, the Carolene Products case upheld the demise of economic due process.[423] Yet, the Court stipulated that there may be a narrower scope for the presumption of constitutionality resulting from a more searching judicial inquiry, or heightened scrutiny when legislation expressly restricts certain fundamental rights or discriminates against certain groups. Examples given were: (1) when legislation appears on its face to violate a specific prohibition of the constitution; (2) classifications which restrict the political process; (3) when prejudice is directed at "discrete and insular minorities... which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities".[424]

This notion was accepted by the Court and the 1950s and 1960s were marked by judicial activism regarding certain rights and issues: the right to vote, content-based expression, freedom of association, religion, equality, judicial rights and privacy. The general and vague concepts in the Bill of Rights were expanded by the Court through progressive interpretation of rights, often criticized as subjective evaluation crossing the lines of legal reasoning.[425]

The Warren Court battled racial segregation based on equality. Criminal defendents' rights were expanded, and the Burger Court expounded the famous decision in *Roe v. Wade* (legalizing abortion) "interpreting" into the constitution (due process) a right to privacy.[426] The court stated in 1978 in *Landmark Inc. v. Virginia*

> "deference to a legislative finding cannot limit judicial inquiry when rights are at stake.. Were it otherwise, the scope of constitutional rights would be subject to legislative definition, and the function of the constitution as a check on legislative power would be nullified".[427]

This statement, however, cannot be generalised for the modern Court based on the foundation of Carolene Products was to be characterized by an "extraordinary variance in the degree of deference accorded by the courts to legislative judgement from one case to

the next".[428] The Court gradually established balancing tests and refined the levels of scrutiny analysis.

Concerning equal protection, the Court faced problems of classification, since the 14th Amendment and 5th Amendment (due process clause)[429] did not give the courts much guidance as to what kinds of classifications should be scrutinized. This is in contrast to Section 15(1) of the *Charter*, which at least sets out certain categories which merit careful inquiry into the reasons or purposes behind a law which makes such classifications. The Court, thus, was left to decide what grounds were to be covered and the degree of scrutiny applicable. The landmark case of *Brown v. Board of Education* invalidating the "separate but equal" doctrine declared segregation unconstitutional.[430] The Court stated that race was not a rational basis for classification in matters of education (later extending this to public transportation, public housing and public recreation). This case reflects the evolution of the most rigorous level of control; the strict scrutiny test involving suspect classifications such as race and ethnicity which was extended to include national origin, alienage, and religion (based on Carolene Products "discrete and insular minorities").[431]

Such classifications are said to be based on "naked preferences motivated by government hostility or indifference to disadvantaged groups".[432] Strict scrutiny also applies when the threatened rights are part of a category of liberties considered fundamental, such as the right to vote, access to the courts, judicial rights, mobility rights, the right to privacy, and free expression.[433]

Regarding suspect classifications and certain fundamental rights, the Court demands that the government justify the law by demonstrating a primordial objective, serving a compelling or overriding state interest that cannot be achieved by less restrictive means. In other words, the law must be precisely and narrowly tailored, the means being necessary to achieve those interests. The law must be neither overinclusive nor underinclusive.[434]

2) Intermediate Scrutiny

Since the early 1970s, an intermediate level of review has been added to the analytical framework. It has generally applied to classifications based on gender and illegitimacy.[435] There is uncertainty at this level as it is not always clear what "quasi fundamental rights" or "quasi suspect classes" will give rise to the middle level, or what this intermediate level will be.[436]

Discrimination based on sex, which in Canada is an enumerated ground in Section 15 of the *Charter*, was not within the framer's intended coverage of the constitutional provision. Sex has thus been analogized to discrimination based on race (the original intended coverage of the provision, protecting blacks from inequality). Parallels were drawn between the way women and blacks have been treated historically, to support a higher scrutiny. For example, women have suffered a lower social status, have been excluded from opportunities and have experienced powerlessness. In addition, race and sex are both immutable characteristics.[437] Although sex presently is not considered an inherently suspect ground, cases such as *Frontiero v. Richardson* have treated it as such.[438]

This middle level scrutiny requires that the contested measure serve an important, rather than a compelling governmental objective, and that there be a "substantial relation" between the reasons and the objective, evident in the case of *Craig v. Boren*.[439] More recently, in *Mississippi University for Women v. Hogan*, and *Heckler v. Mathews*, the Court has expressed a seemingly more stringent formulation of the test stating that the government must demonstrate "a legitimate and exceedingly persuasive justification for the gender-based classification, and show the requisite direct and substantial relationship between the classification and the important objectives it purports to serve".[440]

3) Minimal Scrutiny

A minimal scrutiny review applies to those laws not fitting the requirements of the first two categories. It is a test under which a challenged law will virtually always be upheld. All that is required is a rational link between a classification and the state

objective. The modern Court most often requires that "a challenged statute" bear some rational relationship to a "legitimate state end", and at times, permissively states that the statute will be set aside "only if based on reasons totally unrelated to the pursuit of that goal".[441] However, it sometimes cites a more restrictive 1920 formulation of the test, requiring that the classification "rest upon some ground of difference having a fair and substantial relation to the object of the legislation".[442]

Minimal scrutiny offers maximal deference to legislative judgement. The U.S. Supreme Court has held that legislatures must have latitude to establish classifications that roughly approximate perceived problems and accommodate competing concerns.[443] This usually applies to social or economic regulation (Carolene Products) preventing excessive judicial interference in economic matters. The minimal rationality test allows the Court to defer to legislative judgement, in response to arguments based on the "anti-democratic" nature of the Court, and the appropriate allocation of authority between the judiciary and the legislature.

In addition to commercial regulation, age as a basis of discrimination has been placed in this minimal scrutiny category. This was decided in 1976 in the case of *Massachusetts Board of Retirement v. Murgia*[444]. The Court upheld a state law requiring mandatory retirement of police officers at the age of fifty.

It is evident that the criteria for limitations set up by the United States Supreme Court have reflected a hierarchy of rights and classifications. The degree of deference varies from on constitutional provision to another, and from one issue to another under the same provision.[445] The Court has tried to set up objective criteria in their evaluation and has more or less attempted to achieve a balance between activism and restraint. Generally, the criteria modulating the level of scrutiny are the nature of the right and the type of classification.

The three levels of scrutiny approach has, however, been viewed as rigid and predictable. Rights and classifications have been categorized to fall under one of the three

levels of scrutiny. This classification is of central importance for it almost predetermines the outcome of the analysis. For example, a rigorous high scrutiny will virtually always lead to the invalidity of the contested measure, whereas use of the minimal rationality test assures that the law will be found justifiable, due to its high degree of deference. The intermediate scrutiny developed in the 1970s applies less often and the outcome is not as easy to predict.[446]

D. Canadian Comparison

1) Similar Concepts

In the *Oakes* case, the Supreme Court of Canada was definitely inspired by the jurisprudence of the American Supreme Court, particularly in elaborating the three elements of the criteria of proportionality, although there are differences in application.[447]

Woehrling explains that there is similarity in terminology and criteria with that of the United States. For example, with regards to the characteristics that the means used by the legislature must present, Chief Justice Dickson expressed the necessity of rationality, a rational link between the means and the objective pursued by the legislature. This is quite similar to the "rational" criteria present in the minimal scrutiny test in the United States explained above. Furthermore, in *Oakes*, Chief Justice Dickson's stipulation that the means "should impair as little as possible the right or freedom in question" is actually the test required in the strict scrutiny test in the United States. The third level of the proportionality test, dealing with the prejudicial effects of the measure on individuals or groups, seems to correspond with the substantial link characterized by the medium scrutiny test in the United States,[448] although the correlation is not perfect.

However, the main difference between the criteria of the *Oakes* test and that of American jurisprudence is that in each particular case, Chief Justice Dickson's requirement of rationality, minimal harm, and proportionality are cumulative, not allowing for the alternative use of the criteria depending on what right is being abridged or distinction

made, as in the United States.[449] The *Oakes* test lacks flexibility and thus is more severe and rigorous, as initially there were no different possible levels of severity, only one consistent rigorous control resembling a strict scrutiny in all cases. Concerning the rights, *Oakes*, in its original application, may be considered more neutral and egalitarian as it applies the same criteria in every case of breach.[450]

Perhaps the Canadian Court wanted to avoid the necessity of classifying rights and liberties, and the predictable mechanical results which often result. As well, the Supreme Court, wanting to demonstrate a large and liberal attitude towards the rights guaranteed in the *Charter*, demanded a high degree of justification for any law abridging these rights.[451] This can be due to the Court's past attitude concerning the Canadian Bill of Rights. It did not contain an express limitations clause and the Court developed the jurisprudential criteria of "reasonable limits". However, the Court was not at all demanding in its requirements for justification, resulting in minimal judicial control. To prove that a measure restricting a liberty guaranteed by the Canadian Bill of Rights was justifiable it was necessary just to demonstrate that the measure pursued a regular federal objective, a valid goal with no requirement that the means be proportional to the objective. Thus, the American experience, at this time, was not drawn upon with regards to the necessity of a degree of proportionality. "La cour a adopté une attitude très reservée à l'égard de la jurisprudence americaine".[452]

To continue the comparison, Chief Justice Dickson, as in the American jurisprudence, first employed an objective test, yet unlike the United States, once again, did not distinguish different levels of severity concerning the objective pursued by the legislature.[453] In *Oakes*, the requirement is high and uniform. The objective "at a minimum" must "relate to the societal concerns which are pressing, and substantial". However, the Court in reality has applied a more minimal control relating to the objective.[454] At times, the Court does not use the concept of "pressing and substantial" and settles for a "legitimate legislative objective" an example being *Black c. Law Society of Alberta*[455]. It is noted that although the *Charter* is not precise on what legitimate objectives can be invoked to justify a limit on a right, this criteria has not created much

difficulty. "En réalité, s'il faut se fier à l'experience il sera rarissime qu'un objectif legislatif ne soit pas consideré comme 'suffisament important' pour satisfaire aux conditions de l'Article 1".[456]

In the United States, the objective test has not been the most decisive either, and has been applied quite flexibly. The courts have even allowed the government to invoke an objective pursued by the law other than that which existed at the adoption of the law, (changing objective) a concept rejected by Canada in *Big M Drug Mart*[457].

Furthermore, with reference again to the proportionality test in *Oakes*, the criteria of "minimal impairment" applies to all cases offering no flexibility or distinction between rights. The American courts, however, apply the comparable strict scrutiny test only to certain more important rights and classifications, thus leaving a margin of appreciation to the legislature with regards to other rights requiring a less severe test or level of scrutiny.[458]

It is, after all, the democratically elected legislature who represents the people, not the appointed judiciary. This issue is important in Canada and the United States alike. It is difficult to reconcile the legitimacy of judicial control in its protection of constitutional rights and the democratic principle. The two often contradict each other. Yet, in the United States, as just discussed, there is some leverage, a balance allowing for deference in certain cases (e.g. commercial regulation) and heightened judicial activism in others (evident in the levels of scrutiny analysis). The evolution of the *Oakes* test does allow for some leverage, increasingly similar to the United States. Yet, in *Oakes* itself, the criteria of "minimal impairment" did not allow for any deference to the legislature.

It seems that the criteria of "minimal impairment" is the decisive component of the proportionality test as mentioned earlier and it has thus been at the center of the evolution of the *Oakes* test as will be next outlined. Recall that the criteria of a rational link is not very demanding as it is most often interpreted as the need to demonstrate that the means aid in attaining the objective or have a logical link to the legislative goal. Internal

rationality has not been required by the Court. As explained earlier, it is rare for the Court to conclude that the rational connection test has not been satisfied. This is very similar to the United States experience where the rational link or minimal rationality test is extremely easy to satisfy.

The evolution of the *Oakes* test reflected in the decision of *Edwards Books*, and confirmed in such cases as *McKinney* and *Irwin Toy* has allowed for a less severe variation of the proportionality test, particularly the criteria of "minimal impairment", resulting in a greater affinity with the United States approach (although differences are still evident).[459] For example, in *Edwards Books*, the Court allowed for certain criteria to distinguish which cases would require a less stringent application of *Oakes*. This was further clarified in *Irwin Toy* which specified when a more severe scrutiny was applicable.

The variance to be applied regarding the proportionality criteria is thus indicative of the Canadian Court's recognition that not all infringements on rights are to be treated equally in severity, characteristic of the United States analysis on limitations. Although the *Oakes* test has evolved to allow for various levels of severity, a concept similar to the United States approach, the criteria modulating the level of activism are not exactly the same. In the United States, the level of scrutiny depends primarily on the nature of the guaranteed rights or type of classification. The Canadian court, however, has rejected a strict hierarchy of rights and has established, as we have seen previously, a host of criteria to determine the balance between activism and restraint, despite the inconsistency in their application.

Generally speaking, however, similarities do exist. For example, recalling the preceding section which is quite explicit on the evolution of the *Oakes* test, the cases of *Edwards Books* and *Irwin Toy* both dealt with commercial regulation, although pertaining to different rights. Chief Justice Dickson, in *Edwards Books*, emphasized that commercial and socioeconomic legislation characterized by competing pressures warrants legislative deference, and prescribed a less stringent application of the *Oakes* test, specifically in the analysis of minimal impairment. Judge Laforest concurred that the legislator must be

allowed a certain "marge de manoeuvre" (borrowing from European jurisprudence) to respond to opposing pressures. He recognized that what is reasonable depends on the context, and that the nature of the interests must be taken into account.[460]

The resulting legislative deference or leverage permitted in applying the *Oakes* criteria regarding socioeconomic or commercial legislation does resemble the United States specifically relating to the demise of economic due process in the late 1930s. Recall that the U.S. Supreme Court in *United States vs. Carolene Products Co.* announced its intention to defer to the legislatures on questions of socioeconomic regulation, and to intervene in favour of non-economic liberties.[461] Today, as mentioned, a minimal scrutiny still applies to commercial legislation in the United States.

It is evident that the application of the criteria of minimal impairment will vary. In certain cases, the *Oakes* version may apply corresponding to maximal scrutiny, whereas its deferential version reflected in *Edwards Books* corresponds to a minimal type scrutiny. Thus, although the *Oakes* test is constantly reiterated in its cumulative form, applying to all rights infringements, in reality its application by the Canadian Supreme Court has in the practical sense resembled the alternative criteria used in the United States. For example, when minimal impairment is applied with force, the other proportionality criteria have little or no effect. Additionally, when the Court refuses to apply the least restrictive means test in its originally intended form, this component of proportionality is rendered relatively ineffective. Consequently the test shifts to a minimal scrutiny type analysis, requiring just a rational connection between the measures and the objective.

Nevertheless, the Supreme Court of Canada, as discussed earlier, has taken into consideration various criteria in modulating its level of severity (nature of the interests, effectiveness of the means, expertise, etc.), rather than adopting a strict categorical approach based almost exclusively on the type of classification or nature of the right itself (as in the United States). The latter two considerations have, however, taken root in Canada, somewhat indirectly at times.[462]

For example, recall that *Irwin Toy* clarified what criteria allows for a modulation of severity in judicial control. It confirmed *Edwards Books*' stipulation that the least restrictive means would not be necessary, in the face of contradictory scientific proof and competing interests in a domain of limited judicial expertise, such as the regulation of industry. The notion of not rolling back legislation designed to protect or aid the disadvantaged was also expressed in support of legislative deference.

However, the Court additionally expressed that in the case of judicial rights in the criminal justice field, a higher judicial scrutiny or stricter application of minimal impairment is warranted. This was expressed in relation to the concept of the government acting as singular antagonist to the individual whose rights had been infringed. Dickson C.J. thus indicated indirectly that judicial scrutiny may function also in relation to the nature of the right, by mentioning the judicial guarantees in the *Charter* as warranting a higher scrutiny. In such a case, the nature of the interests involved (singular antagonist) relates to the type of right at stake.[463]

Although the Canadian Court has resisted adopting a hierarchy of rights system as in the United States, it is evident that a stricter application of minimal impairment concerning judicial rights does imply, to a certain extent, a hierarchy of rights. Nevertheless, it seems to be based more on the level of judicial expertise than on the level of significance of such rights in relation to other guarantees. In the United States, judicial guarantees are considered as fundamental, and are also subject to a stricter scrutiny.

The practice of the Supreme Court of Canada in the criminal justice area has indeed been less deferential to the legislature compared to other areas. Concerning various issues it has at times even surpassed the United States in protecting the rights of the accused. This is true despite the fact that the concept of singular antagonism has not been applied consistently due to the presence of often conflicting criteria and interests. The Court has thus allowed for legislative judgement to prevail on many occasions even within this area of relative activism.

The Supreme Court of Canada has also on occasion portrayed an affinity with American jurisprudence regarding the motive of classification as a basis for modulating the severity of judicial scrutiny.[464] For example, the case of *McKinney* dealt with an equality claim, challenging the basis of mandatory retirement policy. The Court stipulated that the type of classification involved, specifically age, was a factor warranting deference to legislative judgment in addition to the existence of other criteria such as competing interests, conflicting social science evidence, and a general lack of judicial expertise in such socioeconomic areas. This reasoning has been confirmed by more recent cases.[465]

Recall that in *McKinney* under the title "nature of the right" it is indicated that age is a less suspect grounds of classification than race, sex or religion. This bears similarity with the United States treatment of equality claims, which internally ranks the type of infringement, or classification within the right, age also receiving a lower scrutiny than race, religion and sex.[466]

Nevertheless, as mentioned earlier, the nature of the right or basis of classification are not conclusive as factors determining the degree of judicial activism to the extent of which they are in United States limitations theory. The Canadian Court, although resembling its United States counterpart to a certain degree, has referred to a host of other criteria in the modulation of the *Oakes* test's severity in reference to Section 1. The nature of the contested legislation, the nature of the interests at issue, the level of judicial expertise are all variables in the application of Section 1. Professor Woehrling describes the evolving limitations theory in Canada as similar to the "sliding scale" approach defended by Judge Marshall in the United States:

> "Avec des critères de modulation aussi nombreux et aussi complexes, on obtient non pas trois niveaux de contrôle, mais une échelle continue sur laquelle l'approche judiciare peut varier insensiblement d'une affaire à l'autre, et dans une même affaire, d'un juge à l'autre, en fonction de tous les facteurs à considerer. On se trouve donc en présence du modèle appelé "sliding scale" aux États-Unis, modèle qui a été defendu dans certains arrêts de la cour suprême par le juge Marshall."[467]

Whereas the three levels of scrutiny approach is predictable categorically and often mechanical, the "sliding scale" is quite flexible, allowing for a comprehensive examination of the complexities in each case. It is, however, criticized as being too unpredictable, contradictory and ad hoc in nature[468], as the Canadian application seems to reflect.

More recently, the Canadian Court, with its application of the contextual approach in cases such as *Cotroni*, *Edmonton Journal* and others previously mentioned, has portrayed great similarity with the contextual internal ranking applied in the United States. Increasingly, doctrine is being created within the rights, ranking the type of infringement to determine the level of activism applied by the Court.

The existence of an external limitations clause such as Section 1 applying to all rights seemed to imply a more comprehensive and coherent limitations theory culminating in the general *Oakes* criteria. In addition, Section 1 supports limitations at the external level. This was probably intended to avoid the more issue and rights specific limitations theory in the United States which has provided a less cohesive framework. However, the use of the contextual approach by the Canadian Supreme Court, in some instances, has provoked a more rights specific analysis in limitations theory.

The area of free expression in Canada with its core value distinctions has increasingly resembled the internal ranking system of the United States. The following section on free expression in the United States will reflect more particularly the similarity in analysis. It will be evident that the Canadian Court has converged more with the American system through contextualizing. In addition, the American Court has made use of Section 1 type analyses (within its internal ranking system) by adopting a justificatory framework in the absence of a limitations clause. Nevertheless, due to the absence of such a clause and to the framing of rights in absolute terms, United States limitations theory has relied far more on definitional type exclusions (reading internal limits into the definition of rights) than the Canadian system in its effort to balance activism and restraint.[469]

2) Free Expression As An Example

The adoption of internal limitations theory is also evident in the area of free speech in the United States. The Court has adopted definitional exclusions and a contextual process of internal ranking in this area. For example, obscenity and libel have been definitionally excluded from coverage by the First Amendment, unlike in Canada.[470] In addition, there is a distinction made between content specific and content neutral regulation based on the differentiation between the purpose and effects of a regulation (a distinction also adopted in *Irwin Toy*).[471] Each is subject to a different type of justification. The Court has adopted such distinctions regardless of the fact that the First Amendment stipulates a general prohibition on Congress to make law infringing freedom of speech, with no textual basis for limitations (contributing to the principle that freedom of speech should be absolutely free).

In reality, the American courts have recognized the need to protect other democratic values and though judge-made doctrines have restricted this freedom. At this level, there is some resemblance to Canada's system of a justificatory analysis of limitations characterized by Section 1. "Decision-making has been governed by issue specific standards of justification, by a host of Section 1 equivalents assessing reasonable limits."[472]

(a) Content Neutral Laws

Content neutral regulations restrict a form of expression indirectly through their effects rather than their purpose. They seem to require a lower standard of justification than those which are content based. They are considered less suspicious and "less likely to skew the marketplace of ideas, to be defended in terms of constitutionally disfavoured justifications or to be motivated by government hostility to any particular idea or viewpoint".[473]

Content neutral infringements are subject to a balancing test varying on a case by case basis, determining the extent to which the restrictive measure constrains the flow of information and considering the substantial nature of the government's interest in applying

the restriction and whether those interests could be served by lesser means. The government's burden of justification varies from one case to the next, depending on the extent of the limitation.[474]

Parallels can be found in the *Oakes* test in relation to content neutral justifications in the United States. A narrow tailoring test resembles the rational link test although the former is more stringent, and the "ample alternative channels" test also resembles the second component of proportionality in that the means used must not impair the right to the extent that other channels of communication are closed off. However, minimal impairment is more severe.[475] The latter formulation of the United States test does examine lesser means, yet not severely. It is a balancing which resembles the variance in minimal impairment after *Oakes*. I note again that the *Oakes* test always requires the three-tiered test of proportionality and although the degree of its application has variance in recent cases, resembling levels of scrutiny, it is a uniform cumulative test. This is not the case in the United States where no such uniformity in testing exists. There are different alternative standards of justification. Results, however, may be similar due to the recent flexibility of the *Oakes* test to suit different circumstances according to various criteria. This can result in different testing patterns regarding minimal impairment although textually only one test exists.

Concerning the distinction between content based and content neutral restrictions, *Irwin Toy* offers the most parallels, although certain distinctions are clear. The Supreme Court of Canada's definition of Section 2(b) requires the Court to determine whether the state's action is "aimed at expressive freedom or merely affects the physical consequences attendant on it". At the definitional stage, the Court examines and distinguishes between the purpose and the effects of the legislation. According to *Irwin Toy*, a breach is presumed only when the state purposely interferes with expressive freedom. Where this was not the state's purpose, as just the effects of the legislation may somehow restrict a form of expression, the plaintiff must demonstrate that her aim was to convey a meaning reflective of the principles underlying freedom of expression, in order to establish that there has been a restriction on the right. Failure to do so may result in the decision that

there has been no restriction, even if there is an interference with expression.[476] As mentioned, in the United States a content neutral measure is just subject to a lower standard of justification and is not subject to this definitional analysis of free expression requiring the plaintiff's demonstration just described in *Irwin Toy*.

(b) Content Based Regulations

Content based violations are deemed core infringements subject to a high level of scrutiny similar to the strict minimal impairment test of *Oakes*. They are considered unconstitutional unless the government can demonstrate that the suppressed speech poses a "clear and present danger", is a "defamatory falsehood" or is obscene.[477]

Basically, free speech is considered central to the democratic process and the Court has allowed limitations on expression which, by their nature, would obstruct or lack relevance to participation in the democratic arena. The same degree of protection is thus not accorded to expression which may inflict injury or which does not contribute to the development of truth.[478]

Generally, the U.S. Supreme Court has found a way to permit certain restrictions on content by applying a standard of justification serving the same purpose as a Section 1 review under the *Charter*, without directly violating the principle of "content neutrality". This concept, endorsed by the Court in 1972 in *Police Department of Chicago v. Mosley* proclaims that: "The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject-matter or its content".[479] This principle was also adopted in *Irwin Toy* reflecting the idea that free expression "protects all content of expression so that everyone can manifest all expressions of the heart and mind, however unpopular, distasteful, or contrary to the mainstream"[480], subject to Section 1 justification.

Such strict neutrality implies that all limitations on expressive content must be judged by the same standard of review, as was implied originally by *Oakes* in Canada for

all restrictions. Thus, in order to get around this, the U.S. Supreme Court has ranked First Amendment values by distinguishing between viewpoint and content discrimination. This reflects that content neutrality prohibits the state from discriminating between points of view within the same category of speech without preventing the courts from using distinct standards of review for different categories of expression.[481] It promotes a contextual type analysis of speech.

The idea is that one general rule was not intended to apply equally to all levels of expression, even "low value" speech. There are a hierarchy of First Amendment values. For example, restrictions on political speech are subject to the strictest scrutiny. They must be "necessary to serve a compelling state interest and narrowly drawn to that end".[482] The state must establish that it employed the least restrictive means of accomplishing its objective[483], similar to the practice concerning the 14th Amendment's strict scrutiny. This corresponds to the *Oakes* test of minimal impairment applied rigorously.[484]

By contrast, limitations on commercial expression are considered regulatory, and subject to a more deferential standard of review. To justify restrictions, the state must demonstrate a substantial interest in restricting expression and show that its "regulatory technique is in proportion to that interest".[485] This is similar to the Court's softened application of the *Oakes* test in *Irwin Toy* concerning commercial freedom of expression. Furthermore, quite similar to the deferential attitude of the Canadian court in *Irwin Toy*, the U.S. Supreme Court in *Federal Communications Comm. v. Pacifica Foundation* established a more deferential approach concerning regulation "associated with broadcast media which could reach children".[486]

Offensive speech is at the bottom of the hierarchy, characterized by increased latitude towards government regulation.[487] The hierarchy of values just described portrays that different categories refer to distinct speech values. Each employs a different justificatory standard or scrutiny utilising concepts of objective and proportionality to

determine the reasonability of the means. (These are concepts similarly used by the Canadian court in *Oakes* and adjusted in later cases.)

Thus, although "content neutrality" is the governing principle in the United States, many First Amendment cases are decided by issue specific doctrines while others result in ad hoc solutions when strict adherence to content neutrality may produce "undesirable results".[488]

3) Contextual Ranking

It is interesting to note that the contextual approach recently adopted in Canadian jurisprudence bears resemblance to the process of internal ranking in the United States. For example, in Canada, particularly regarding free expression, the Court has proceeded to rank values of speech within the substantive provision, pre-determining to a certain extent the level of scrutiny in the application of the *Oakes* formula. The Court has determined core values of speech, against which infringements are measured, to determine the degree of protection.

The core values underlying freedom of expression were originally espoused in *Irwin Toy* to establish whether a content neutral regulation violated Section 2(b). The Court, however, in *Keegstra* and other expression cases previously described, extended the core value theory to content based restrictions in a contextual analysis, ranking interests within the right. The hierarchy of values intertwined with the degree of activism in a Section 1 analysis is quite similar to the internal ranking of content based restrictions in the United States; political expression receiving a higher protection than "low value" expression which does not reflect the core values (e.g. hate propaganda).[489] Similarly, as well, in Canada, commercial expression (as reflected in *Irwin Toy*) is treated deferentially, in accordance with the general deference attributed to socioeconomic regulation. In addition, cases such as Butler, Rocket and Prostitution reference have reflected the deferential attitude accorded to expression deemed "commercial" in nature and thus distant from the core values underlying the right.[490]

Nevertheless, the contextual approach adopted by the Canadian Court has not yet achieved the strict categorical process practiced in the United States. Although different levels of justification for different categories of speech (internal ranking) has taken root in Canada, judges such as Dickson C.J., have expressed resistance to the concept of a strict categorical approach.

> "I do not wish to be taken as advocating an inflexible "levels of scrutiny" categorization of expressive authority... to become transfixed with categorization schemes risks losing the advantage associated with this sensitive examination of free expression principles, and I would be loath to sanction such a result."[491]

Thus, although similarity exists, the Canadian Court has been characterized, in the words of one author, as preferring a more "sliding scale" approach to justification or "fluid contextual approach" without fixing exact categories.[492] This avoids the categorical application of minimal scrutiny to certain types of activities as exists in the United States, where such low ranking has resulted in what is described as "a de facto form of definitional exclusion".[493]

4) Concluding Remarks

Although there are various differences in approach and historical development between the two countries, United States influence on Canadian limitations is evident. The similarities between the United States and recent Canadian jurisprudence are largely related to their concern for striking a balance between deferring to legislative judgment and judicial activism in assessing limitations on fundamental rights.

This struggle turns on the issue of the legitimacy of judicial review in a democracy. In the United States, the conflict over the allocation of authority between the judiciary and the legislature in constitutional adjudication has been termed "The Counter-Majoritarian Paradox".[494] This term has relevance for Canada as well with the advent of the *Charter*, for it reflects the difficulty in a democratic society of justifying the ability of judges to make decisions on fundamental issues of public policy. They are, afterall, unelected

officials, seen as insulated from responsibility to the democratic process. There is no definite solution to this controversy. However, it seems that the courts in the United States, and now in Canada, have strived to achieve some balance on the issue, allowing for deference in the areas discussed earlier. One thing is for sure: this balance has taken into account that the judiciary, as protector of the constitutional guarantees, must be allowed to perform this function especially when the most fundamental rights are in danger. Otherwise, the constitutional guarantees could, in practice, lose their effect.

Legislatures can often yield to short-sighted policies, overlooking minority or individual interests. The Court's role must therefore be recognized as a check on legislative tendencies, keeping in mind, though, that it is the elected parliament who is responsible for political and social change.[495] The legislator also plays a role in the protection of rights, a role which is not uniquely the job of the judiciary.[496]

The second part of this essay will explore the complex legitimacy debate. The varying theoretical perspectives on judicial review will be examined as they have invariably influenced judicial decision-making concerning rights limitations. This examination is put forth to support the legitimacy of judicial review from a theoretical stance despite the difficulties such a position encounters. How the actual development and workings of limitations theory in the United States and Canada (explored in this first part) affects the legitimacy debate, will also be discussed.

PART TWO: THE LEGITIMACY OF JUDICIAL REVIEW IN A DEMOCRACY

The legitimacy of judicial review of legislation in a democracy has been highly debated in the United States and increasingly in Canada with the entrenchment of the *Charter of Rights and Freedoms*. This part will focus on the conflict between majoritarian democracy and judicial review at the constitutional level.

The previous part, focusing on the practical workings of limitations, portrayed the power the Courts in the United States and Canada have attained in the policy field as "guardians" of a constitutional bill of rights. The role of assessing limitations on guaranteed rights clearly involves the judiciary more in the policy arena, the legislative domain. Yet, it is also clear that there is a conscious attempt by the Courts in both countries through limitations theory, to strike a balance between actively enforcing rights and deferring to legislative democracy. In Canada, in particular, the Court's treatment of Section 1, central to any legitimacy debate, has evolved in a short time to accommodate the democratic institutions.

A full understanding of whether an adequate or "legitimate" balance has or can be achieved is inexorably tied to an understanding of the legitimacy debate, and of our democratic institutions. This part of the study will examine the implications the Court's role has to democratic theory. It will be explored whether their present role in the constitutional arena can be reconciled with traditional views of democracy and the rule of law, which require that life be governed by laws enacted through an elected legislature. Are the judges overstepping their boundaries as appointed officials, insulated from the democratic process, when they make decisions on fundamental issues of public policy? Is the Court's "progressive" interpretation of rights and invalidation of legislative policy a violation of the democratic process and the rule of law? Or can the independent Court's present role be justified as a vital check on legislative tendencies, upholding the supreme law of the constitution? Does the judicial role guarantee against the tyranny of the majority and operate justifiably as a protection of minority and individual rights? The issue is quite controversial and worthy of examination.

The historical roots of judicial review will first be briefly set out to shed light on its philosophical foundation and the factors which influenced its development in the United States and Canada. The development of judicial review in the United States will then be the main focus, as American society has been faced with the issue of legitimacy for two centuries. In fact, the Supreme Court has yielded great influence in American history through its interpretation of the Bill of Rights.

An examination and analysis of the contemporary debate in American society will be conducted. Different theories will be explored on the suitable role of the courts in constitutional adjudication, theories which attempt to reconcile judicial review in a democracy. The democratic principle and the theoretical influences on the legitimacy debate will also be analyzed in order to shed some light on the conflict. A brief analysis of separation of powers theory and checks and balances will then be put forth in support of judicial review as a vital component to a healthy system of checks and balances. The Court's practical attempt to strike a balance between activism and restraint will support this conclusion.

Finally, judicial review in the Canadian context will be explored. Since the Canadian *Charter* has further led the courts into the public policy arena, as in the United States, it is vital to examine whether the American debate applies and to what extent. The differences between the American and Canadian context will be explained. The legitimacy of judicial review, particularly in Canada, will be supported from a theoretical and structural standpoint, in conjunction with the Court's practical efforts to strike a legitimate balance, explored in the first part of this study. It will be concluded that the practical efforts of the Canadian judiciary thus far have further served to enhance the legitimacy of judicial review, despite the inconsistencies in the Court's analyses.

I. HISTORICAL CONTEXT OF JUDICIAL REVIEW AND ITS INFLUENCE

The seeds of judicial review were actually sewn in England during the 17th century in the context of the struggle between Crown and Parliament. This gave rise to a judicial

struggle for independence from control by the Crown and Parliament itself. In the 16th and 17th centuries the judges were part of the Royal administration. In the tudor period, judges were not independent, as they were under strict Royal control. Lord Coke C.J. sought to change this in the early 17th century, supporting judicial review of legislation. He claimed in the case of *Prohibitions del Roy* that judges must impartially expound and apply a supreme law which governs Royal prerogatives, parliamentary privilege and the rights of the individual.[497]

Coke C.J. was actually the first to "constitutionalize" the rule of law and its interpretation. He held that it encompassed certain fundamental rights, which if violated would render an act of parliament, Royal proclamation, or customary rule null and void.[498] Lord Coke bravely stated in Dr. Bonham's case, "And it appears in our books that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act or parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."[499] Coke stipulated that if repugnant acts are to be controlled by the courts then courts cannot be part of government or parliament.[500]

In *Day v. Savadge*, Hobart C.J. stated that an Act of Parliament made against "natural equity" was "void in itself".[501] Furthermore, in *City of London v. Wood*, Holt C.J. stated, supporting Coke, that "if an act of parliament should ordain that the same person should be party and judge in his own case, it would be a void act of parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party".[502]

Parliament in the 17th century sought to exercise control over the judiciary. It was not until the Act of Settlement 1701 that judicial tenure was established. Independence ensured that the country would be governed by the rule of law. Yet despite Coke's precedent, the supremacy of parliament eventually took preference over the courts' ability to overturn parliamentary enactments. Parliamentary sovereignty entailed that the force of law would take precedence over any higher law or written constitution to be interpreted

by the judiciary. Dicey defined this doctrine: "Parliament has under the English constitution, the right to make or unmake any law whatever, and no person or body is recognized by the law of England as having a right to override or set aside the legislation of parliament."[503]

The English experience did have its influence on the American colonies and in a different fashion on the colonies later to become Canada. The concept of a higher law, and the views of Coke and his supporters were well known in the American colonies who later developed a strong aversion to the principle of parliamentary supremacy. This, in addition to the philosophy of natural rights, liberalism and individual autonomy (popular in revolutionary America), led to courts in the colonies passing judgment on colonial legislation, invoking the principle of higher law or common law[504]. This, in turn, layed the foundation for judicial review relative to a written constitution, solidified by Judge Marshall in *Marbury v. Madison*[505] (discussed in the following section).

Canadian colonies were not to any extent influenced by Coke's dictum due to several factors; settlement in the English speaking areas was sparse until the 18th century, already after the English civil wars of the prior century had established the supremacy of parliament, accepted among the population. While the Americans were revolting, many of the colonists in the north remained loyal to the Crown rejecting the natural rights theories. The French settlers rejected the concept of republicanism and the excesses of democracy, for they did not feel the imperial parliament was their oppressor. The Quebec Act of 1774 was considered a guarantee of their law and religion, while to the 13 American colonies it was one of the "intolerable Acts".[506]

Yet, the Canadian colonies did experience judicial review of their enactments by the colonial courts or the Judicial Committee of the Privy Council. Laws would be struck down as inconsistent with English Common Law. By 1865, the Colonial Laws Validity Act provided that colonial laws would be void only if they were inconsistent with an imperial law or order in council extending to Canada.[507]

When Canada emerged as a dominion in 1867, the British North America Act assumed the collective supremacy of the legislative branch. This constitution was based on the British concepts of responsible government and parliamentary supremacy. The BNA Act, as a British law extending to Canada, held supremacy over the laws of the parliament of Canada and the provincial legislatures. Inconsistent laws could be reviewed by the Canadian courts and up until 1949 by the Privy Council as well. The principles of justice, freedom, and due process dominant in the Bill of Rights were not, however, present in this Act. Rather, the Act set out the powers of parliament and provincial legislatures for self-government. Very few provisions prevented specific legislative action, and basically the guarantees were limited, and mainly related to the federal and bicultural nature of Canada. There was also limited mention of a few group rights; regarding the establishment and operation of Roman Catholic and Protestant minority schools, and regarding language guarantees. Yet, there was no indication or evidence that Canadians felt the need to protect themselves against the possible despotism of the legislatures. Consequently, judicial review in Canada has mainly related to the division of powers among the federal government and the provinces. Thus the Canadian origins of judicial review can be seen as a product of the imperial system. Its primary focus was the protection of federalism, not the protection of individual rights.[508]

The 1960 Canadian Bill of Rights was concerned with protecting individual rights yet it remained applicable only in the federal sphere, and was not a constitutional instrument. Furthermore, it was unclear on the effect it was to have on inconsistent legislation. The Supreme Court did in *R v. Drybones* declare that it could render such legislation inoperative, however, this was one of the rare cases in which it did so.[509] Basically, the presumption of constitutionality remained intact regarding challenged legislation. The Court remained reluctant to effectively review legislation affecting human rights. In 1982, a new era was about to begin. The Constitution Act of 1982 patriating our constitution terminated the powers of Westminister and provided for a domestic amending procedure. The Canadian Bill of Rights experience further led the federal government to negotiate the entrenchment of a bill of rights in the newly patriated constitution, culminating in the Canadian *Charter of Rights and Freedoms*.[510]

Since 1982, the Supreme Court has been careful not to repeat the Canadian Bill of Rights experience. Due to the constitutional nature of the *Charter*, the judiciary now faces a new role similar to that which the United States judiciary has been faced with since *Marbury v. Madison*. The dilemma is similar in that the courts now face the prospect of enforcing limitations on legislative and administrative powers in their role as guardians of certain fundamental guarantees. The courts must define the scope of these rights and overturn laws which they deem in conflict with the constitution, if they cannot be "demonstrably justified in a free and democratic society". [Section 1 of the *Charter]* Along with this comes the discussion concerning the courts' role in a democracy so predominant in the United States, which in the past has had no counterpart in Canada. Yet there are differences (which will later be discussed). First we will examine the American experience.

II. JUDICIAL REVIEW IN THE UNITED STATES

A. Constitutional Provisions and Historical Justifications

The United States constitution does not explicitly provide a mandate for judicial review. This factor has led to much controversy on the issue. The Bill of Rights does, however, allude to this power through two of its provisions. Article VI Section 2, the supremacy clause, certainly implies federal courts' judicial review over state actions, in addition to demanding that all acts of the United States be made in pursuance thereof (the Constitution), thus requiring an arbiter to ensure the command is respected.[511]

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

In addition, Article III, Section 2, expresses the authority of the judiciary over all cases,

> "The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States..."

Although the Bill of Rights does not clearly establish the parameters of judicial review (nor did the Judiciary Act of 1789), prior events and decisions set the precedent that it was a recognized and accepted notion. For example, during the revolutionary war era, the practice of judicial review was evident in the colonists' appeals to a higher law when arguing for the nullity of certain acts of the King or parliament. Furthermore, colonial courts and the English Privy Council held the power to review acts of the colonial legislatures. After independence from Great Britain, states adopted written constitutions which were considered a higher law than that of ordinary statutes. At this time, state judges practised judicial review and several times pronounced legislative acts void, in violation of these constitutions.[512]

Furthermore, the records of the Constitutional Convention in 1787 reflect that judicial review was widely debated by the delegates who distrusted the idea of unrestrained popular government. In fact, the vast majority of delegates favoured it. Governor Morris of Pennsylvania stipulated the necessity of such judicial control over the legislature, despite the inconveniences as even "the most virtuous citizens will often as members of a legislative body concur in measures which afterwards in their private capacity they will be ashamed of".[513]

In addition, Alexander Hamilton framer and author of Federalist Paper No. 78 argued for judicial review in his work. He did so pursuant to his discussion of the need to protect judicial independence by establishing the concept of life tenure during good behaviour. He recognized the need for a barrier to the "encroachments and oppressions of the representative body". He stated that judicial review was to operate as a check on legislative authority, and that the courts would ensure this for they were designed to be an intermediate body between the people and the legislature. The judge's independence and role were deemed important relative to a constitution that limits the legislature, for the limitations could only be ensured through courts of justice, who would declare acts

contrary to the Constitution void. In order to fulfil this function, judges must be subject to no authority but the law.[514]

Hamilton, in his comparison of the judiciary to the other branches of government, stated that it "will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them", as long as it remains separate from the legislature and executive. The judiciary, unlike the other levels of government, only can render judgment, not force and must depend on the executive to enforce its decisions. For these reasons, in addition to the legislative power of impeachment, the judiciary could not usurp legislative power either.[515]

Although the power of the judiciary to declare acts unconstitutional appears to some as a superiority of the judiciary to the legislature, Hamilton explained that the legislature cannot be the judge of its own bounds of authority for power can be abusive, and such a situation would remove any effective control over the constitutionality of laws. In Federalist No. 80, he wrote "no man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias"[516] (similar to the concerns of Lord Coke in England). James Madison also declared that all power "is of an encroaching nature" and that the "judiciary is truly the only defensive armour of the federal government, or rather for the Constitution and laws of the United States. Strip it of that armour and the door is wide open for nullification, anarchy and convulsion."[517]

Hamilton expressed not the superiority of the judiciary to the legislature, but rather, the power of the people to both, which is not undemocratic. The interpretation of laws was to be the domain of the courts, and judges would regulate their decisions by the fundamental law of the Constitution; by judgment not will. The possibility of the courts acting wrongly did not hold weight, for it would be an argument against having judges at all, a worse alternative.[518]

Judicial review was considered by Hamilton as especially vital in order to protect the Constitution and the rights of individuals when a majority oppresses a minority.

Tyranny of the majority after all would be tantamount to corruption. Independent judges could prevent such an occurrence by striking down such legislation in addition to deterring the legislature should it contemplate such action.[519]

Despite the historical evidence, the fact that the Constitution did not specifically provide for judicial review (or rather just implied it at the state level, and not for congressional acts) left the matter uncertain. It was the Supreme Court who finally pronounced on the issue in 1803 in *Marbury v. Madison*. Judicial review was clearly established, as a congressional act was declared void for the first time. Judicial review thus applied to Congress and not just to state legislatures.[520]

Judge Marshall stipulated that the Constitution is the superior law and cannot be modified by ordinary law, or the instrument itself would be ineffective. The Constitution only has sense if its values can be enforced by the courts. The courts, he said, have the duty to overturn laws which are in conflict with the Constitution. According to Marshall, such a law is void, and the courts, as well as other branches of government, are bound by the Constitution, the supreme law. This is in essence the rule of law.

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each....
>
> If then the courts are to regard the Constitution and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.
>
> Those then who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.
>
> This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act, according to the principles and theory of our government is entirely void, is yet in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the expressed prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with

> the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."[521]

B. Judicial Review Extended - Rights or Restraint

Marbury v. Madison firmly established the institution of judicial review in America. Yet it did not resolve the difficulties surrounding the extent of its application. Since the Marbury decision, the United States Supreme Court has embarked on a path of extensive judicial review shifting from one area of protection to another. The Court has tried to achieve a balance, according heightened scrutiny regarding certain rights and deference to the legislature regarding others, explored in the first part of this study. Nevertheless, a progressive interpretation of the open-textured provisions in the Bill of Rights has been practiced causing much controversy on the Court's legitimate role in a democracy. The Court has had a profound influence on American history: Judge Marshall's centralizing decisions had great effect. The Taney Court in the Dred Scott decision, by legitimizing chattel slavery, helped to precipitate the Civil War. Substantive due process first enforced property rights and in later forms affirmed rights to contraception and abortion.[522]

This progressive interpretation is often criticized as a subjective evaluation crossing the lines of legal reasoning, sparking a heated debate. The debate is generally not over the foundation of judicial review, but rather over the type of judicial review which can be justified in a democratic society. The issue of legitimacy revolves around the attempt to reconcile the democratic principle, with the power of non-elected judges actively overturning the decisions of elected officials representing the majority. Activist review is associated with a more vast interpretation of rights increasing the Court's power of review, in addition to actively overturning policy. Judicial restraint is associated often with an "originalist" type interpretation resulting in less review of government policy. It can also refer to restraint in overturning policy despite an initial inclusive interpretation.

Although the Supreme Court in the outcome of its decisions has sought to strike a balance between actively enforcing rights and judicial restraint (depending on the right and

type of infringement), much attention has been focussed on the manner in which the Bill of Rights is interpreted. Its vague concepts have generally been expounded upon to include the protection of interests unforeseen by its framers, issues in modern society which are central to the values of a nation. Critics thus accuse the judiciary of overstepping its adjudicative role and the boundaries of the Constitution itself.

Deciding on issues fundamental to national policy, in the defense of rights and interests extrapolated from, yet, not clearly formulated in the Constitution has led to the argument that the legislature's domain has been trampled upon. In addition, the United States Supreme Court has fashioned remedies in civil rights cases taking a proactive stance in ensuring its rulings were enforced.

For example, the Warren Court's activist decisions expanded traditional rights to promote their liberal agenda. The famous 1954 decision of *Brown v. Board of Education* overruled the separate but equal doctrine stating that the equal protection clause of the 14th Amendment required the desegregation of schools. It is clear that the framers of the Constitution had not envisioned the desegregation of schools to promote equality. Furthermore, in order to ensure the integration of schools, the Court not only instructed the legislature what would be unconstitutional, but eventually issued affirmative orders to be carried out by federal courts, enforcing judicial policies on the government and school boards.[523]

Some judges reacted by giving detailed orders almost taking over school administrations and later the development of integrated housing. The courts basically supervised their own instructions. Following the lead of the Warren Court, structural injunctions were issued by American courts forcing governments to adopt specific policies.[524]

Positive remedies have also been issued in policy areas such as the operation of hospitals, recreation, inmate employment, sanitation, prison renovation and closing, programs for the mentally ill, school expenditures and bilingual education, to name but a

few areas.[525] Such activism has sparked criticism of the Court' s increasing "legislative" role. This, it is said, goes beyond the traditional adjudicative and interpretive function. Supporters of such rulings, however, stress the positive outcome of such activism to minorities and individuals, using desegregation as an example.

Other examples of activism involve the Court's interpretation of the due process clause. The Supreme Court has read a substantive element into the due process clause, originally conceived as a procedural protection.[526] At first, due process was developed to staunchly protect the rights of property and liberty of contract, supporting a *laissez faire* capitalist philosophy. The substantive reading ironically was justified by many of those who identified the founders of the constitution with *laissez faire* policy.[527] Conservative Courts such as the Taney Court ruled in Dred Scott that Congress could not deprive an individual of his slave property even in free territories.[528] Social welfare policies such as maximum hour legislation and minimum wage legislation were overturned, halting economic regulation.[529] Substantive economic due process continued until 1937, halting Roosevelt's New Deal legislation until his "court packing" threats put an end to it. Critics of such "activist interpretation" cite the cases of this past era as examples of the dangers judicial review poses in interfering with legislative policy.[530]

Although the rule after *Carolene Products* was legislative deference in matters of economic regulation, the substantive reading of the due process clause did not cease. The Court instead actively took a liberal stance combatting minority and individual rights deprivations (exemplified by the Warren Court), reading new rights into the due process clause. Those who support judicial activism often rely on the protective nature of the Court in the liberal era regarding minority and individual rights.[531]

Some decisions, however, have been quite controversial. In 1965, the U.S. Supreme Court first read into the due process clause the "right to privacy". This substantive reading was evidently not clearly formulated in the constitutional clause itself. Yet, the Court extrapolating from other constitutional provisions elements of privacy "discovered" this new right, thus attempting to ground its decision in the text. Opponents,

however, claimed that the Court illegitimately created a new right.[532] Later, in the 1973 case of *Roe v. Wade*, the Court used the "right to privacy" in the due process clause to constitutionalize the right to an abortion, overturning legislation denying this right within the first six months of pregnancy. Satisfying all "procedural" requirements could not save a law which violated the substantive element of privacy. These are just a few examples of the Court's progressive or "living tree" interpretations.[533]

"Judicial legislation" or policy-making has provoked much criticism from those who believe that the Court's role should be properly confined to a "strict interpretation of the text"; according to them, progressive review violates the consent of the people to the original document, represented by the framers intentions. They believe that judicial review is too interstitial and question the institutional capacity of the Court to decide on policy issues. It is also claimed that judges are substituting legislative decisions representing the will of the people and replacing them with their own elite values, that of white anglosaxon lawyers unrepresentative of the population. (a government of judges) Many critics believe that activist review entails usurping the legislative function in violation of separation of powers and democratic theory. They state that the bicameralist nature of government and the other diverse checks and balances inherent in the Constitution sufficiently protect against the abuse of power. Through progressive interpretation, judges are also accused of amending the Constitution without going through the proper process of constitutional amendment. It is also said that judges are not soley responsible for constitutional interpretation, as this violates the American principle that all exercises of power must be balanced and controlled. Judges should thus confine themselves to holding acts of other branches unconstitutional only when there is a clear inconsistency with the text. To various degrees, these critics believe that in order to achieve a proper system of checks and balances desired by the framers, the legislative and executive branches along with the Supreme Court must act as partners with parallel coordinate powers in constitutional interpretation. Aggressive review, giving the Court the final word, according to their perspective, is tantamount to judicial supremacy. Some even suggest that other branches of government should disobey the Court's decisions.[534] They claim that "judicial supremacy" was not intended - "it was rather the totality of interactive constitutional

mechanisms that would finally be the surest protection of human liberties in a just society, and not a single organ of government".[535]

In the early 19th century Thomas Jefferson defended a strict system of coordinate review, the position that each branch may interpret the Constitution for itself in questions properly before it according to their respective spheres of influence. The idea was that judicial review should not be carried to the extent where judges have the last say or rather more power than the executive or legislative branches. Jefferson espoused a radical form of coordinate review: "that instrument (the Constitution) meant that its coordinate branches should be checks on each other. But the opinion which gives to judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislative and executive also, in their spheres, would make the judiciary a despotic branch".[536] The idea was that a judge's ruling should be binding only within its traditional adjudicative sphere. Lincoln, as well, supported this view that judicial decisions be binding on the litigants but not on the government. If otherwise, he stated, "the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal".[537] The argument for strict coordinate review however fails to account that it might result in contradictory decisions, and that judicial review does not deny the right of other branches to consider constitutional questions.

The defenses of modern judicial review, many of which have already been expressed, include: the necessity of an impartial tribunal checking and deterring the often short-sighted legislature in order to protect minorities and individuals (protecting against tyranny of the majority, according to the framers' intentions for the constitution), and the protection of minorities and individuals as a vital element of democracy. Judges' application of fundamental principles (a higher law) established by extraordinary majorities (representing the democratic social consensus) versus the will of ordinary majorities is also pointed out. Their consequent protection of these fundamental rights which bind the government as well is said to uphold the rule of law. The judiciary's training and ability to rule on principle, and their independence and insulation from majoritarian whims and

self interest are used as defenses. Additionally, the inefficient and indirect workings of the democratic political process, which often leaves decision-making to the courts, has been alluded to. The existence of certain constitutional provisions giving the legislature some control over the judiciary if utilized, and the nature of the interpretive process itself also may be used to defend modern judicial review. The appointment of judges by elected officials and their protection of rights as contributing to the reinforcement of certain democratic values are also arguments put forth. These defenses will be placed in context within the following sections.

C. The Contemporary Debate: Interpretivism vs. Noninterpretivism - Definitions

Generally, the contemporary debate surrounding the legitimacy of judicial review revolves around the dichotomy between two schools of constitutional theory, attempting to reconcile judicial review in a democracy: interpretivism or "originalism" and noninterpretivism, a dichotomy which will be criticized. These two clashing schools of thought are closely related to the conflicting notions of judicial activism and restraint.

Interpretivists or originalists state that the role of the Court in reviewing legislation should not go beyond the strict interpretation of the text, based on the language of the Constitution in order not to violate the democratic principle. These "textualists" respond to the arguments or fears above, made against judicial review by attempting to limit its scope. They operate on strict constructionism, as to them this approach does not violate the consent of the population, as experienced in the document itself. Originalists also expound a theory of intentionalism which in an effort to resolve textual indeterminacy, appeals to the concept of original understanding or the intentions of the framers. They state that the Court should give meaning to the open-ended provisions of the Constitution by interpreting them in accordance with the views of the individuals who drafted them. Judges thus cannot be accused of usurping legislative power, for rather than imposing their own values, they would be upholding the fundamental values in the text itself according to the consent of the people of the time.[538] In short, they would be just interpreting, not "legislating". This theory is criticized for its narrow approach to interpretation, or "frozen

concepts" approach. It is said to illegitimately allow long dead generations to govern living ones.

"Noninterpretivists" also attempt to justify judicial review in a democracy, yet they state that since many provisions of the Constitution are indeterminate and vague, judges must go beyond the text and apply other standards or sources. Depending on the theorist, they could stem from the moral values of society, a higher principle, the judge, natural law or consensus. They use these standards to explain decisions in a manner which distinguishes the judicial from the political function. Many of these theorists claim to apply norms which are not specifically evident in the four corners of the document. Yet, as will be discussed, in reality they do not completely disregard the text or the motives of the adopters. They rather attempt to place them in the proper context, in light of changing experiences and perceptions.[539] This "living tree" approach is more progressive and reflects the position of the Warren Court and many of the decisions of the Court today. Since interpretation of the text itself is considered the proper role of the courts, and conflicts are to be decided in favour of a **constitution** and not outside sources, this school of thought has been fiercely criticized. It is said that once the Court moves away from the "original understanding" of the text, it is no longer interpreting but engaging in an illegitimate political function.[540]

This debate is extremely heated in the United States. It has even led to the politicization of judicial appointments, since activist "non-interpretivists" and restrained "interpretivists" can diversely affect the outcome of governmental policy when appointed to the Supreme Court.

D. Interpretivist Theories

Raoul Berger exemplifies the interpretivist approach. He claims that the United States Constitution is frozen in its intended meaning at the time of adoption. Judicial review is only legitimate if it confines itself to this sense, since the terms of the people's consent are in this document. The meaning may be derived from the plain words, the text,

or when ambiguous, from evidence of the intention of the framers. If the interpretation of the Constitution could not go beyond the original understanding , the judges policy preferences or extrinsic values would be excluded, thus reconciling judicial review in a democracy. This would resolve the difficulty in a democracy of non-elected judges substituting their policies for those of the elected legislators'. Berger also argues that "noninterpretivism" is illegitimate because it is tantamount to the Supreme Court amending the Constitution without utilizing the proper amending procedure required by the Constitution.[541]

R. Bork also represents this interpretivist viewpoint: "the judge must stick close to the text and the history, and their implications, and not construct new rights".[542] It follows that originalists strongly disagree with the role the Supreme Court has assumed in its progressive interpretation, or rather "noninterpretivist" stance regarding the 14th amendment and due process. To them, issues of suffrage and segregation were never intended by the framers to be included in the 14th amendment. As well, *Roe v. Wade*'s constitutionalization of abortion based on a right to privacy emanating from due process is an abomination.[543]

These theorists have been criticized on several grounds which will be further explored later in this study. Briefly, the "interpretivist" holds a very narrow view of what is interpretation. By relying on indeterminate substantive intentions of men who lived over a century ago, they fail to place open-ended constitutional provisions within the context of an evolving society, relying, rather, on the consent of a past polity. The values of the Constitution are not specific and surely the document was intended to last for generations. Framers of such a text must have been aware of this and the need for the document to be applicable to the needs and problems of future generations.

E. Noninterpretivist Theories

Noninterpretivist theories have also struggled to justify the Court's role in constitutional adjudication. Some such as Dworkin and Perry justify an activist judicial

role by espousing its necessary function of protecting higher principles or morals vital to a democratic society. They base the legitimacy of judicial review on these essential attributes fundamental to human dignity. To them, rights are within the competence of impartial judges, not politicians who will overlook individual rights and moral philosophy. Fundamental rights of individuals or groups are primary and must be protected independent of consensus or majority will. Lawrence Tribe also defends this position.[544]

Jesse Chopper offers a more functional analysis which limits the Court's role in certain areas, yet defends the Court's expertise in protecting individual rights.[545] Others, like J.H. Ely, reject theories of judicial review based on moral principles for a more process-oriented interpretation. According to him, activist judicial review is reconcilable with democracy only when it serves to reinforce representation and participation in the democratic process. Under this theory, judges should not concern themselves with the substantive merits of the political choice attacked, for in doing so they impose their own elitist values contrary to the democratic process.[546]

Furthermore, there are consensus theorists like Alexander Bickel who hold that judicial review is valid when the Court can gain the general assent of the population for the values and principles it proclaims. This requires an initial judicial restraint.[547] Each of these theories should be examined more effectively.

Ronald Dworkin's theory on judicial review rests on a distinction between concepts and conceptions. A "conception" is a specific account or understanding, while a "concept" conveys some general idea. Since the Constitution expresses concepts, it is these which are binding on interpreters, although the drafters may have had conceptions of their own as to specific meanings.[548]

According to Dworkin, the drafters did not intend for their conceptions to hold any conclusive weight. He uses the following example: If I tell my children not to treat others unfairly, I might have examples in mind, but I would also expect them to apply my instructions to situations I could not have thought about. In addition, if they can convince

me that an act which I thought might have been fair is actually unfair according to the circumstances, I would agree. In other words, the latter view would be seen as included in my instructions, not changing them. The point is that my children should be guided by the concept of fairness, and not just by any specific conception of fairness I might have had in mind. The concept of fairness thus poses a greater moral issue than any particular view I may have held, and thus my views have no special or exclusive standing.[549]

The Constitution establishes certain concepts and judges should take account of the generalized purposes or intentions of the drafters, according less weight to their individual conceptions. Dworkin thus refutes the theories of strict constructionism and originalism. A Constitution, after all, is designed to express the general and enduring principles which will govern the life of a people. The drafters' role was in identifying those purposes, not in deciding the substantive elements of later individual cases. By employing concepts, the drafters demonstrated an intent for the document to adapt to the evolution of society. The Court which is qualified must therefore enforce the conceptions of political morality by relying on the concepts or standards layed out in the text. This refutes the claim that outside sources are being utilized, for the judge is in fact engaging in a legitimate "interpretation" of the Constitution itself relying on the drafters values and interpretive intent.[550]

Dworkin denies the need for judicial restraint, stating that democratic institutions such as legislatures are not likely to make sounder decisions than courts on individual moral rights and principles. Minorities need protection and the Constitution holds this intent. In fact, he stipulates that issues of rights should not be left to majorities, for the Constitution is intended to restrain majorities, and to make the majority a judge in its own cause is inconsistent and unjust.[551] This is similar to Hamilton's view previously expressed.

Judges are more apt to act on principles (in line with textual values) than legislatures, who act on the impulse of momentary popular pressure particularly in disputes about individual rights. He argues that the interests of those in political control of the

governmental institutions are "homogenous and hostile". Thus effective review must come from the courts. The judge has the required expertise to create a "forum of principle", not policy in order to ensure that people are treated as equals. The legitimacy of judicial control of the constitutionality of laws is based on the need to protect certain vital attributes of human dignity and morality, which underly the rule of law.[552]

Dworkin does distinguish between policies, which deal with collective goals of the community, and principles, which deal with individual or group rights. By inventing a judge named Hercules, he defines what the judge's attitude must be:

> "He is not a passivist because he rejects the rigid idea that judges must defer to elected officials, no matter what part of the Constitution scheme is in question. He will decide that the point of some provisions is or includes the protection of democracy, and he will elaborate these provisions in that spirit instead of deferring to the convictions of those whose legitimacy they might challenge... He will refuse to substitute his judgement for that of the legislative when he believes the issue in play is primarily one of policy rather than principle...".[553]

Although judges do play some political role, this does not mean they will base their decisions on their own personal values or in a partisan way like politicians do. Judges do not have a blank check. They must interpret judicial texts justifying their decisions in the history and political structure of their community. The judge identifies a perception of community morality as decisive, a political morality presupposed by the laws and institutions of the community.[554] Thus, the judicial role is distinguished from the political function.

Dworkin establishes two criteria which legitimize the judicial interpretation. The first, the "formal fit" test, ensures the judge will look to link his interpretation to past experience; the legislative and jurisdictional history of a provision within a proper context. The second, the substantive test, requires that the interpretation of a provision will respect the democratic ideal which he describes as "the rights each person has to be treated by his government as an equal".[555]

It is admitted that judges in their search for the right answers are fallible but this does not mean that they should forego the effort of producing just decisions. There is no group with "better facilities of moral argument to decide the hard cases". If anything, it is the selecting of judges which should be improved, not judging itself.[556]

Dworkin has been subject to criticism. Briefly, his distinction between concepts and conceptions has been described as unfounded as there is no proof that the document was intended to espouse a moral content larger than the drafters conceptions. This criticism is not adequate based on the fact that these particular conceptions are indeterminate, not conveyed and perhaps unrealistic in a changing modern society.

In addition, although Dworkin describes his theory as valid interpretation of the Constitution itself, he is accused of actually detaching judicial review from the text of the Constitution. This, it is said, frees judicial power from the rule of law making judges, judges in their own cause, imposing their own particular preferences. It is explained that the framers tried to limit the people's power by laying down the principle of the rule of law, a part being the fundamental law of the Constitution which was to be supreme over the people acting through political branches. What keeps judges impartial is that they too are limited by the rule of this fundamental law. When they venture away from the document or remain attached only by vague concepts, their role is illegitimate.[557]

His position that principled judicial decisions about rights are superior to legislative decisions is also attacked, using the example of the courts laissez-faire economic decisions from 1890 to 1937 (based on the principle of liberty of contract) which blocked vital social and economic reform.[558] Furthermore, the notion of a higher morality is abstract and difficult to discern.

The movement of the "political legal scholars" have especially attacked Dworkin's theory. This radical group is opposed to the intellectual and political dominance of the liberal establishment. They criticize as futile any attempt to demonstrate that judicial power can be objective or democratically justified. They refute the operation of law as

ideology. To them, legal discourse is masked political discourse and reflects the imposed preferences of an elite hierarchy. "Legal doctrine is riddled with indeterminacy and adjudication is essentially a process of choice." They claim that although democracy has become increasingly indirect and bureaucratized, the answer is not to have more law and judges who mask policy making in the name of principle. What is needed is a revolution in democratic consciousness, or a vigourous commitment to the practice of participatory democracy. "A deconstruction of judicial structures and liberal ideology is needed to improve the participation of citizens in the structure of societal values and remove the disparity and domination inherent in society." To them adjudication and legal scholarship "clothe this political organization with essential garments of political legitimacy".[559]

Michael Perry also espouses a vision of the Court as a moral guide. He admits that the power of the Court over the will of the accountable legislature is contrary to the rule of the majority, fundamental to the democratic ideal. However, he provides a functional justification of judicial activism based on the Court's role of providing moral guidance. According to him, the legislature is unable to fulfil such a function adequately, due to pressure and the bureaucratic nature of government. The power of the judiciary is legitimate to him because it allows for control, or moderation of the excesses of the majoritarian political process, which cannot manage its affairs consistently with the principles and ideals of American society. Thus, to him judicial review of the constitutionality of laws is valid even if it contradicts majority rule. The Court still serves the democratic principle by keeping certain moral ideals alive and in focus.[560]

Unlike Dworkin who classifies much of noninterpretivism as really interpretation of textual values, he begins with the premise that judicial review is a form of judicial policy making in which "the Court decides, ultimately without reference to any value judgment constitutionalized by the framers, which values amongst competing values shall prevail".

> "What matters is that many, indeed most constitutional decisions and doctrines of the modern period... cannot fairly be understood as the products of anything but noninterpretive review, and therefore cannot be deemed

> legitimate unless the noninterpretive review that generated them can be justified."[561]

He rejects the view that judicial review can only be justified if the judiciary relies on an objective source of values. He does not however regard all constitutional decisions as emanating from the judges' own values. Some review he sees as interpretive or based on a value judgment in the Constitution, but in the human rights context this is more rare. Perry justifies what he deems "noninterpretive" review or judicial policy making by espousing the courts' role in shaping and advancing the political morality of America. The Court will exemplify a higher moral law by imposing principle on legislative judgments.[562]

In his search for morality Perry rejects consensus theorists who search for common ground in the beliefs of the people. However he searches for his own type of consensus in the philosophical and religious systems to identify their "points of convergence". These points will represent the "right answers to ethical problems", whereas the morality of the public falls behind.[563]

Unlike Dworkin and other theorists classified as "noninterpretive" (and interpretivists as well who see a stricter dichotomy), he rejects a distinction between legal and political reasoning, stating that morality and politics are intertwined with judicial review. He claims this distinction is not necessary to legitimize judicial review.[564] Yet both Dworkin and Perry do reflect a distrust of politics and majority will. They see the necessity of restraining the latter in the protection of fundamental rights. However, Perry's theory, unlike other "noninterpretivist" theories, does not try to find any justification in the text or in the population. He holds a very narrow concept of what can be classified as "interpretation". To him "interpretation" of the Constitution is ascertaining how the framers would have decided a case in their day, a view which will be criticized later.

Furthermore, Perry states that since Article III of the Bill of Rights, which extends to Congress the power to remove from the jurisdiction of the Supreme Court, certain types of questions, has not been exercised by Congress for over 100 years, the people's

representatives have legitimized the action of the Court.[565] He stipulates that the American democratic system (and the people) not only require the need for elected representatives to make decisions but also require a respect for moral values which democratic institutions may not reflect. The role of the Supreme Court is legitimate in achieving a balance between these two vital seemingly irreconcilable commitments.[566] Thus, to him non-interpretive review is necessary and desirable.

Perry's theory can be criticized as accentuating the anti-democratic nature of judicial review rather than attempting to resolve it. It is true that the protection of fundamental rights versus majority rule and legislative deficiencies is also a vital aspect of democracy. The Constitution is supreme and it does wish to protect rights and prevent any tyranny of the majority. However, Perry does not try to base his theory on the values in the document or make any distinctions about legal reasoning. It is said that his theory leaves judges imposing their values onto society in their search for a consensus in moral theory. He defines the democratic institutions and the people as morally apathetic and unrepresentative and accepts it without question, leaving the Supreme Court with a prophetic role. Yet this role undermines individual and collective moral responsibility rather than attempting to improve it.[567]

Jesse Choper's functional analysis of judicial review also relies on the protection of fundamental individual rights as a justification for judicial review in a democracy. He does establish some limits on judicial power yet in other areas of adjudication, thus combining a theory of activism and restraint. He explains that despite the anti-majoritarian character of judicial review, the Court must exercise this power in order to protect individual rights, which are not adequately represented in the political process. According to him, in order to minimize the tension between judicial review and democracy and preserve the Court's institutional prestige, the Court should decline to exercise this power in areas relating to federalism and the separation of powers. He is concerned with the procedural role of the Court and not with how the Court should interpret the Constitution. Although he bases his legitimacy position on functional considerations, he does express that

his views are "not at war with original intent" trying to maintain a connection with the past.[568]

Choper begins by an analysis of democracy and the undemocratic, unrepresentative operation of the political branches, yet he concludes that the political branches are more democratic than the Supreme Court. However, the protection of individual rights is the paramount justification. The Court's role is necessary here not due to its deeper wisdom but because it contains the vital elements to protect these rights, qualities lacking in political institutions. "It is insulated from political responsibility and unbeholden to self-absorbed and excited majoritarianism."[569] Like Dworkin and Perry, he asserts that judicial review is essential for rights as majority desires may be excessive, and threaten the rights of a politically isolated group or individual.

Choper defends his individual rights proposal by examining the history of judicial review concerning rights, and its effects. He concludes that the Court's record in this area has been very good, and their role in this area is thus desirable. (He is thus criticized as being overly simplistic.) The Court has accomplished a lot "both for the substance of liberty and for the furtherance of the goals of democracy", this being just as vital as majority rule. Choper explains that the Court has also reassured minority groups and helped them to adjust to laws they detest. It has provided them with an alternative to violence or disgruntled acceptance of unjust laws.[570]

The way to maintain public acceptance of the Court's necessary function is to restrict the Court's involvement in federalism and separation of powers matters as mentioned earlier. Choper explains that these questions should be left to the ordinary political process, as the states and the two political branches are properly represented there, and thus can defend their own interests producing adequate results. Separation of powers issues are resolvable by the checks and balances inherent in the system and by elections.[571]

Aside from the above fundamental rights theorists, there are those like Alexander Bickel who find the legitimacy of judicial review in a research of consensus. According to him, the controversy of judicial review of laws, marked by the lack of accountability of judges, can be resolved if their decisions reflect public opinion. The Court must lead opinion, not impose its own. Basically, by putting the Court under an "obligation to succeed", legitimacy is established. The Court which must succeed in convincing public opinion that its arguments are just must do so by initially exercising restraint.[572]

The Court's constitutional function is to define values and proclaim principles, yet at first it should neither strike down legislation nor validate it. The Court can avoid pronouncing on the issue and attain assent by various judicial techniques or "passive virtues", in order to engage the people and their representatives in a conversation or "continuing colloquy". Problems in initial cases should be deflected and allowed to simmer "so that a mounting number of incidents exemplifying it may have a cumulative effect on the judicial mind as well as on public and professional opinion". Through this colloquy "the Court has shaped and reduced the question, and ... it has rendered the answer familiar if not obvious". Consent is gained and legitimacy established.[573] Unlike Perry's theory, the Court looks to the people's morals.

Fundamental rights theorists such as Dworkin, Perry and Tribe reject consensus as a basis for judicial review, for they regard the Constitution as defining certain rights (based on ideals of moral philosophy) against the community.[574] Consensus theory operating on consent of the people does seem attractive in legitimizing the Court's power, yet it does not offer the immediate remedy needed for minorities or individuals who seek it. In any case, what if public opinion is unjust towards minorities? The Constitution is intended to avoid tyranny of a majority. A judge's decisions should not just be ruled by public acceptance but by their accuracy according to the Constitution. In addition, principles that are socially valuable should be announced, not delayed. Otherwise, the Court's role is reduced to acting according to political considerations, instead of impartially pronouncing decisions based on justice and principle.

The last American theory to be examined in this section is one demonstrated by John Ely. His, unlike the others, is a process based argument, limiting the scope of judicial review to a certain degree. Like originalists he believes that the courts must be bound to the Constitutional text, yet in a very different manner.

Ely suggests that where constitutional provisions are open-ended, and their interpretation is inconsistent with the need for the consent of the governed, judicial review should be confined to "questions of participation, and not with the substantive merits of the political choice under attack". The judge thus will not be assuming a policy making role substituting his values for those of the legislature. He advocates this "participational" model of judicial review derived from a particular theme of the Constitution taken as a whole. To him the document is overwhelmingly concerned with procedural fairness in the resolution of individual disputes, and with ensuring broad participation in the processes and distributions of government.[575]

Ely concludes that judicial review is reconcilable with and reinforces representative democracy if it confines itself to protecting processes, political channels or ensures "discrete and insular minorities the protection afforded other groups by the representative system".[576] He leaves substantive values up to the political process.

If the procedural element could truly be separated from the substantive elements, this theory would certainly offer a solution to the problem of the legitimacy of judicial review. Judges would not be deciding substantive issues, as the Constitution according to this theory does not address such issues. Judges would only concern themselves with the justness of the process itself by which legislatures reach their decisions, not the fairness of the outcomes. The invalidation of a statute enacted by the elected body would be due to an impediment to the participational process, thus supporting democracy rather than contradicting it. However, as Tribe and others have pointed out, it is not possible to distinguish the process from the substantive outcome. In fact, many of the rights in the Bill of Rights are substantive and thus the document does not indicate a greater concern with process. Identifying when someone is a "discrete and insular minority" relies on

substantive values. It is also difficult to distinguish when minority interests are being overridden democratically, from when they are being ignored or denied access. In addition, procedural fairness itself can be considered a substantive value.[577] As well, this process or access based theory of judicial review designed to support democratic rule and the integrity of the democratic process fails to confront a major problem of democratic rule: the lack of protection of minority rights. An essential purpose or underlying theme of the constitution is afterall the limitation of legislative abuses of minority and individual rights. Equal access does not resolve the issue of tyranny of the majority.

Moreover, it is interesting to note that Ely's self-classification as a noninterpretivist is questionable as are many other noninterpretive theories. Ely like Berger and other "interpretivists" hold that the courts should interpret the Constitution. They just differ on what should be considered interpretation. Ely states that reliance on intention is insufficient. He claims the document must be placed in its context, and seen as reflecting a structure of a government process based theme. Ely is actually trying to interpret the Constitution, for he is not suggesting that judges apply values outside the Constitution. The fundamental rights theorists as well advocate a type of interpretation by trying to uncover the moral values in the Constitutional system as a whole.[578] For example, Dworkin sees the principle of equality and respect as a common theme in the document. Since the legal materials reflect this morality, it is possible to distinguish doctrine from ideology. Even Perry who claims no such distinction exists, and espouses a justification of "noninterpretivism" (looking to outside sources as necessary and possible) is actually searching for a morality which is reflected in the Constitution. The problem is that many of these theorists themselves hold a very limited view of interpretation. Consequently, their theories are often too narrow in their approach and effort to gain reconciliation or legitimacy.

The dichotomy central to the controversy of legitimacy will now be discussed, for what we deem as interpretation of the Constitution lies at the heart of the reconciliation between judicial review and the democratic principle. In addition, our concept of what democracy actually entails affects the outcome of the legitimacy debate. Finally , it is

interesting to discuss the influence of political theory and liberalism on the vision of the constitutional ideal in order to shed some light on the motivations of present theories. Perhaps then it will be easier to offer some suggestions, essential to achieving some equilibrium surrounding the controversy.

F. Critical Analysis of Interpretivism as Opposed to Noninterpretivism: A Flawed Dichotomy

Interpretivism has been highly criticized by various authors. Aside from its overly restrictive nature, it fails to resolve certain difficulties. It is inherently flawed and unrealistic. The first problem lies in the concept of the "original understanding" which is vague and difficult to discern as a means of interpretation; whose intentions should count? Who should we consider as the framers? In addition to actual founders, there were numerous individuals in the various legislative bodies who ratified the text, in addition to members of Congress who proposed it. Is it really possible to discover a single intention among their opinions, or even to ascertain disputed historical facts? I doubt it. How could opinions or substantive intentions so confusing to discern obtain conclusive weight in interpretation?[579]

Furthermore, various authors address the issue of what should count as the original intention. Is it the drafters' substantive intent; their views on the meaning of the text (difficult to discern as mentioned) or rather their interpretive intent; referring to how the drafters wished for the substantive values to be interpreted? Originalists hold that only the substantive intent is important. This does not make sense for although the drafters may have held an array of personal beliefs, they themselves may not have held them to be conclusive due to the nature of their views on the interpretive process.[580] Perhaps a progressive interpretation in light of a changing evolving society was their understanding. Besides, relying solely on the substantive intent and its consent at the time of founding erroneously suggests that today we must be bound by the consent or indeterminate intentions of people who lived centuries ago, which may not reflect the ideals, needs and consent of American people today. Perhaps the people have in fact consented to the

Court's creativity or progressive interpretation by failing to invoke the amendment procedure (although it is a terribly cumbersome procedure).[581]

It is vital to consider that the framers wrote a document probably intending it to last and apply for a long time with the knowledge that society would evolve, change and perhaps be faced with issues they could not foresee. They also knew that constitutional amendment would be a difficult procedure. This is why they incorporated into the document certain values which could apply to such future events in the proper context. Thus the framers themselves could not have wished for the document to be frozen in time. A frozen Constitution would be absurd in light of an evolving society. For example, equal protection of the laws can certainly logically apply to eradicate racial segregation and under-representation in our modern world. To say it cannot, just because the original framers may not have anticipated these particular applications, or did not directly specify them is to render the document as an inefficient means of protection of liberties in our time. They were not psychics and by not specifying every detail, in favour of general values they surely at least anticipated a Constitution capable of growth and usefulness beyond their time and particular frame of reference. (Recall Dworkin's example of instructing his children and his definition of concepts.) Knowing that the rule of law, the supreme law of the Constitution with its limitations of legislative power could have no effect without a third party (the courts to deal with its detailed application), they may have expected that such an adjudicative role be handled by judges, enabling their text to be applied in the resolutions of matters they would never live to see[582] (even if a clear and concise mandate was not given, but only alluded to). Perhaps it was their intention to leave the extent of judicial involvement up to future generations. Recall, however, that the constitutional debates do reflect an acknowledgement of the necessity of judicial review as well.

Thus, the progressive interpretation expounded by American courts in response to changing conditions and ideas can be considered compatible with the intentions of the framers, and the consent of the people then and now (who have accepted by extraordinary majority to be bound by a constitution representing the rule of law). Progressive judicial

review thus may indeed be seen as a legitimate function, depending on what is regarded as "interpretation". Relying on the constitutional document is essential to legitimizing the Court's role in adjudication, yet not in the narrow sense of originalists.[583]

Even some "noninterpretivist" theory can be described as engaging in interpretation. They do not necessarily apply values drawn from outside of the Constitution but rather apply and interpret what they see as governing values in the structure of the document itself. Ronald Dworkin explains: "Any recognizable theory of judicial review is interpretive in the sense that it aims to provide an interpretation of the Constitution as an original, foundational, legal document, and also aims to integrate the Constitution into our constitutional and legal practice as a whole... No one proposes judicial review as if on a clean slate."

> "The theories that are generally classed as "non-interpretive"... disregard neither the text of the Constitution nor the motives of those people who made it; rather they seek to place these in the proper context. "Noninterpretive" theorists argue that the commitment of our legal community to this particular document, with these provisions enacted by people with those motives, presupposes a prior commitment to certain principles of political justice which, if we are to act responsibly, must therefore be reflected in the way the Constitution is read and enforced."[584]

Dworkin logically states that the distinction between constitutional theories of legitimacy is not truly based on whether the intentions of the framers are decisive for they all rely to a certain extent on original intention. The question central to the dispute is: what counts as that intention? "The important question for constitutional theory is not whether the intention of those who made the constitution should count, but rather what should count as that intention."[585] Recall that Dworkin distinguishes between concepts and conceptions to clarify this point. Interpretivists claim it is the framers specific conceptions which count, whereas Dworkin states that original understanding can also be enforced by adhering to the general concepts in the document. Dworkin is correct in stating that the distinction between interpretivism and non-interpretivism is "misnamed".

It becomes vital to examine further the notion of progressive interpretation of the Constitution as justifiable in a democratic society. As has been described, the interpretivist notion of interpretation is far too narrow. It must also be clarified that any "noninterpretivist" explanation of judicial review which wishes to justify judicial review by standards or morals such theorists deem outside of the Constitution is also illogical. Judicial review must be based on the Constitution. This is so because the Court may hold a law invalid only if it is inconsistent with that higher law which emanates from the people, and was adopted years ago by their elected representatives as an enduring document.[586] The rule of this supreme law must as a first premise be respected. This does not however mean that judicial review must be solely based on the "original understanding" as discussed earlier. Yet, a fundamental rights theorist must also be careful to ground his explanations in the Constitution.

To clarify the discussion, the notion of "interpretation" must be placed in a proper context. Interpretivist theorists and most noninterpretivist theorists share a very narrow view of what can be regarded as constitutional interpretation. The idea is that once you go beyond the notion of some substantive original understanding, the Court is no longer interpreting and is engaging in an illegitimate political function. "Noninterpretivists" thus often claim to look for standards outside the text that may justify judicial decisions in a democratic society. Consequently, most of them try to make a distinction between the judicial and political role. The point is that judicial review can be based on the Constitution and be engaged in interpretation without following the originalist ideal. Progressive interpretation can be considered as following the words and values of the text as a whole without keeping it frozen in the past.[587]

The framers substantive opinions are not even clear, yet their general concepts **are** in the words of the text. A progressive interpretation follows the text in a manner consistent and appropriate to modern problems. It is certainly plausible, even logical that the framers intended an interpretation which could progress with American society. Thus, judicial review can be legitimized on the basis of consent in the protection of fundamental

rights for the two are not mutually exclusive, even when stepping beyond the "interpretivist" version.

G. The Democratic Principle

It is essential to note that any opinion on the legitimacy of the Court's role in constitutional adjudication is firmly bound to the conception one holds of democracy. Yet, there is an absence of clear consensus on the democratic principle. It is certain, however, that majority rule has been considered the foundation of a democratic system. This is supported by such classical theorists as Aristotle, Locke, and Rousseau in addition to American thinkers such as Madison and Jefferson.[588] If one holds majority rule as the only essential ingredient of democracy, then it is clear that the judicial function will be deemed illegitimate, except perhaps to protect two fundamental rights of the individual on which effective majoritarianism depends, the right to vote and the right to freely express and exchange ideas. However, several factors must be considered to expose the limited nature of this conception of democracy relative to our times.

The early ideals of democracy were based on a more collective direct participational element. For example, Aristotle wrote "What effectively distinguishes the citizen proper from all others is his participation in giving judgement and in holding office."[589]

> "It is the peculiarity of man, in comparison with the rest of the animal world that he possesses a perception of good and evil, of the just and unjust, and of other similar qualities; and it is association in these things which makes a family a polis."[590]

The conception of democracy was a direct form based on the collective participation of the Greek polis. Society was radically different including its conception of public freedom linked to direct democracy, which was based on the belief that individuals should take responsibility for creating and changing the terms on which they lead their lives. De Toqueville describes this notion of public freedom:

> "The citizen takes a part in every occurrence in the place; he practices the art of government in the small sphere within his reach; he accustoms himself to those forms without which liberty can only advance by revolutions; he imbibes their spirit; he acquires a taste for order, comprehends the balance of powers and collects clear practical notions on the nature of his duties and the extent of his rights."[591]

The democratic ideal of earlier times does not exist in a complex modern society, where numbers alone make such a direct form impossible. Instead, our democracy is an indirect representative form where decisions are left to elected officials representing the majority. Many decisions, however, are made within a complex bureaucracy of unelected administrators far removed from the will of people themselves. The law-making function is thus often inefficient and subject to abuses. Many would argue that a bureaucrat making important decisions for the polity has as indirect a relationship to the people or democratic process as does a judge appointed by an elected official.[592] Both are chosen by representatives, yet the independent judge, at least, is immune from political whims. Additionally, legislatures are often too short-sighted and occupied to concentrate on the protection of individuals and minorities in their formulation of laws.[593]

There are also limitations on popular representation or majoritarianism due to the apportionment process. In addition, it is often difficult to discern a true majority when constituents have many varying views on a single issue. Furthermore, interest groups often dominate the legislative scene, although their views may not necessarily represent a large portion of the population. Thus, the average citizen, who has not exacted such pressure on legislative bodies, may not be well represented.[594]

Along with this indirect democracy and governmental machinery comes a lack of control of the decision-making process, a warranted distrust of politics and the need or the desire of the people for some restraint in order to protect certain fundamental rights which may be stifled. Can "majority" rule **alone** (or rather what we perceive as majority rule) be just or intended in such a system?

Furthermore, many democratic thinkers, especially those early American framers, have expressed serious reservations about legislative omnipotence in an indirect democracy. Tyranny of the "majority" was considered contradictory to the democratic ideal. Thus, democracy holds more than just the one dimension of majority rule. It has also stood for equality and certain fundamental liberties essential to a liberal society, accorded to the majority, individuals and minorities alike. The Constitution itself recognized such values as supreme in American society, and intended to limit legislative excesses.

> "There is a fairly strong connection between democracy and majoritarianism, but that these values are not the whole of a political democracy. The moral equality of equal liberty is just as fundamental as the moral equality of equal representation."[595]

The foundation of American democracy was in fact marked by a fear of unrestrained majorities inherent in the framers' views. The legislature could not always be trusted in such a system. The preservation of fundamental or natural inaliable rights, as exposed in the Constitution were an equally important ingredient in the democratic scheme. The impartial courts were seen as necessary to protect the individual from the growing power of the legislative and executive branches, considered the greatest danger to liberty. Such views stemmed from the philosophy of liberalism predominant at the time.

> "Governments were to be prohibited from interfering with freedom of person, security of property, freedom of speech, and of religion. The quality of liberty was, therefore, to give the rulers as little power as possible and then to surround them with numerous restrictions - to balance power against power."[596]

James Madison wrote "A dependence on the people is no doubt, the primary control on the government but experience has taught mankind the necessity of auxiliary precautions."[597] His solution included the necessity of independent courts as guarantors of rights, limiting the power of government.

De Toqueville, in Democracy in America also expressed the dissatisfaction with unchecked majoritarianism.

> "A majority taken collectively may be regarded as a being whose opinions, and most frequently whose interests, are opposed to those of another being, which is styled a minority. If it be admitted that a man, possessing absolute power, may misuse that power by wronging his adversaries, why should a majority not be liable to the same reproach? Men are not apt to change their characters by agglomeration; nor does their patience in the presence of obstacles increase with the consciousness of their strength. And for these reasons I can never willingly invest any number of my fellow creatures with that unlimited authority which I should refuse to any one of them."[598]

That democracy was meant to entail more than majority will through elected representatives is evident. Such a widened conception offers insight into the legitimacy debate. It supports the belief that substantive judicial review can be seen as consistent with democratic government. This is based on the premise that regardless of the state's popularity it does not possess the authority to deny or belittle the fundamental liberties of its constituents.[599] "Court enforced rights are not supported only on the basis of the ideas of the necessary conditions for representative democracy but also on the basis of ideas of security and autonomy which are underlying justifications for representative democracy."[600] This is not meant to advocate an unlimited role for the courts, for they must remain bound to the Constitution in their interpretation, recalling however that the notion of interpretation can legitimately be extended to a "progressive interpretation". The Constitution represents the ultimate will and consent of the polity. It incorporates the workings of democratic institutions (consent) and the importance of protecting fundamental rights also consented to by the people. Judges are thus required to ensure that these rights be effectively protected and applicable to modern society according to the will of the people who desire such protection. Without the remedy of such judicial protection in the face of conflicts, rights would be void. At the very least, the presence and the extent of the judicial role acts as a check on legislators who may feel more compelled to consider minority rights, knowing their laws are subject to being overturned. By supporting fundamental rights and protecting individuals and minorities (a vital aspect of democracy), judicial review supports democracy rather than hinders it.

Recognizing the judges' legitimate role in a democracy does not purport to minimize the importance of the legislative role, however. Democracy does have two facets, and

besides, the legislature also has the responsibility, the obligation to maintain and protect fundamental rights. Looking to one **or** the other is a mistake. Both are needed to achieve a balance faithful to the Constitution. People definitely must be realistic in their views of the democratic process, and its potential influences and shortsightedness in protecting minority or individual rights. The judicial role as a check is necessary in this respect. Yet they must also be aware of their membership to a community, a collectivity and realize that the individual and the state are not always protagonists. Yet, political theory and liberalism have influenced this way of thinking. The government, as well, should refrain from leaving a vacuum of decision-making on important social and political issues to the judiciary; and, along with the people, should exert effort to strengthen the democratic machinery.

H. Separation of Powers and Checks and Balances

This section will examine the separation of powers between the legislative executive and judicial branch, for judicial review is often attacked at this level. Judicial review of legislation will be placed in this context to emphasize the necessity for all institutions to fulfil various functions beyond their respective spheres. This is necessary in order to attain a vital, healthy system of checks and balances (intended by the framers). Once again, it will be evident that both the courts and the government are required to ensure that policy be respectful of majorities and minorities alike.

Separation of powers theory states that the roles of the legislature, executive and the judiciary are to be distinct from one another and fulfilled by independent separate institutions. In the United States, for example, the legislature and executive are made independent of one another by instilling the necessity of separate elections and fixed and staggered terms. Congress and the executive powers are often controlled by different parties.[601] The President of the United States is not a member of the Congress and the members of his cabinet are not as well. The President does not exercise control over the Congress.

> "... The presidential form of government in the United States ... was established at a time when the separation of the executive, legislative, and judicial powers of government was regarded by influential political theorists as the ideal constitution for the preservation of individual liberty."[602]

Furthermore, the Constitution requires an independent judiciary. The controversy lies in the judiciary's political impact when assessing the constitutionality of laws. The judge's role is after all rooted in deciding legal questions, the adjudication of disputes. Within this context, the interpretation and application of the law is their limited domain, whereas the policy-making function is reserved for the legislature. Enforcing the law is the executive domain. Yet, the Court's responsibility to adjudicate on conflicts arising between individuals and the state (in upholding constitutional liberties) often entails judicial inspection of major social and political questions, considered legislative territory. Moreover, exercising the power to overturn such laws and balancing competing interests in the process inevitably goes beyond the adjudicative role, encompassing a political function. This is a realistic contention despite the Court's valid "interpretation" of the text and application of its fundamental legal principles described in the previous section. The political implication still exists as a corollary of the judicial function in the constitutional arena. Choosing between various interpretations does, in itself, affect the outcome of the law.[603]

There are those such as the political legal scholars who refute any distinction at all between law and politics, claiming all judging and all interpreting involves law-making. Such legal realists, thus, might deny that constitutional adjudication is radically different from other forms of adjudication. The separation of powers to them is illusive or imaginary.[604]

Theorists on the other side of the continuum assert the distinction between the legislative and judicial function. Some stipulate that the judges are not making law but are rather applying and enforcing the fundamental law of the constitution adopted by the extraordinary majority. Judges, according to this view, are not violating the democratic process, but applying the supreme law of the constitution versus the ordinary democratic

majorities which violate them. It is said that judges validly accomplished this function by ruling on principle not passion.[605] Some, however, contend that modern constitutional adjudication has illegitimately brought the courts into the political arena, usurping the law-making power of the legislature, violating separation of powers theory.

Aside from the law/policy distinction, it is additionally argued by some that in the constitutional arena, separation of powers theory is violated by the judiciary's influence and authority over the actions of other governmental branches, outside the traditional adjudicative context.[606]

In this study, it is contended that constitutional adjudication does bring the courts more into the political realm. Outside the constitutional arena, judges may help shape the law by interpreting the meaning of statues, yet in doing so, they do not overturn important social and political policy. The substance of the law is not radically changed, nor does the authority of their decisions extend beyond the adjudicative context, applying rather to the litigants at hand in the resolution of concrete disputes.

We have established, in the previous section, that the courts can be considered as legitimately interpreting the document and applying fundamental law. Yet in the process, as a corollary, they are involved more so in the policy arena especially when important laws are overturned and changes supervised by the judiciary. Even if it is denied that they are "creating" new law, the influence they exert over policy is evident. Their decisions are authoritative as well, beyond the adjudication context. It is difficult to deny that separation of powers theory is not strictly observed within this scenario.

Accepting that the separation of powers model is not strictly adhered to does not, however, serve to invalidate the judicial function. Modern judicial review may still be justified on this level, according to another constitutional theory, that of checks and balances.[607] It is thus vital to examine what this entails and how the present judicial role can be justified as contributing to a proper and effective system of checks and balances, on the theoretical and practical level.

The separation of powers is actually based on the need for separate independent institutions to check each other. In order to do so, however, it is ironically necessary to violate, to a certain degree, their separateness. In order to check each other efficiently, the "separate" institutions must have some influence over each other. They must possess the ability to share in each others' power while performing their respective obligations. This is why the judicial function must, to a certain extent, extend into the political domain. Contributing to a vital system of checks and balances thus requires and may justify the political implications of judicial review. A healthy system of checks and balances is deemed necessary to prevent the abuse of power, by encouraging moderate "fair" policy.[608]

It is thus important to examine whether the present judicial role is required to achieve a proper system of checks and balances and if it is beneficial to the system as a whole. There are those, such as Agresto, who argue that the constitution already provides sufficient measures for an effective system of checks and balances.[609] Various examples in the United States are the presidential veto, granting the executive a legislative function, and the requirement of Senate confirmations of presidential appointments and treaties giving some executive power to the legislature. In addition, congress, by special majority, can override a presidential veto. Note that these examples clearly reflect the need to cross the separation of powers to attain effective checks and balances between the various institutions.

In addition to the above, checks and balances are achieved by the division of the legislature into two chambers, Congress and the Senate. Bicameralism, as it is called, is intended to create more moderate policy outcomes. The system of representation was also originally thought to help counteract an abusive majority by filtering through the whims of the public.[610] Furthermore, there is also the requirement of separate elections and fixed and staggered terms.

Although in the United States there is an elaborate system of institutional checks and balances between the executive and legislature, the framers themselves expressed the desire

for judicial review as an added precaution. Independent tribunals were, in fact, considered the ultimate protection against majority tyranny. As James Madison explained,

> "If they are incorporated into the constitution, independent tribunals of justice will consider themselves, in a peculiar manner, the guardian of these rights; they will be an impenetrable bulwark against every assumption of power in the legislative or the executive; they will be naturally led to resist every encroachment upon rights..."[611]

Modern judicial review is necessary to a healthy system of checks and balances. The checks and balances between the legislative and executive inherent in the system may aid in preventing the abuse of power. It may subject policy to added scrutiny and deliberation but it does not alone resolve the issue of tyranny of the majority, nor is it a sure barrier against the neglect of individual and minority rights. Governments and their opposition must still answer to majority voters and may still be guided by self-interest. Policy may still fail to efficiently protect individual rights as it grinds through the bureaucratic machinery.

The judiciary as an independent arbiter helps to resolve the conflicts which still arise. After all, the government cannot be a judge in its own cause as many theorists have stipulated. This could only lead to further abuse. Additionally, the Court's presence as guardian of rights, possessing the power to overturn policy is in itself a vital check, for it may deter governments from crossing the line.

Furthermore, the judiciary contributes to the deliberation and debate on many important issues, sensitizing the polity to the implications of certain policy on the fundamental rights of others. Perhaps, at times, sound policy may be delayed, yet not for long as the Court's decisions eventually will follow those of the insistent law-making majority.[612] The judges, trained to adjudicate first, are aware and sensitive to the limits of their role. In the case of inefficient or unjust policy, however, the judicial role can only serve as a contributory force to the system of checks and balances by moderating unjust laws or simply obliterating them. The progressive review of the courts regarding racial segregation is an example.

In addition, the system of checks and balances between the executive and legislature and the conflicting views on controversial issues does at times, inevitably lead to the necessity of judicial interference. For example, a legislative deadlock may occur, where the courts must respond to the pressure for judicial action. Where the government lags behind, the courts are often called in to remedy the situation. This has been referred to by scholars as "the safety valve theory of judicial review".[613] The legislature may often leave a vacuum for the judiciary to fill when legislation is delayed or enacted in such a fashion as to leave difficult political issues to the resolve of the judges.

Many argue, however, that there are limits to the benefits judicial review can bestow on the system of checks and balances. One such argument is based on the limited institutional capacity of the courts. Judicial review is criticized as too interstitial, limited to the facts of the case at hand. The presentation of the issues and evidence may be manipulated by the litigants failing to uncover the larger consequences. In addition, it is sometimes difficult for the courts to acquire social science evidence whereas legislatures have the ability to amass information through commissioning studies and conducting hearings. As a result, it is claimed that the judiciary might be unaware or miscalculate the valid trade-offs involved in policy choices.[614]

It is critical, however, to emphasize that the judiciary is aware of its limited capacity regarding certain types of policy, for example, socioeconomic legislation. In fact, as outlined in Part One of this study, the Courts in the United States and Canada have been deferential regarding socioeconomic policy. In other areas, the Courts have accumulated much expertise, such as in the area of judicial rights which comprise the majority of cases. Often, such cases challenge official rather than legislative action.

Generally, through "judicial legislation", the Court has managed to establish a balance between activism and restraint, often giving much consideration to existing policy. Thus, despite limitations on judicial capacity, this argument cannot be used to completely deny the necessity and benefits of the judicial role as a check on legislative and executive power.

Many theorists also question the legitimacy of the Court's function in the system of checks and balances, claiming that the judicial institution is not properly checked itself.[615] John Agresto, for example, states that while the Court oversees congress and the president, no one oversees the Court.

> "What we need is a theoretical and practical base on which to oversee the Supreme Court as the court itself oversees congress and the president. That, in essence, is what the principle of checks and balances demands."[616]

He suggests that devices similar to the congressional power to override a presidential veto (by special majority) should exist in the relationship between the judiciary and the legislature to enable review of judicial decisions. "It would have been the perfect balancing of the principle of constitutionalism with active popular sovereignty." As things stand, he claims, the problem of "interpretive finality" and "judicial imperialism" subsists.[617]

What he suggests in order to justify judicial review within the system of checks and balances is actually similar to the Canadian legislative override provision - Section 33[618]. Paul Weiler, as well, suggests that a Section 33 type of legislative override of judicial review in the American system would, by reducing judicial finality, make the judicial function more a part of a system of checks and balances. It would encourage more dialogue and deliberation conducive to a more moderate sensible policy outcome.[619]

The absence, however, of such an override in the American system does not preclude the availability of other existing mechanisms (to be mentioned in the following section) which do provide a check on the judiciary. Furthermore, such an override is quite controversial in itself as the Canadian experience has portrayed.

In addition, the Court itself has practically established limitations on the process of judicial review with its various levels of scrutiny giving deference to legislative judgment on many occasions. This, in itself, lends some support to the judicial role as a contributing factor to a healthy system of checks and balances. As Part One of this study displays, the

Court has not usurped the legislative function, but rather has struck a balance between activism and restraint. Otherwise, theoretical justifications aside, the judicial role would, in fact, be guilty of violating a system of checks and balances which requires the input of all the institutions.

I. Striking a Balance - Concluding Remarks

The democratic machinery of today may not be as faithful to the ideal as would be desired. In addition, people have become apathetic to the process and the community. Although such disillusionment with the democratic process does lend support for judicial review as a necessary check on legislative action, distrust of the system and of people's capabilities taken alone do not, however, provide a sufficient argument to depend only on judges, nor to justify their role as sole guardians of rights in a democracy. The legislature is still the cornerstone of the democratic process. For the reasons set out in the previous section, I believe the judges' progressive interpretation of the Constitution may be seen as legitimate in a democracy, and certainly necessary in order to deter and check legislative tendencies. Without judges the constitutional guarantees could in practice lose their effect. Individuals and minorities must be protected in democratic society by independent impartial arbiters.

However, the democratic process should not be disregarded. Leaders and theorists alike must begin to improve democracy by encouraging the people's involvement in decision making in order to improve representation, and develop community values and sensibilities. The legislature is still responsible for social and political change, and does play a vital role in protecting national values. It too must be sensitive to enacting laws faithful to constitutional rights and the people must insist on this.

It must also be stressed that the judiciary as guardian of the Constitution, although not as "democratic" as the legislature, is appointed by a popularly elected government (by the president with senate approbation). Tribe states that the senate veto power helps provide the Court with a legitimate democratic character.[620] (Let's not forget the indirect

nature of the democratic process itself.) Certainly no one can deny the supreme role of the Supreme Court in American society, yet the legislature itself does through certain constitutional provisions possess a control or check on the judiciary, even if not utilized. This is still a vital element in the legitimacy debate. Constitutional amendment is possible to override Court decisions, however difficult it may be. In addition, Article III paragraph 2 of the Bill of Rights states that the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make. Congress also has the power to modify the size of the Court[621], although this may cause quite an uproar.

In addition, the U.S. Court has exercised self restraint by actively imposing the requirement of standing.[622] Furthermore, the Court has also observed a degree of deference regarding certain decisions of the executive and legislative branches. American jurisprudence and doctrine have developed the doctrine of political questions where deference is often accorded to the government on certain constitutional issues pertaining to acts of the legislature and executive. These are considered non-justiciable or uniquely political issues which they are more qualified to deal with, notably: foreign relations, constitutional amendment, exclusion of an elected member of Congress, electoral representation and the necessity of a state to have a type of government which is truly democratic.[623]

It must be mentioned, however, that the Court has made exceptions to the political questions doctrine primarily concerning the right to vote. In the early 1960s, the Warren Court actively ruled on malapportionement claims in the cases of *Baker v. Carr*, *Wesberry v. Sanders* and *Reynolds v. Sims*[624]. Thus, despite the previous judicial restraint on such constitutional questions (due to the political questions doctrine), the Court decided it held jurisdiction in this area. The Supreme Court, for example, in Wesberry and Reynolds, established that the right to vote encompassed a "one person - one vote" rule on the federal and state legislators. This imposed a stricter system of representation by population requiring more equal constituencies (based on equal population size) unlike the 25% deviation rule recently decided in Canada.[625] Thus, constituencies of varying population

size, or rather, "over-representation" of less densely populated rural areas based on non-population considerations was deemed "malaportionment" and invalid. The deviations in apportionment were, in fact, quite large and attributed to partisan gerrymandering. The area of equal apportionment imposing the "one man - one vote" rule has been a primary example of judicial activism in the United States, warranting strict scrutiny by the Court.[626]

This rule has, however, been applied more strictly to the House of Representatives constituencies than to the state legislatures due to the fact that non-population based considerations at the national level are adequately reflected in the Senate. The latter house allows for two senators in every state regardless of population size.[627]

Although the Court has made exception to the political questions doctrine, it must be noted that the activism in this particular area may be considered an affirmation of democracy, rather than a hindrance, as the right to vote is the cornerstone of the democratic process. Despite this fact, however, such activism has been viewed as conflicting with the legislative sphere of action in that such cases not only implicate voter parity, but also challenge the very structure of the legislative process.[628]

Furthermore, the courts in an effort to achieve some balance have also reflected legislative deference regarding certain rights and classifications, while according a heightened scrutiny to others (such as certain forms of freedom of speech, the right to vote - essential in any event to majoritarianism, and classification based on race, etc.). The modern Court has been sensitive to the socioeconomic consequences of judicial scrutiny (based on the premise of no taxation without representation) as many decisions in the social and economic sphere entail government expenditures, cutting into the spending power reserved to the government. Therefore, it must not be forgotten that judges (as guardians of rights) through what is termed "judicial legislation" (rather than progressive interpretation) also often serve to limit rights in deference to legislative judgement, facilitating legislation. Those who advocate a strict interpretation of the constitutional text as the only legitimate judicial role must also realize that there is no limitations clause in

the Bill of Rights. Thus such a narrow reading would also indirectly suggest, as absolutists claim, that rights cannot legitimately be limited (strict absolutists denying many definitional limits as well). There is a paradox. Even a strict reading of the textual rights without limitations would make legislation impossible. Thus, progressive interpretation coined as "judicial legislation", besides serving to enforce fundamental rights, also serves to limit them (aiding the legislative process). This balance is essential to constitutional adjudication.

Affirming the vital role of the courts in this balance does not nevertheless excuse their makeup. To prevent the notion of an elitist judiciary careful attention should be paid to the appointment of judges to ensure that they are not only qualified but more reflective of the diversity of American society. There may be inconsistencies or controversies surrounding the judges' role in a democracy. It is certainly a complex issue. They assume a powerful role but in truth, there is no other remedy available to ensure the rule of law is upheld.

III. JUDICIAL REVIEW IN CANADA - IMPORTING THE AMERICAN DEBATE? FACTORS TO CONSIDER

As previously mentioned, judicial review in Canada, before the *Charter*, was concerned mainly with issues of federalism. Aside from this, the courts' main role centred around the criminal justice system and the resolution of private disputes. Since 1982, with the entrenchment of the *Charter of Rights and Freedoms* into the Constitution, the courts have been faced with a task similar to that of the United States judiciary. The question remains as to what extent should the American debate on the legitimacy of judicial review in a democracy be imported into the Canadian system. Several factors must be examined. First, we will briefly discuss the implications of the courts' new role.

A. The *Charter* and the Judicial Function

The *Charter* certainly altered the institutional framework in Canada. Legislation affecting an array of social and moral issues suddenly fell under judicial scrutiny, whereas before they were matters of the legislative domain. The courts were given the mandate to decide whether laws "unreasonably" infringed the fundamental rights of the *Charter* (Section 1). They were thus faced with the controversial power to overturn democratically enacted legislation based on judicial interpretation of these guaranteed rights.

Without further probing, this prompts serious questions of democratic legitimacy and crosses the traditional lines of the separation of powers. After all, as perviously conceded, judicial interpretation of the *Charter* does inevitably lead the courts into the policy arena and consequently does involve value-laden normative decision-making. The definition of general open-textured *Charter* rights itself is subject to various interpretations, depending on the circumstances of the case and the makeup of the court, as Justice McLachlin, Professor Russel and Weiler, to name but a few, point out,

> "Judges are faced with essentially open-ended moral categories into which they must pour precise meaning and content."[629]

> "In settling disputes of this kind, the judiciary puts flesh on the bare skeleton of the law and in so doing, shapes the substance of the law."[630]

Concepts such as fundamental justice and equality invite value-laden judgments. Furthermore, Section 1 of the *Charter*, in addition to its vague concepts seems to require the judiciary to engage in a balancing of policy interests in deciding whether a law which violates a *Charter* right has been demonstrably justified as a "reasonable limit", in a free and democratic society.[631]

As demonstrated in Part I of this study, the legalistic objective terminology of the *Oakes* test could not mask the political implications a Section 1 analysis presents, despite the efforts of the Court. Academics, such as Professor Monahan, have attested to this and consequently have denied the possibility of separating law and policy in the adjudication of *Charter* issues.[632] Russell, as well, states that the *Charter* inevitably plunges the Court

into public policy, and states that the idea that law and policy are strictly separate realms must be abandoned.[633]

Some members of the Court, on the other hand, along with academics such as Beatty have depicted the Court's Section 1 analysis as maintaining a "proper" division between the judicial and legislative function. According to this perspective, since the minimal impairment component is the "decisive factor", the *Oakes* test gives adequate deference to legislative goals and objectives by questioning instead the means chosen to attain the goals (rather than the actual political agenda). Such an approach, it is said, enhances the democratic element by ensuring that legislators consider all the various interests affected by the challenged regulation.[634]

This perspective, however, is not reflective of the manipulability of minimal impairment in relation to the Court's definition of the objective, as alluded to in the first part of this study. Consequently, the alternative means test is not truly separate from the purpose of the law itself.

Nonetheless, Justice Wilson has also, on occasion, asserted the separation of law and policy by differentiating between questioning the wisdom of a law and assessing whether it is constitutional. For example, in Operation Dismantle, she rejects the automatic application of a political questions doctrine to foreign policy matters and states:

> "The question before us is not whether the government's defense policy is sound, but whether or not it violates the appellant's rights under Section 7 of the *Charter of Rights*. This is a totally different question."[635]

There is a distinction made between assessing the proportionality of the means and actually second-guessing the legislative goal itself.

Regardless of such views, the Court generally has shown concern over the issue of democratic legitimacy as demonstrated in Part One, despite its original statements to the contrary. This sensitivity, however, has only contributed to creating a workable balance

between judicial and legislative authority. Such a balance is what Section 1 of the *Charter* seems to support: protecting rights while showing proper deference to reasonable legislative limitations in a free and democratic society. Such a system reflects concern for maintaining a proper system of checks and balances, rather than advocating a usurp of legislative power. The Court's sensitivity to arguments based on the political implications of constitutional adjudication (portrayed in its reaction to cases such as Edwards Books) seems to be a motivating force towards achieving a balance through a degree of restraint.

Despite those who maintain the existence of a rigid law policy distinction, some judges such as McLachin,J. openly admit the inherently political nature of the Section 1 analysis beyond any traditional concept of legal reasoning and adjudication.

She states:

> "This requires the Court to weigh the significance of the infringement of the individual right against the collective interest of the state in continuing the infringement. This is essentially a judgment of a political rather than judicial nature. The answer cannot be determined by logic or stare decisis, even assuming precedents were available, the answer resides ultimately in the values of the Court deciding the case."[636]

This reality, she states, does not, however, prevent the Court from seeking the dominant views and values in society (the consensus) and retaining a degree of objectivity. Additionally, through a purposive analysis, the Court remains true to the text of the Supreme law.[637]

Basically, the *Charter* has altered the institutional balance, or rather, the allocation of authority between the judiciary and the other branches of government. Nevertheless, accepting that *Charter* interpretation and adjudication have increasingly involved the judiciary in the political arena crossing traditional boundaries does not necessarily provoke the debate on the issue of democratic legitimacy in the same manner as exists in the United States. Although the issue of legitimacy is more center-stage with the advent of the *Charter* and despite the anti-majoritarian role of the Court at times, the applicability of the

debate is mitigated by the unique Canadian experience in addition to the manner in which the Court has handled its new role. In fact, if the legitimacy of the judicial role concerning rights adjudication is defendable in the United States (as demonstrated in the previous section), it is even more so in Canada.

B. Climatic and Structural Differences in Canada

Unlike in the United States, the *Charter* was clearly adopted with the intention for judges to assume the role as guardian of *Charter* rights; to interpret their meaning and limitations. Judicial intervention was not just implied, but rather stipulated. Sections 1 and 24 of the *Charter* in addition to Section 52 of the Constitution Act 1982, attest to this intention (aside from constitutional convention). Consequently, these sections assert that parliamentary supremacy no longer applies in Canada in the traditional sense. It is the Constitution which is supreme, not parliament, or the legislatures, and it is the courts' function to determine the constitutionality of laws (Section 1) and to overturn those which they deem inconsistent with the *Charter* (Section 52). Section 24(1) directly permits the court of competent jurisdiction to award such remedy as it considers appropriate and just in the circumstances.[638] Furthermore, it was the elected representative of the people, not the courts, who decided to entrench the *Charter* into the Constitution.[639]

In Canada, the courts' intervention in rights adjudication may thus hold added legitimacy, as parliament and the legislatures (representing the majority of the population in nine out of the ten provinces) made the decision to entrust the courts with the power to intervene through the various provisions just mentioned.[640] The courts did not assert this power unilaterally as the United States judiciary did in *Marbury vs. Madison*. The *Charter* reflects a national political choice.[641] Justice Lamer has thus expressed this fact in *Motor Vehicle Act Reference*, asserting the legitimacy of judicial review;

> "It ought not to be forgotten that the historic decision to entrench the *Charter* in our constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts

> with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy."[642]

Additionally, the Court, in its first *Charter* judgement, Skapinker, expressed its concern for legitimacy when it cited extensively *Marbury v. Madison* and *McColloch v. State of Maryland*, asserting that the supervision of constitutional provisions in Canada "is left by a tradition of necessity" to the judicial branch.[643] Chief Justice Dickson also defended the legitimacy of judicial review in a democracy, regarding the *Charter* in *R. v. Holmes*. By focusing on the balance Section 1 requires between defending individual rights and allowing reasonable limitations on those rights, he demonstrates that the needs of both the individual and the collectivity are considered and measured by the same principle: what is "free and democratic". The implication under Section 1 is that both individual rights and majoritarian values are necessary in a true democratic state. The judicial role, he concludes, is compatible with the democratic element, as the courts may ensure that more interests are considered and represented in society.

> "The overarching principle of judicial review under the *Charter* is that the judiciary is entrusted with the duty of ensuring that legislatures do not infringe unjustifiably upon certain fundamental individual and collective interests in the name of broader common good. Viewed from one perspective, this proposed responsibility potentially can be seen as challenging the nature of democratic institutions in Canada, to the extent that those institutions represent the collective voice of the communities and individuals which comprise Canadian society. Viewed from another perspective, however, in interpreting and giving meaning to constitutional guarantees and determining what constitutes reasonable limits under Section 1 of the *Charter*, the courts are guided by the same principle under both lines of inquiry; namely, that Canadian society is to be "free and democratic". The infusion of the spirit of the individual and collective democratic aspirations into the process of defining the contours of constitutional guarantees and determining the reasonableness of the state-imposed limitations on those guarantees thus ensures that the courts are and will remain allies of the Canadian democracy, strengthening any weaknesses of democracy by providing a voice and a remedy for those excluded from equal and effective democratic participation in our society."[644]

Aside from Section 1's express mandate to the courts to weigh competing values (as opposed to the silence of the American Bill of Rights), it must be pointed out that the

Charter, although expressing broad values, gives more express protection to rights which are not explicitly found in the text of the Bill of Rights. Examples are the mention of equality "before and under the law", an affirmative action provision [15(2)], language rights, equality of the sexes, freedom of association, mobility rights, and aboriginal rights. The legal rights in Canada are more explicit as well.[645] Thus, regarding the Bill of Rights, more general principles such as due process (in the 5th and 14th Amendments) have necessarily been used to embrace various rights causing an increased controversy surrounding the judges' legitimacy in interpretation.

Furthermore, as Trakman and others have pointed out, *Charter* rights are stated affirmatively, many provisions opening with "everyone has the right" (e.g. Section 3 and 6-12).[646] Some rights are worded emphasizing state obligations to provide, such as the equality provision Section 15(1) and 15(2), the right to vote (Section 3) and minority language education in Section 23.[647] This is unlike the United States Bill of Rights where rights are framed in a negative fashion. The *Charter* seems to imply a wider notion of state obligations which has prompted some academics to advocate a more proactive stance on behalf of the courts.[648] The framing of such *Charter* rights connotes a wider definition of rights and helps to reinforce the Court's legitimate function in applying and enforcing those rights in a more expansive and proactive manner.

Nevertheless, the Canadian Court, despite the positive language of the *Charter*, has refrained from such a proactive vision, often refusing to tell the legislature what it must accomplish (as described earlier). The Court has refused to draft, devise or implement legislation, preferring rather to grant leeway to the legislature to reformulate legislation. At times, the Court has even maintained the effect of overturned laws for a period, so as not to leave a vacuum.[649] Unlike the American Court which has regarding various issues exhibited a proactive stance (as described earlier) in addition to overturning laws, the Canadian Court has shown the utmost restraint, portraying much deference to the legislative function at this level.

Furthermore, as McLachlin, J. explains, in Canada traditionally, the courts and the legislature have exhibited much cooperation and inter-communication. In constitutional matters, the legislature has voluntarily sought the Court's advice through references. In the past, the government has also responded in good faith to correct impugned legislation. The courts, in turn, have traditionally exercised restraint and even with the *Charter* have been cautious not to trample on the legislative role (as the first part of this study exhibits). Thus, the Canadian system does not emulate the tension that has often existed between the government and the courts in the United States.[650] This tension has motivated the judiciary in the face of defiance to deliver broad directives and to involve itself in the implementation and administration of its orders, as the desegregation cases reflect. This has often sparked the legitimacy debate to a greater degree.

Cooperation between the judiciary and the legislature is increased by the fact that the courts were directly given the mandate to intervene, in addition to the legislative power to override judicial decisions in Section 33[651] (to be discussed). Such cooperation has also added to the legitimacy of judicial intervention. The Court's restraint regarding certain issues and its refusal to devise and implement legislation to render it constitutional have demonstrated its respect for the legislative role. The usurp of legislative power is unlikely and has not occurred. Furthermore, the legislative respect for judicial decisions, its lack of direct defiance emulates this cooperation and gives credibility to the judicial role in constitutional matters.

Perhaps the existence in Canada of both a collectivist and liberalist tradition has led to more cooperation between the legislatures and the courts than that which has existed in the United States. The collectivist tradition recognizes that the individual is also a member of the community "the state is viewed as an agency which mediates between the interests of various groups within society, and by which the goals of the collectivity are advanced".[652] This differs from the classic liberalist tradition which dominates in the United States, pitting the state against the individual. "The individual and the state are seen as protagonists. Rights inhere in the individual and are enforced against the state."[653]

In Canada, the existence of a liberalist and collectivist tradition, as reflected in the text of Section 1 itself, logically leads to the recognition of both the legislatures and the courts, as crucial institutions in the advancement and protection of human interests. The courts guard rights against infringement, yet the state is not always seen as the natural enemy to individuals and is often given leeway. This may lead to added respect between the institutions and also serves as a foundation supporting a balance between the legislative and judicial role in constitutional adjudication (respectful of a healthy system of checks and balances).

As Justice Wilson stated in McKinney;

> I believe that this historical review (of the government's role in Canada) demonstrates that Canadians have a somewhat different attitude towards government and its role from our U.S. neighbours. Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society. The state has been looked to and has responded to demands that Canadians be guaranteed adequate health care, access to education and a minimum level of financial security to name but a few examples. It is, in my view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action."[654]

In the United States, classic liberalism may pit the courts defending individual rights against "the enemy", the state, causing added friction and judicial intervention to enforce its decrees (which have been defied at times). Such a scenario produces added accusations relating to the anti-democratic nature of the judicial function.

Furthermore, in Canada, there exists a different attitude towards the weight accorded to legislative history (the drafting process of constitutional and statutory texts) in the interpretation of statutory and constitutional documents. In the United States legislative history is highly admissible as an aid to interpretation. This has provided a basis for American legitimacy arguments based on the substantive original intention of the framers as binding on the courts. However, the originalist position, central to the United States

legitimacy debate, is actually inappropriate and illogical in Canada. This is due to the fact that in Canada traditionally, legislative history has been held to be inadmissible as an aid to the construction of constitutional or statutory texts.[655] The Supreme Court of Canada has occasionally been receptive to its use in recent years, yet has remained firm that it is the language of the text which is primordial, not the often unexpressed intention of its framers. For example, in the case of *B.C. Motor Vehicle Act*, it was stated that legislative history, although admissible, is to be used with great caution, and is far from being conclusive. It should be given minimal weight.[656]

The interpretivist / non-interpretivist debate in the United States is also less applicable on the Canadian scene as it invariably contradicts the text of the *Charter* itself. The existence of Section 1 as an external limitations clause can be said to preclude the originalist argument. Furthermore, it actually supports the view that the intention of its framers was to offer rights a broad or progressive interpretation from the onset.

"Section 1 of the *Charter* gives Canadian judges a clear option: instead of building limitations into the definitions of constitutionally protected rights and freedoms as the American Supreme Court has done, they can give the widest, most absolutist interpretation of rights and freedoms and then, on a case by case basis, assess the government's reasons for limiting them under Section 1."[657]

"Since we have a provision whose exclusive function is to allow reasonable limits to be placed on rights, arguably we should not place a narrow construction on those rights to begin with."[658] The analysis of limitations on rights logically should more often take place under Section 1, not definitionally. Narrow definitions in line with interpretivist thought could be overly restrictive as Section 1 also provides a limiting process.

> "The fact that in the United States rights are framed in absolute terms and there is no provision in the constitution comparable to our Section 1 has caused the American courts to read internal limits into the definition of the rights themselves. It is questionable, however, whether Canadian courts should follow this practice. The argument against doing so is that in the Canadian context, such an approach would be overly restrictive. Rights

> would be filtered first on their face, and then again under Section 1. Since we have a provision whose exclusive function is to allow reasonable limits to be placed on rights, arguably we should not place a narrow construction on those rights to begin with."[659]

In addition, such a narrow approach to interpretation would limit the utility of Section 1 contrary to its purpose.

The Court has thus established that the principle of progressive interpretation is to generally apply in *Charter* interpretation (as opposed to a frozen concepts approach). In the earliest *Charter* case, *Law Society of Upper Canada v. Skapinker*, the interpretivist view was clearly refuted by Judge Estey when he stated:

> "Narrow and technical interpretation, if not modulated by a sense of the unknown of the future can stunt the growth of the law and the community it serves.[660]

Furthermore, in *Hunter v. Southam*, Chief Justice Dickson stated:

> "The task of expounding a constitution is crucially different from that of constructing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a Bill or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts not to read the provisions of the constitution like a last will and testament lest it become one."[661]

In fact, even before the advent of the *Charter*, the "living tree"approach was defended in constitutional matters. In *Edwards v. A.G. Canada*, it was stated that the Constitution is to be regarded as a "living tree capable of growth and expansion within its natural limits".[662]

A generous interpretation need not, however, be equated with interpreting beyond the text itself, as many theorists in the United States have suggested it entails. (Recall that some "non-interpretivists" in the United States have described their position as going beyond the constitutional document.) In Canada, it has been stated additionally that the *Charter* is to receive a purposive interpretation. Such an approach stays true to the text by honouring the concepts expressed in the document rather than being necessarily bound to a particular conception. (Recall Dworkin)

For example in *R. v. Big M Drug Mart*, Judge Dickson stated as follows:

> "The Court has already in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter et al v. Southam Inc.* this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgement in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee, and securing for individuals the full benefit of the *Charter's* protection."[663]

In other words, "... every component contributes to the meaning as a whole, and the whole gives meaning to its parts". The courts must interpret each section of the *Charter* in relation to the others.

In light of the previous comments, it is clear that although judicial review is only legitimate if it is based on the text of the constitution, it does not mean that only a narrow approach to the text is an acceptable or legitimate form of interpretation. In Canada, it is accepted that use should be made of various means to reach a valid understanding of the

text: a cautious non-conclusive examination of legislative history (thus making questionable any strict originalist arguments in Canada), judicial precedents interpreting the text (although the Court may subsequently change its rulings), the purpose of the text and its relationship to other parts of the constitution (keeping in mind that there need not be one underlying purpose, as the substantive provisions may reflect a range of purposes), and implications drawn from the governmental institutions and structures established by the constitution.[664] American legitimacy theories, isolating judicial review to a single procedural purpose of facilitating or furthering the democratic process are thus not appropriate in Canada (nor in the United States for the reasons set out in the previous section).

It has been suggested that reasoning utilizing the above criteria is adequately bound to the terms of the constitution and thus may be considered valid "interpretation".[665] Consequently, theories which claim to legitimately base themselves on values or sources outside the constitution are inappropriate and reflect unnecessary justifications based on a narrow view of interpretation. In the United States the notion of interpretation warrants re-examination, keeping in mind that a purposive interpretation based on the above considerations is actually remaining faithful to the underlying values in the document (similar to Dworkin's observations). This makes it unnecessary to rely on abstract views of higher moral philosophies or originalist theories to justify judicial review. The American traditions of interpretation, however, do differ, thus provoking criticism of the actual practice of the U.S. Supreme Court.

Furthermore, it must be noted that actively defining *Charter* rights does not preclude the courts from examining the dominant values of a liberal democracy as an interpretive tool. Such an approach ensures that the views of society as it evolves are being considered. Combined with a purposive analysis, such an approach is also sufficiently bound to the text.[666] Thus, although judges are forced to make certain value judgments, they often base those judgments on values reflected in society at large. Looking into the evolving views of our society conforms more with the democratic element than confining one's analysis to past conceptions or "frozen concepts".

It is, nevertheless, conceded that actively defining *Charter* rights does result in increased debate under Section 1, encouraging judicial involvement in policy considerations. However, as just mentioned, the drafting of Section 1 invites such probing. In addition, this does not necessarily mean that the courts will not often show restraint under the Section 1 analysis (as Part One of this study demonstrates) preserving the validity of a challenged law, or overturning it on procedural rather than substantive grounds. A review of the Court's balance between activism and restraint conforming to an appropriate system of checks and balances will soon be discussed.

Perhaps the most essential element mitigating the legitimacy debate in Canada is the addition of the controversial Section 33 into the *Charter*[667] (which has no counterpart in the American system). Section 33, the broad notwithstanding clause and the result of a political compromise, enables judicial decisions under most of the provisions of the *Charter* (specifically Article 2 being the essential fundamental liberties, Section 7-14, the legal guarantees reflecting the rule of law, and Section 15, the equality rights), to be overridden by the competent federal or provincial legislatures without constitutional amendment. Rights which are not subject to the override clause are the mobility rights, the collective language rights, the democratic rights, and the sexual equality rights (Section 28).

In addition, no substantive justification or criteria is necessary for the use of this Section. Only simple conditions of form are required. Technically, the elected legislatures maintain the last call regarding most of the provisions, even though political constraints may affect the use of this clause.

Section 33 (in addition to Section 1 of the *Charter*) represents a compromise between the protection of individual *Charter* rights as desired by Canadian citizens and democratic majoritarian values both essential to democracy. While Section 1 allows for the validity of legislation which violates the *Charter* under certain circumstances, Section 33 goes even farther permitting legislatures to override judicial decisions concerning most *Charter* rights.[668] The government may preserve a law found unconstitutional for a five year period, subject to review afterwards.

Although parliamentary supremacy does not exist any more in the traditional sense, Section 33 concedes that it has not been completely abandoned.[669] The elected legislatures representing democratic, majoritarian values may still have the last word on many issues. Some, such as Bayefsky, claim legislative supremacy still reigns due to Section 33 of the *Charter*[670]. In any event, although the *Charter* has expanded judicial authority in constitutional matters, Section 33 does reflect a balance between the judicial and legislative function.

Due to Section 33 in particular (in addition to the factors previously mentioned), the issue of legitimacy so predominant in the United States has less applicability in Canada. The presence of Section 33 certainly preserves democratic majoritarian values, mitigating the legitimacy debate. The Court can never be said to be immune from popular control.[671] (This is not meant to condone Section 33, which, if put to misuse, can obstruct the rule of law, and the protection of fundamental liberties also essential to our democratic state.)

Nevertheless, it is important to note that despite the previous comments on the unique Canadian experience, Canadian theorists have adopted various theories on judicial control under the *Charter* which almost identically reflect the array of positions found in the United States (concerning the interpretivist, non-interpretivist debate). For example, Monahan and Fairley have defined a process-based approach claiming that the legitimacy issue can be resolved if judicial review is limited to providing access to the procedural function of the political process.[672] Their approach is similar to that of Ely's which is rejected as being insufficient in relation to the substantive values (and possible array of purposes) which pervade the constitutional document.

Furthermore, Bayefsky models a theory after Bickel. Strayer reflects Perry's notion of judicial review enforcing democratic values by upholding certain ideals. Weinrib resembles Dworkin to a certain extent, as Weinrib defends the Court's expertise as a forum of principle, replacing political passions with reason. These theories represent varying degrees of confidence in the judge's interpretive capacity and the interpretive process as

a whole. There are also more radical Canadian theorists such as Hutchison, Petter, and Mandel who advocate ideas similar to those of the critical legal studies movement in the United States.[673]

C. Checks and Balances

1) Institutional Factors and Section 33

The legitimacy of judicial review in Canada is less questionable as the aforementioned reasons reflect. From the perspective of checks and balances, the judicial role is equally justifiable.

Recall that the legitimacy of the Court's role in rights adjudication is often contested on the grounds that it violates separation of powers theory. As conceded earlier, judicial review under the *Charter* is more policy-oriented and does extend beyond the traditional adjudicative context. Nevertheless, this is justifiable according to checks and balances theory. This was expressed in the Sections pertaining to the legitimacy of judicial review in the United States. In Canada, for the reasons to follow, the judicial role is even more justifiable, as a necessary and legitimate element in a thriving system of checks and balances.

In order for the separate institutions to properly check each other, they must be permitted to extend into one another's sphere of power to a certain extent. For example, in Canada's parliamentary system, the concept of responsible government requires the mixing of executive and legislative power (e.g. the cabinet must have majority support in the legislature and the latter may face early elections in the face of disunity). A healthy system of checks and balances is designed to promote fair and moderate policy and should not violate fundamental human rights.[674]

The viability of the judicial function as a check on government power (further justifying its policy involvement) is contingent upon whether the institutions already have

adequate checks and balances built in. Although the concept of responsible government does appear, on its face, to enable the governmental institutions to adequately check each other, this may not be the case. In reality, the emphasis in our system on party discipline has been said to undercut the effectiveness of the institutional checks and balances.

> "The caucus often fears the electoral consequences of party disunity more than ministers fear the loss of caucus support, thus giving the executive effective control. Bringing the executive within the legislature and making it depend on the support of a majority of legislators was historically intended to solve the problem of executive tyranny. Ironically, it is argued, the lines of control have been reversed; in the context of modern democratic politics, interdependence led to disciplined parties through which the executive could turn the tables and control the house.
>
> Nor do the bill of rights enthusiasts think more effective control of the executive would solve the problem. Along with executive tyranny, after all, we need to worry about the tyranny of the majority."[675]

In effect, Canada's parliamentary system seems to lack the institutional checks on the legislative process which exist in the United States. Thus, merely balancing out the executive power is not enough. It seems that instituting mechanisms for limiting parliament's power was not considered primordial. Emphasis was placed instead on increasing its representative power, as parliament was considered as a safeguard against the executive bulwark. Representation in turn was intended to moderate majority policy by filtering it through painstaking deliberation.[676]

Ironically, however, the development of party discipline has given the executive the power to issue motions of non-confidence when its proposals are defeated by parliament, resulting in the government's resignation (prompting new elections). As a result, the representative factor, intended to moderate policy is not effective (for fear of disunity). The interdependence established between the executive and legislature thus did not have the intended effect. In the end, parliament is not an effective check on the executive, nor on the will of the majority.[677]

Nor does the existence of the Canadian Senate (bicameralism) provide an adequate check. The appointed Canadian Senate itself lacks democratic legitimacy and is subject to party discipline. In reality, it is not a vital part of a system of checks and balances as in the United States. The Senate has not proved to be a truly effective deliberative institution.[678]

> "In any event, the senate has never been an effective voice of regional or provincial interests."[679]

The judicial check on power is thus said to be even more defendable and required in the Canadian system. This is not to say that measures should not be taken to strengthen the deliberative process and the legislative machinery as a whole. Rather, the judicial function should be seen as a legitimate check on the government; provoking debate and ensuring the consideration of neglected interests in the democratic process, while showing the proper restraint on issues resulting from true political compromise.

Furthermore, legitimacy arguments in the United States based on judicial finality and the lack of proper judicial integration into a system of checks and balances are even less applicable in Canada. Academics, such as Agresto and Weiler, have argued that while the Court oversees the government in the United States, the Supreme Court is not itself properly checked. Although in the United States section, this argument was addressed through various points, in Canada the existence of Section 33 resolves the issue in an even more straight-forward fashion.

Section 33, the legislative override, subjects judicial review to a legislative review thereby acting as a check, overseeing the courts rulings. As earlier mentioned, this clause adequately balances constitutional rights with majoritarian values. Professor Russell describes Section 33 as integral to our system of checks and balances, for it properly addresses judicial finality while encouraging public discussion on important issues. The possible improvement of policy and the ability to deal with potential judicial error underly Section 33, fully integrating the judiciary into the system of checks and balances.[680]

Furthermore, Professors Knopff and Morton have pointed out that academics such as Agresto (and Weiler) have suggested that in the United States subjecting judicial "vetos" to some sort of legislative review or override "would have been the most unobjectionable method of combining the benefit of active judicial reasoning and scrutiny with final democratic oversight. It would have been the perfect balancing of the principle of constitutionalism with active popular sovereignty".[681]

Agresto suggests that activist review would obtain legitimacy in the United States through some form of legislative review (as exists for the other institutions). He states that this would enable the judicial function to be fully integrated into the system of checks and balances.[682] From this perspective, Section 33 of the *Charter*, which provides for the possibility of such a legislative review in Canada, adds to the legitimacy of the judicial function. It counteracts anti-majoritarian allegations, while helping to justify judicial review in Canada as part of a healthy system of checks and balances (despite political constraints on its use).

2) The Courts Striking a Balance - Judicial Restraint and Capacity

Sound arguments concerning the unique Canadian experience have been offered to demonstrate the added legitimacy of judicial review of policy in Canada. Such arguments have defended activist interpretation of rights and the potential overturning of policy despite the counter majoritarian aspect. Furthermore, the judicial function under the *Charter* has been justified as an integral element in a system of checks and balances despite its violation of traditional separation of powers model.

Nevertheless, although it is contended that theoretically sound arguments exist for legitimacy, an essential factor to consider (as explored in Part 1) is the manner in which the courts have practically handled their new role under the *Charter*. Recall that Section 1, although vague in its concepts, does imply a dual function. The courts must strike a balance. They must fulfil their role as a check on government action to ensure the enforcement of individual rights. Yet Section 1 also recognizes reasonable limits on these

rights in the name of the collectivity. The implication is that both lines of reasoning are valid in the name of a free and democratic society. It is the judiciary's interpretation and analysis under Section 1 which are central, for they determine the outcome.

Achieving a healthy balance between rights enforcement and deference to legislative values, both important in a democracy, is crucial to maintaining a healthy system of checks and balances. Thus, despite the justifications given for judicial review, if the judiciary did not actually strike a balance (under Section 1), allowing for a degree of legislative deference in its mandate of review, it could be guilty of usurping the role of the elected government. This could upset the delicate institutional balance violating the system of checks and balances (keeping in mind that legislative policy often promotes and protects important values in society, and thus, deserves a degree of deference).

Although it is contended that a wide (activist) interpretation of rights is called for in Canada, refuting the applicability of the American debate to a great extent, the possibility of overturning legislation under Section 1 reflects the greatest potential for activism and must be subject to limits. Such judicial scrutiny, although justifiable as a check on legislative action, must, not be uniformly high for such lack of moderation could actually run contrary to the Court's legitimate function in a system of checks and balances. Without striking a balance, the Court would not just be a check, but a replacement for the legislative function.

As the first part of this study demonstrates, this is not the case. Although the judiciary has legitimately received the mandate for review, it has in action demonstrated an awareness of what is practically required to achieve a legitimate place in a system of checks and balances. The Court has been cautious not to overstep its function as a check on government action, thus enhancing its legitimacy. Judicial review under the *Charter* has, in fact, reflected the Court's respect for its legislative counterpart, despite the often inconsistent application of criteria in the modulation of Section 1's severity. In fact, this inconsistency has often portrayed the Court's willingness to consider competing societal interests represented by challenged laws (as use of the singular antagonist criteria reflects).

At the same time, the Court has taken its role seriously, careful not to repeat the Canadian Bill of Rights experience. Basically, the Court has been successful in striking a sort of balance, as articulated by Section 1, despite the difficulties encountered.

Generally, the Court has shown sensitivity to its own institutional capacity in striking this balance. Recall that in order to contribute to a healthy system of checks and balances, the judiciary must not only be needed (as the previous section displayed) but it must be able to fulfil its function well. In fact, judicial capacity has often served as a basis to determine the appropriate level of scrutiny.

The Court has displayed great deference to the legislature regarding socioeconomic policy (as described in detail in Part One) recognizing that legislative expertise in such matters must prevail. The Court has considered the legislative protection of vulnerable societal interests regarding such policy. Even when dealing with matters of judicial expertise, such as criminal justice and judicial rights, the Court has shown ample consideration to the competing interests protected by challenged laws.

Regarding procedural laws, legal rights and professional licensing cases, the Court has been more activist as compared to socioeconomic issues (although a case may display coinciding elements). Basically, judicial expertise in these areas accounts for the increased level of activism. Thus, the Court's active contribution cannot be dismissed as arbitrary or inappropriate in relation to its capacity.

Even the most staunch *Charter* sceptics such as Monahan have reconsidered their initial criticisms of the judicial function under the *Charter*. Recently, Monahan has expressed

> "...At the same time, the Court has resisted the temptation to install itself as a kind of 'super legislature'. Many critics had warned that the *Charter* would permit the judiciary to roll back the considerable achievements associated with the modern welfare state in favour of a theory of 'limited government'. Indeed, I should confess that I was one of those voicing precisely this concern (see Monahan, 1987). I am happy to report that this

> fear has not materialized.. and there is little evidence at this point to suggest that things will change for the worse in the future. The Court has evinced a very considerable sensitivity for the difficult trade-offs between competing social interests that most modern regulation requires. Particularly, in the field of social and economic regulation, it has been willing to accord to the legislature a 'margin of appreciation' in which the legislature is not required to follow the judge's ideas as to the 'best possible means' of achieving its objectives... Indeed, the Court's deference in these cases has been such as to provoke complaints that the highest court has abandoned any semblance of serious judicial review under the *Charter*. (Beatty, 1990)
>
> In my view, however, the Court has adopted a fundamentally sound approach, particularly given the relative novelty of the *Charter*. The Court has chosen to proceed in a deliberately prudent manner, building first in areas where it regards itself as having some particular expertise or knowledge, and the capacity to assess the likely effects of its rulings. The fields of criminal law and of professional regulation have been the clearest examples of areas where the court has adopted a relatively activist approach. But it has been much more restrained in areas of social or economic regulation, where it's understanding of the subject matter is much more limited and where its calculation of the possible effects of its rulings is more problematic...
>
> In effect, the Court has conducted itself in a politically astute fashion, intervening in discrete areas where its perceived legitimacy and authority are high, while deferring to the legislature in the broad majority of cases."[683]

In fact, since 1986, the success rate for *Charter* claims as a whole has been rather modest.[684] Activist decisions are mainly related to the criminal justice system and legal rights (which comprise the vast majority of cases). In this area itself, most challenges involve police or administrative conduct rather than legislation. As well, many of the laws actually struck down have been procedural in nature not provoking much collision with legislative values.[685] It is evident that the Supreme Court under the *Charter* has not replaced the elected government, rather providing an effective check on government action in a cautious, yet qualified manner.

Often, controversial "activist" decisions actually reflect a moderated activism as *Morgentaler* portrayed. In *Morgentaler*, the Court struck down the abortion law (Section 251 of the Criminal Code). However, the majority of judges found only procedural violations of the *Charter* avoiding making substantive judgements. Only one judge in seven

expressed a constitutional right to abortion and all acknowledged that parliament held a valid interest in protecting the life of an unborn child.[686]

The Court has also shown moderation in the area of extradition and foreign policy. It is true that the Canadian Supreme Court has rejected a formal political questions doctrine (as exists in the United States), subjecting to review political decisions which would otherwise be excluded. For example, Dickson, C.J. stated in *Operation Dismantle* that the courts should not decline from reviewing a case because it relates to foreign policy, crown prerogatives or is highly political.[687] However, cases such as *Operation Dismantle* also display the Court's deference to government policy in the matters of foreign policy and defense, despite the absence of a political questions doctrine. In this case, the Court refused to overrule (based on Section 7) the Canadian government's decision to allow United States cruise missile testing in Canada.[688] (preventing the Court from judging on "conjecture" rather than fact) Furthermore, cases such as *Cotroni* reveal a deferential attitude to extradition laws.[689]

The Court has, in fact, been respectful of legislative majorities, striking a legitimate balance between activism and restraint. There is evidence that the majority of Canadian society is favourable to the role the judiciary has played under the *Charter*. Monahan points out that according to a 1992 Angus Reid poll, the *Charter* is very popular with the public, by a three to one ratio. Furthermore, nearly three in five Canadians feel that the *Charter* has permanently protected individuals from legislative majorities. Ironically, the highest support for the *Charter* exists in Quebec. (Angus Reid, 1992; 3-4)[690]

Russell also reports from surveys taken that the majority of Canadians think that the *Charter* is a good thing and are not concerned with "the possible erosion of legislative supremacy". As well, over 60% of a sample of 2,000 citizens felt that the courts, not the legislatures, should have the final say when a law is found to be unconstitutional.[691] The judiciary seems to have continuing support from the people. "Amongst the public, the judiciary may well have more legitimacy than elected legislators as decision-makers on the meaning and limits of rights and freedoms."[692]

It is evident that the Court has not usurped the legislative function through its power under Section One of the *Charter*. The judiciary instead has remained faithful to a healthy system of checks and balances, reserving its activism to cases where judges are competent to ensure the protection of individual rights. In addition, Canadian society has generally favoured the judicial function under the *Charter* confirming the consent of the people.

The legislature plays a crucial role in promoting and protecting important values. Yet, individual or minority rights may be overlooked or trampled on in the process. The Canadian judiciary under the *Charter* has served to remind the government that policy must be considerate of all legitimate interests, conforming with *Charter* values as much as is reasonably possible. They have also served as an impartial arbiter when a collision of values does take place.[693] Furthermore, the legislature itself through delayed action or vague drafting, may leave tough issues in the hands of the judiciary, who out of necessity must act.[694]

Basically, all institutions (governmental and judicial) play a crucial role in comprising an intricate healthy system of checks and balances ensuring our society remains free and democratic.

> "In short, acting alone each could threaten the stability of the whole, but it is in their interaction that the integrity of the whole is preserved. The Court then does not threaten to undermine the validity of public consensus and accountable democracy, it helps keep it balanced. There is no absolute morality in majority interests, any more than there is in minority ones. What the courts are being asked to do under the *Charter* is ensure that the morality of the constitution remains supreme, and that in the delineation of public policy by each of the three partners, the constitution's guarantees are realized."[695]

CONCLUSION

Judicial review of the constitutionality of laws has certainly evoked much criticism as being contrary to democratic values and the rule of law. Judges have been accused of

creating a government of men and not of laws. They have been described as a bevy of platonic guardians, an aristocracy of the robe.

Although judicial review and majoritarianism are at odds, the above comments overlook certain inescapable realities. Democracy has also stood for liberty, tolerance, and the protection against possibly tyrannical or omnipotent legislatures, which if not properly deterred could themselves become a government of unjust laws. Constitutional values attempt to ensure that this will not occur, that power will be limited, and liberty and tolerance preserved.

Although judicial review in its modern form is a powerful institution, it still enables legislatures to perform their vital function. Part One of this study indicated that the judiciary in Canada and the United States through limitations theory have developed a balanced approach to constitutional adjudication, taking an active stance on some issues while granting adequate leeway to government initiatives in many instances: in Canada with the modulation of Section 1's severity based on various criteria and in the United States through the levels of scrutiny analysis. Legislatures do afterall often serve to protect values, yet judicial review under the constitution ensures they remain faithful to this function on behalf of majorities and minorities alike.

The rule of law itself has come to be regarded as the mark of a free society. It has been identified with the liberty of the individual.[696] According to Dicey, it encompasses the absence of arbitrary governmental power.[697] The constitution is the supreme law, the cornerstone of the rule of law. But it has no meaning unless there is a remedy available to enforce it.

> "The courts are the ultimate guardians of the rights of society. Legislators may pass laws upholding these rights; boards and human rights councils may act to enforce them. But when conflicts arise, it is to the courts that the citizen must turn. If the courts decline to act, the law becomes an empty symbol, full of sound and fury but signifying nothing."[698]

The rule of law also "seeks to maintain a balance between the notions of individual liberty and public order". Such a harmony can only be attained "by the existence of independent courts which can hold the balance between citizen and state, and compel governments to conform to the law."[699] Judicial review, thus, is not contrary to the rule of law. It rather protects it. Furthermore, it can be reconciled to a certain extent with democratic values, in the United States and certainly in Canada for the reasons set out in this study.

This is not meant to be overly simplistic. The issue remains controversial. Judges are people too, with subjective beliefs. Yet, as long as they perform their function impartially to the best of their abilities, striking a balance between activism and restraint and remaining bound to the concepts in the document, they can legitimately help to apply and protect rights within the context of modern society. The people can still voice their opposition. Legislatures, especially in Canada, do maintain elements of control. Ultimately, the fact remains that there is no alternative to the judicial function.

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    See also: The Honourable Jean Chrétien, "The Negotiation of the Charter: The Federal Government Perspective" in Litigating the Values of a Nation. *Ibid.* p. 5.

12. J. Hiebert, *Ibid.* pps. 103, 124, 125.

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16. "Federal Draft - The Canadian Charter of Rights and Freedom" (Federal - Provincial Conference of First Ministers on the Constitution, Ottawa, 8-12 September 1980).

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18. J. Hiebert, *supra* Note 10, pps. 120-124.

19. *Ibid.* p. 125.

20. *Procureur général du Québec c. Quebec Protestant School Boards* (1984), 2 R.C.S. 67.

21. Does Section 1 however have any relevance to the rights and liberties which have internal limitations; specifically, Sections 7, 8 and 9. The two stage analysis establishes some difficulty in this area. The petitioner must not only prove the existence of a restriction regarding these rights but ends up being required to prove that the restriction is unreasonable. For example, Section 7 guarantees a right to life, liberty and security, yet only in the measure where any deprivation is not incompatible with the "principles of fundamental justice". Furthermore, Section 8 guarantees a right of security against "unreasonable" search or seizure thus qualifying the right within the provision. Consequently, the petitioner at the first stage must prove that the restriction does not adhere to the principles Section 7 presents, that it is unreasonable and relating to Section 8 that the search is unreasonable. It has thus been questioned if, in light of this, it is still necessary to resort to the analysis of the limits' reasonableness by way of a Section 1 analysis. In *R. c. Noble and Re Moore and the Queen* (1994) 10 C.C.C. (3d) 306, 313 concerning Sections 8 and 9, the possibility of invoking Section 1 was rejected. However, the Court in *Renvoi sur la Motor Vehicle Act* (1985) 2 S.C.R. 486 decided that the Section 1 analysis is applicable to these dispositions, specifically in this case to Section 7, although its usefullness may be limited to exceptional circumstances.

See: José Woehrling, *infra* note 24, pps. 8, 9.

See also: Pierre Béliveau, Les Garanties Juridiques dans les Chartes des Droits Montréal: Université de Montréal, 1991. p. 47.

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24. José Woehrling, "L'Article 1 de la Charte Canadienne et la problematique des restrictions aux droits et libertés: L'État de la jurisprudence de la cour Suprème" dans Actes des Journées Strasbourgeoises de l'Institut Canadien d'études juridiques supérieurs, droits de la personne: L'emergence de droits nouveaux Cowansville: Editions Yvon Blais, 1992. p. 6.

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30. *Reference Re: Alberta PUblic Service Employee Relations Act* (1987), 38 D.L. R. (4th) 161.

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35. David Beatty, "Human Rights and Constitutional Review in Canada" (1992) 13 *Human Rights Law Journal*, p. 188.

36. *R. v. Jones* (1986), 2 S.C.R. 284.

37. *A.G. Saskatchewan v. Carter* (1991), 81 D.L.R. (4th) 765.

    See also: David Beatty, *supra* Note 35, p. 188;

    and Rainer Knopff, F.L. Morton, *supra* Note 29, pps. 332-372.

38. *Andrews v. Law Society of British Columbia* (1989) 1 S.C.R. 141.

39. *R. v. Turpin* (1989) 1 S.C.R. 1296.

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41. *Irwin Toy*, *supra* Note 40.

42. Dale Gibson, *supra* Note 40, p. 435.

43. P.A. Chapman, "The Politics of Judging: Section One of the Canadian Charter of Rights and Freedoms" (1986) 24 *Osgoode Hall Law Journal*, p. 879.

44. David Beatty, *supra* Note 35, p. 189.

45. Peter Hogg, *supra* Note 28, p. 819.

46. Rainer Knopff, F.L. Morton, *supra* Note 29, p. 44.

47. *Ibid.*, p. 44.

48. *Andrews v. Law Society of British Columbia*, *supra* Note 38, p. 178.

49. *R. v. Oakes*, *supra* Note 22.

50. José Woehrling, *supra* Note 24, p. 7.

51. David Beatty, *supra* Note 35, p. 187.

52. *Hunter v. Southam, supra* Note 26.

Big M. Drug Mart, supra Note 25.

See Beatty, *supra* Note 35, p. 188.

53. Dale Gibson, *supra* Note 40, p. 440.

54. In *Danson c. Ontario* (1990) 2 S.C.R. 1086, the Court, while affirming that a factual proof has always been an essential aspect of constitutional decisions, also recognized the distinction between adjudicative facts and legislative facts. According to this distinction (inspired by American doctrine) adjudicative facts are precise and are established by traditional methods of proof. However, legislative facts are more general and uncertain contingent upon reasoning and judgment. Therefore, the conditions surrounding the admissibility of proof are less severe. The Court will admit whenever possible at every stage of the case proof of extrinsic legislative facts to clarify the social, political,

economic and cultural context under which the law was adopted, and in which it operates. The presentation of these legislative facts is permitted in the form of writings including studies, investigative reports, reports from social science experts, parliamentary commission reports and debates, statistical reports, minutes of parliament. These extrinsic documents are also known as "Brandies Briefs" (inspired by the United States practice) and they demonstrate the flexibility concerning the rules of proof, especially regarding heresay (oui-dire).

See Simon Potter, "La preuve requise et sa nature" in Droits de la Personne: L'emérgence de droits nouveaux, *supra* Note 24, pps. 59-63.

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61. *Retail, Wholesale* and *Dept. Store Union, Local 580* and *Dolphin Delivery Ltd.* (1986) 2 S.C.R. 573.

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64. *Ibid.*, p. 72.

65. *Ibid.*, pps. 72-75 discussing *Young v. Young* (1993) 4 S.C.R. 3.

66. Joel Bakan, Bruce Ryder, David Schneiderman, Margot Young, *supra* Note 63, p. 73.

67. *Young v. Young, supra* Note 65, p. 90.

68. Constitutional challenges to extradition in cases when foreign states used the death penalty have been rejected.

See: David Beatty, *supra* Note 35, p. 187.

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69. See Articles 8-11 of the European Convention using the terms "prescribed by law" or "in accordance with the law" both phrases receiving the same interpretation (*Sunday Times v. United Kingdom*, April 26, 1979, Series A, no. 30.). For example, Article 8 referring to freedom of thought, conscience and religion states, "freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law, and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

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R. c. Swain (1991) 1 S.C.R. 933.

See: Pierre Béliveau, *supra* Note 21, p. 51.

75. See, for example: *Sunday Times v. United Kingdom, supra,* Note 69, *Silver v. United Kingdom*, 5 E.H.R.R. 347, Eur. Ct. of Human Rights (1983)

Barthold v. Federal Republic of germany Series 8, No. 90.

See: B. Hovius, "The Limitations Clauses of the European Convention of Human Rights: A Guide for the Application of Section 1 of the Charter" (1985) 17 *Ottawa L. Rev.*, p. 226.

76. *Weatherall v. A.G. Canada* (1989) 1 F.C. 18 (F.C.A.).

77. *R. c. Therens, supra* Note 74.

78. *Sunday Times v. United Kingdom, supra* Note 69.

See: B. Hovius, *supra* Note 75, p. 230.

79. *Silver v. United Kingdom, supra* Note 75.

80. *Barthold v. Federal Republic of Germany, supra* Note 75.

81. *Irwin Toy Ltd., supra* Note 40.

82. *Luscher v. Deputy Minister Revenue Canada* (1985) 1 F.C. 85, (1985), 17 D.L.R.(4th) 503 (F.C.A.).

See: Pierre Béliveau, *supra* Note 21, p. 54 and Dale Gibson, *supra* Note 40, p. 439.

83. *R. c. Red Hot Video Ltd.* (1985), 18 C.C.C.(3d) 1 (B.C.C.A.).

See: Béliveau, *supra* Note 21, p. 54.

84. Dale Gibson, *supra* Note 40, p. 439.

85. *Osborne v. Canada Treasury Board* (1991), 2 S.C.R. 69.

86. *Irwin Toy, supra* Note 40.

87. *Ontario Film and Video Appreciation Society c. Ontario Board of Censors* (1984), 38 C.R.(3d), 271 (Ont. C.A.).

See: Pierre Béliveau, *supra* Note 21, p. 54.

88. *R. v. Nova Scotia Pharmaceutical Society* (1992) 2 S.C.R. 606, p. 621.

See: Dale Gibson, *supra* Note 40, p. 439.

89. P.A. Chapman, *supra* Note 43, pps. 869-870.

90. R.M. Elliot, "The Supreme Court and Section One: The Erosion of the Common Front" (1988) 12 *Queen's L.J.*, 277.

91. *L.S.U.C. v. Skapinker* (1984) 1 S.C.R. 357.

92. *A.G. Quebec v. Quebec Association of Protestant School Boards, supra* Note 20.

93. *Hunter v. Southam Inc., supra* Note 26.

94. *Singh v. Minister of Employment and Immigration* (1985) 1 S.C.R. 177.

95. *Ref. re S. 94(2) of the British Columbia Motor Vehicle Act, supra* Note 21.

96. *Law Society of Upper Canada v. Skapinker, supra* Note 91, p. 384.

97. *Ibid.*, p. 363.

98. *A.G. Quebec v. Quebec Association of Protestant Schoolboards, supra* Note 20, p. 88.

99. *Hunter v. Southam, supra* Note 26, p. 155.

100. *Ibid.*, p. 145.

101. Rainer Knopff, F.L. Morton, *supra* Note 29, pps. 22-23.

102. *Re Singh and the Minister of Employment and Immigration, supra* Note 94, p. 219.

103. Rainer Knopff, F.L. Morton, *supra* Note 29, p. 24.

104. *Re Singh, supra* Note 94, p. 217.

105. *Motor Vehicle Act, supra* Note 21, p. 321.

106. *Ibid.*, pps. 284, 285.

107. *Ibid.*, p. 521.

See: R.M. Elliot, *supra* Note 90, p. 310.

108. *Ibid.*, pps. 273-276.

See: Peter Hogg, *supra* Note 28, pps. 822, 823.

Peter Hogg, "Judicial Reform of Criminal Law under Section 7 of the Charter" in Gérald A. Beaudoin (ed.) The Charter Ten Years Later Cowansville: Editions Yvon Blais, 1992. p. 74.

109. *Motor Vehicle Act, supra* Note 21, p. 273.

110. *R. v. Big M Drug Mart, supra* Note 25.

111. *Ibid.*, p. 352.

112. *Ibid.*, p. 352.

113. *R. v. Oakes, supra* Note 22.

114. *Ibid.*, p. 138.

115. *Ibid.*, p. 138.

116. *Ibid.*, p. 138.

117. *Ibid.*, p. 138.

118. *Ibid.*, p. 135.

119. *Ibid.*, p. 136.

120. Simon Potter, *supra* Note 54, p. 67.

121. *Ibid.*, p. 69.

122. Pierre Béliveau, *supra* Note 21, p. 67.

123. The technique of comparing our contested norms with those of other jurisdictions has actually been inspired by European law. The limitation clauses in the European Convention also refer to laws being in accordance with a democratic society. Section 1 referring to a "free and democratic society" provides an excellent justification for the legitimacy or legality of the recourse to comparative law, as such a justification (although not always elaborated upon by the courts) is necessary if the comparative study plays an important role in the judges' reasoning or motivation to adopt a certain solution. All that is required to justify the comparison is that the country consist of a democratic society, and the Court may look to the norms of that country or to its jurisprudence in defining the criteria of a free and democratic society. It is only necessary to demonstrate that the country is comparable to Canada in its democratic and liberal tradition and that the same norms exist there. Comparisons may be made with other provinces and countries as well and to international instruments binding various democratic countries. Yet in all comparisons, whether bilateral or multilateral, attention should be paid to the socioeconomic differences and judicial traditions of the country of reference to avoid an oversimplified comparison. When referring to foreign legislation and jurisprudence, the court must be prudent, as the viability of a different rule or norm in our society may be explained in light of the above factors. Canadian specificity must also be recognized.

The United States bilateral comparison is most often used as a source of foreign comparison due to its similarities with Canada regarding culture, politics and socioeconomic conditions, in addition to the practical and accessible nature of its documentation. (The jurisprudence of the European Convention is the most utilized at the international level.)

See: José Woehrling, "Le Rôle du Droit Comparé dans la Jurisprudence des droits de la Personne" in A. de Mestral (ed.) The Limitation of Human Rights in Comparative Law Cowansville: Editions Yvon Blais, 1986, pps. 459, 494, 506-508.

See also: Pierre Béliveau, *supra* Note 21, p. 84.

124. The European Convention refers to the terms "necessary in a democratic society". The absence of the word "free" has no real consequence as this norm operates and is defined in a similar fashion as that of Section 1 of the Charter. The European Court has interpreted this norm emphasizing "tolerance, broadmindedness and individual interests". [See, for example, *Handyside c. United Kingdom* 2 E.H.R.R. 245 (Eur. Ct. of Human Rights), 1978.] They also engage in a comparative type analysis in thier assessment of restrictions with other democratic contracting states. In *Handyside* and *Dudgeon v. United Kingdom* (1981) 3 E.H.R.R. 40 (Eur.Ct.H.R.) it was decided that the countries of the E.E.C. represent models of democratic societies, and if many of them accept restrictions of the same nature, it can be considered an indication of the reasonable nature of such limitations.

See: Simon Potter, *supra* Note 54, p. 66.

Errol P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights" (1982) 20 *Alta. L. Rev.* 383.

B. Hovius, *supra* Note 75, p. 244.

Pierre Béliveau, *supra* Note 21, p. 84.

125. *R. v. Oakes*, *supra* Note 22, pps. 138, 139.

126. *Ibid.*, pps. 139-140.

127. *Ibid.*

128. Andrew Lokan, "The Rise and Fall of Doctrine Under Section 1 of the Charter" (1992) 24 *Ottawa Law Review*, p. 170.

129. R.M. Elliot, *supra* Note 90, p. 312.

130. P. Chapman, *supra* Note 43, p. 885.

Andrew Lokan, *supra* Note 128, p. 177.

131. *R. v. Oakes*, *supra* Note 22, p. 337.

132. Ruth Colker, "Section 1, Contextuality and the Anti-Disadvantage Principle" (1992) 42 *University of Toronto L.J.*, p. 90.

See: *R. v. Oakes, supra* Note 22, pps. 138-139.

133. *Ibid.*, p. 108.

134. José Woehrling, *supra* Note 24, p. 12.

135. Andrew Lokan, *supra* Note 128, p. 176.

Pierre Béliveau, *supra* Note 21, p. 56.

See: *Big M Drug Mart*, *supra* Note 25, pps. 335-336 and *R. c. Zundel* (1992) 2 S.C.R. 731 where the court rejected the shifting purpose doctrine.

136. See, for example, *R. c. Butler* (1992) 1 S.C.R. 452 at 494.

For further comments, see also D.F. Bur, J.K. Kehoe, "Developments in Constitutional Law: The 1992-93 Term" (1994) 3 *Supreme Court Law Review*, pps. 87-89.

Christopher M. Dassois, Clifton P. Prophet, "Charter Section 1: The Doctrine of Grand

Unified Theory and the Trend Towards Deference in the Supreme Court of Canada" (1993) 15 *Advocate's Quarterly*, p. 293.

137. See, for example, *R. v. Jones* (1986) *supra* Note 36, p. 299 and *Edwards Books & Art Ltd.* (1986) 2 S.C.R. 713, p. 770.

See: Christopher M. Dassois, Clifton P. Prophet, *supra* Note 136, p. 295.

138. *Black c. Law Society of Alberta* (1989) 1 S.C.R.

José Woehrling, *supra* Note 24, p. 15.

139. *Andrews v. Law Society of British Columbia, supra* Note 38.

140. *Re Singh, supra* Note 94.

See: Christopher M. Dassois, Clifton P. Prophet, *supra* Note 136, pps. 294, 295 citing *R. v. Lee* (1989) 2 S.C.R. 1384.

141. For example, a variety of general objectives are listed in Articles 8-11. They include national security, public safety, the economic well being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others, the protection of public order, the interests of national security, territorial integrity, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary.

See: Alexander Kiss, "Les clauses de limitation et de dérogation dans la Convention Européenes des droits de l'homme" in G. Turp and G.A. Beaudoin (eds.), Perspectives Canadiennes et Européenes des droits de la personne. Cowansville: Editions Yvon Blais, 1984, pps. 125-130, 241 and B. Hovius, *supra* Note 75, p. 239.

142. David Beatty, *supra* Note 35, p. 193.

143. Andrew Lokan, *supra* Note 128, pps. 177-178.

144. *Ibid.*, p. 178.

David Beatty, *supra* Note 35, p. 193.

145. Christopher Dassois, *supra* Note 136, p. 291.

146. *R. v. Oakes, supra* Note 22, *Andrews v. Law Society of B.C., supra* Note 38.

Pierre Béliveau, *supra* Note 21, p. 62.

147. *Ford v. Québec, supra* Note 23, *R. v. Morgentaler* (1987) 1 S.C.R. 30.

148. José Woehrling, *supra* Note 24, p. 21.

149. *Ibid.*, p. 25.

Andrew Lokan, *supra* Note 128, p. 176.

Christopher Dassois and Clifton Prophet, *supra* Note 136, p. 296.

150. See, for example, *R. v. Downey* (1992) 13 C.R. (4th) 129 and Reference re. ss. 193 and 195. 1(1)(C) of the Criminal Code (1990) 77 C.R. (3d) 1.

Christopher Dassois and Clifton Prophet, *Ibid.*, pps. 296-297.

151. *Ibid.*, p. 297.

152. *Ibid.*, pps. 297, 299.

See: *R. v. Butler*, *supra* Note 136, *R. v. Keegstra* (1990) 3 S.C.R. 697, *R. v. Chaulk* (1990) 3 S.C.R. 1303.

153. Pierre Béliveau, *supra* Note 21, p. 63.

154. According to the European Convention, a restriction must be "necessary in a democratic society", a standard present in Articles 8-11. This standard is the most decisive, employing a proportionary test, a balancing adopted as well by the Canadian courts. Although the term "necessary" connotes a more stringent requirement than that ot "reasonable", the European Convention has been quite flexible in its interpretation, allowing for a "margin of appreciation" to the States. (See: *Handyside*, Dec. 7, 1976, Série A, No. 24, p. 23.)

The necessity test is not applied in absolute terms. Various factors or criteria are examined in the proportionality test to determine the level of scrutiny. They include the nature of the interests involved, the legitimate aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case. Personal liberties or freedom of expression will receive a higher scrutiny than economic liberties or social and technical issues.

See: B. Hovius, *supra* Note 75, p. 242.

Stéphane Marsolais, Guy Tremblay, "Droit Constitutionnel: Reconnaitre aux Pouvoirs Politiques une Marge d'appréciation aux fins de l'article premier de la Charte Canadienne" (1992) 52 *Revue du Barreau*, pps. 850-855 and J.F. Aubert, "Limitations de droits de l'homme: Le rôle respectif du législateur et des tribunaux" dans A. de Mestral et autres (ed.), *supra* Note 123, p. 202.

The factors or criteria examined in the proportionality test by the organs of the European Convention are similar to those deemed relevant by the Canadian Court in such cases as

Edwards Books and *Irwin Toy* in determining the stringency of the proportionality test. The recent Canadian analysis in its use of such a host of criteria thus resembles that of the European Convention.

155. See: Geoffrey Stone, "Limitations on Fundamental Freedoms: The Respective Roles of Courts Legislators in American Constitutional Law" and Edwin Baker, "Limitations on Basic Human Rights - A View from the United States" in Armand de Mestral and others (eds.), *supra*, Note 123, pps. 173, 75.

156. José Woehrling, *supra* Note 24, pps. 18, 19.

157. *Ibid.*, p. 19.

158. *Ibid.*, p. 19.

159. Rainer Knopff, F.L. Morton, *supra* Note 29, pps. 157, 158.

160. P.W. Hogg, "Section 1 Revisited" (1991) 1 *N.J.C.L.*, p. 19.

161. José Woehrling, *supra* Note 24, p. 19.

162. Ruth Colker, *supra* Note 132, p. 90.

163. José Woehrling, *supra* Note 24, p. 21.

See also: Peter Hogg, *supra* Note 160.

164. José Woehrling, *Ibid.*, p. 21.

165. Pierre Béliveau, *supra* Note 21, p. 64.

166. Christopher Dassois and Clifton Prophet, *supra* Note 136, p. 306.

167. *Dagenais v. Canadian Broadcasting Corp.* (1994) 3 S.C.R. 835.

168. Don Stuart, "A Welcome New Approach to Section 1 Justification in Criminal Cases" (1995) 34 *Criminal Reports*, 399.

169. *R. v. Laba* (1994) 1 S.C.R. 175.

170. Don Stuart, *supra* Note 168, p. 399.

171. *Ibid.*

172. P.A. Chapman, *supra* Note 43, p. 886.

173. *Ibid.*, pps. 886-887.

R. v. Jones (1986), *supra* Note 36.

174. *R. v. Jones, Ibid.*, p. 299.

175. *Ibid.*

176. *Ibid.*

177. *Ibid.*, p. 304.

178. Andrew Lokan, *supra* Note 128, p. 176.

179. *R. v. Jones, supra* Note 36, pps. 317-319.

180. *Ibid.*, p. 315.

181. *Ibid.*, pps. 313-315.

182. *R.W.D.S.U. v. Dolphin Delivery Ltd., supra* Note 61.

183. *Ibid.*, p. 605. See R.M. Elliot, *supra* Note 90, pps. 324-326.

184. *R. v. Edwards Books*, *supra* Note 137.

185. *Ibid.*, p. 768-69.

186. *Ibid.*, p. 772.

187. *Ibid.*, p. 770.

188. *Ibid.*, p. 771.

189. *Ibid.*, p. 772.

190. See *Big M Drug Mart, supra* Note 25 where Dickson, C.J. refuses to give weight to arguments of administrative convenience.

191. *Edwards Books, supra*, Note 137, pps. 772-73.

192. *Ibid.*, p. 779.

193. *Ibid.*, p. 773.

194. *Ibid.*, p. 782.

195. *Ibid.*, pps. 781-82.

196. *Ibid.*, p. 783.

197. *Ibid.*, p. 794.

198. *Ibid.*, pps. 794-95.

199. *Ibid.*, p. 796.

See Note 154 discussing the margin of appreciation applied by the European Court. Deference is often accorded to the member states respecting state sovereignty and the responsibilities and authority of governments in a democracy. (The latter factor being of extreme importance to the Canadian Court as well.)

See Stéphane Marsolais and Guy Tremblay, *supra*, Note 154, p. 855.

200. *Edwards Books, Ibid.*, p. 796.

201. *Ibid.*

202. *Ibid.*, pps. 809-10.

203. Andrew Lokan, *supra*, Note 128, pps. 181-82.

204. *Ford c. P.G. de Quebec, supra*, Note 23.

205. *United States v. Cotroni*, (1989) 1 S.C.R. 1469, pps. 1489-90.

206. *Ibid.*, p. 1489.

207. *Ibid.*, p. 1490.

208. *Ibid.*, p. 1481.

209. *Irwin Toy, supra,* Note 40.

210. *Ibid.*, p. 999.

211. *Ibid.*, p. 993-94.

212. José Woehrling, *supra*, Note 24, p. 28.

213. *U.S. v. Carolene Products*, 304 U.S. 144, (1938).

214. Andrew Lokan, *supra*, Note 128, p. 183.

215. David Beatty, *supra*, Note 35, p. 191.

216. Isabel Grant, "Developments in Criminal Law - the 1993-94 Term" (1995) 6 S.C.R., p. 210-211.

217. F.L. Morton, P.H. Russell, M.J. Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis", (1992) 30 *Osgoode Hall L.J.*

218. Don Stuart, "Will Section 1 Now Save Any Charter Violation? The Chaulk Effectiveness Test is Improper" (1991) 2 *Criminal Reports*, p. 115.

219. Andrew Lokan, *supra*, Note 128, p. 183.

220. Patrick Monahan, "The Charter Then and Now" in P. Bryden, S. Davis, J. Russell (eds.), *supra*, Note 34, p. 183, and Ruth Colker, *supra*, Note 132, p. 106.

221. F.L. Morton, P.H. Russell, M.J. Withey, *supra,* Note 217, p.9.

222. *Ibid.*, p. 11.

223. Dale Gibson, *supra*, Note 40, p. 436.

224. Andrew Lokan, *supra*, Note 128, p. 185.

225. *McKinney v. Université de Guelph*, *supra*, Note 62.

226. *Ibid.*, pps. 305, 308.

227. *Ibid.*, p. 309.

228. José Woehrling, *supra*, Note 24, p. 30.

229. McKinney, *supra*, Note 62, p. 296.

230. *Stoffman v. Vancouver General Hospital*, (1990) 3 S.C.R. 483.

231. *University of Alberta v. Alberta (Human Rights Commission)* (1992) 2 S.C.R. 1103.

Bell v. Canadian Human Rights Commisison (1994) 20 C.R.R. (2d) 267.

Cooper v. Canada (Human Rights Commission) (1994) 167 N.R. 17.

232. *Andrews v. Law Society of B.C.*, *supra*, Note 38.

R. v. Turpin, supra, Note 39.

Ref. Re. Workers' Compensation Act (1989), 56 D.L.R. (4th) 765.

233. *R. v. Swain, supra*, Note 74, p. 992.

See Hester Lessard, Bruce Ryder, David Schneiderman, Margot Young, "Developments in Constitutional Law" (1996) 7 S.C.L.R., p. 87.

234. Anne F. Bayefsky, "A Case Comment on the First Three Equality Rights Cases Under the Canadian Charter of Rights and Freedoms", (1990) 1, (2nd) S.C.L.R., p. 531.

235. *U.S. v. Carolene Products, supra*, Note 213.

See J.M. Ross, "Levels of Review in American Equal Protection and Under the Charter", (9186) 24 *Alta. L. Rev.* 441, and Neil Finkelstein, "Section 1 and 15 of the Canadian Charter and the Relevance of U.S. Experience", (1985-86), 6 A.Q.,, 188.

236. *Egan v. Canada* (1995) 2 S.C.R. 513.

Miron v. Trudel (1995) 2 S.C.R. 418.

237. *Thibaudeau v. R.* (1995) 2 S.C.R. 627.

Lessard, Ryder, Schneiderman, and Young, *supra*, Note 233, pps. 90-91.

238. *Ibid.*, pps. 90-95. See *Egan v. Canada, supra*, Note 236.

239. *Egan v. Canada, Ibid.*, pps. 535-538.

240. *Ibid.*, p.538, 540. (See McKinney, *supra*, Note 62, p. 316)

241. *Ibid.*, p. 572.

242. Lessard, Ryder, Schneiderman, and Young, *supra*, Note 233, p. 100.

243. *Ibid.*, pps. 100-103.

Native Women's Association of Canada v. Canada, (1994) 3 S.C.R. 627.

244. *Haig v. Canada* (1993) 2 S.C.R. 995.

245. Leon Trakman, Reasoning with the Charter, Toronto: Butterworths, 1991, pps. 31-33.

246. Terence A. Wade, "Parliament and the Charter", in G.A. Beaudoin (ed.) The Charter Ten Years Later. Cowansville: Carsell, 127, pps. 131-33.

247. *R. v. Prosper* (1994) 3 S.C.R. 236, pps. 267, 288. See also Lessard, Ryder and others, *supra*, Note 233, pps. 104-105.

248. Andrew Lokan, *supra*, Note 128, pps. 168-69, 184-85, and D.F. Bur, J.K. Kehoe, *supra*, Note 59, p. 90.

249. D.F. Bur, *Ibid.* Although the contextual core value theory regarding, for example, free expression, allows for a wide protection of content based expression (except for violent forms), many values are deemed distant from the core values of Section 2b thus not meriting much scrutiny at the justificatory level. This may be perceived as narrowing the right, for it pre-determines (at the definitional level) a low level of protection for the Section One analysis. In this respect, the contextual approach is significant in delineating the scope of the right.

250. *Edmonton Journal v. Alberta* (1989) 2 S.C.R. 1326.

251. *Ibid.*, pps. 1355-56.

252. See, for example, *Osborne v. Canada, supra*, Note 85.

D.F. Bur, J.K. Kehoe, "Developments in Constitutional Law: The 1990-91 Term" (1992) 3 S.C.L.R., p. 483.

253. Rainer Knopff, F.L. Morton, *supra*, Note 29, p. 48.

254. *Irwin Toy, supra*, Note 40, p. 976 and *Rocket v. Royal College of Dental Surgeons of Ontario* (1990) 2 S.C.R. p. 247.

255. *Irwin Toy, Ibid.*

256. *R. v. Keegstra* (1990), 117 N.R.I., pps. 67, 72.

Saskatchewan Human Rights Commission v. Bell (1994) 5 W.W.R. 458.

257. Rainer Knopff, F.L. Morton, *supra*, Note 29, pps. 48-49.

258. Reference re. SS. 193 and 195.1 (1) (c) of the Criminal Code, *supra*, Note 150.

259. *Ibid.*, p. 13.

260. *Ibid.*, pps. 14-15.

261. *Ibid.*, p. 162.

See also Don Stuart, *supra*, Note 218, pps. 110-11.

262. D.F. Bur, J.K. Kehoe, *supra*, Note 59, pps. 88-89.

See Butler, *supra*, Note 136, pps. 494-495.

263. *Ibid.*, p. 500.

264. *Ibid.*, p. 506.

265. F.L. Morton, *supra*, Note 29, p. 49

See also, Ruth Colker, *supra*, Note 132, pps. 109-110.

266. *R. v. Keegstra, supra*, Note 256, p. 75.

267. *Edmonton Journal, supra*, Note 250.

268. *Rocket, supra*, Note 254.

269. Patrick Monahan, *supra*, Note 220, pps. 116-117.

Christopher M. Dassois, Clifton Prophet, *supra*, Note 136, p. 299.

270. *Rocket, supra*, Note 254, pps. 242-247.

271. *Ibid.*, pps. 246-47.

272. *Andrews v. Law Society of B.C., supra*, Note 38.

Black v. Law Society of Alberta, supra, Note 138.

273. Andrew Lokan, *supra*, Note 128.

274. *R. v. Keegstra, supra*, Note 256.

Canadian Human Rights Commission v. Taylor (1990) 3 S.C.R. 892.

275. *Keegstra, Ibid.*, p. 65.

276. *Ibid.*, p. 59.

277. *Ibid.*, pps. 86-87.

278. *Ibid.*, p. 208.

279. *Ibid.*, p. 51.

280. *Ibid.*, p. 91.

281. D.F. Bur, J.K. Kehoe, *supra*, Note 252, p. 478.

282. *Taylor, supra*, Note 274.

283. *Motor Vehicle Reference, supra*, Note 21, p. 503.

284. *Societé des Acadiens v. Association of Parents* (1986) 1 S.C.R. 549, p. 548.

285. Isabel Grant, "Developments in Criminal Law - The 1993-94 Term" (1995) 6 S.C.L.R., pps. 209-212.

286. Isabel Grant, "Developments in Criminal Law - The 1994-95 Term" (1996) 7 S.C.L.R., pps. 254-55, 259.

See also Rosemary Cairns Way, "Developments in Criminal Law - the 1995-96 Term" (1997) 8 S.C.L.R., p. 182.

287. Michele Fuerst, Alan D. Gold, "The Stuff that Dreams are Made of - Criminal Law and the Charter of Rights" (1992) 24 *Ottawa Law Review*, p. 16.

288. *Ibid.*

289. Hamar Foster, Robert Harvie, "Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter", (1992) 24 *Ottawa Law Review*, pps. 107, 108.

290. *Ibid.*, p. 109.

291. B.L. Strayer, "Life Under the Canadian Charter: Adjusting the Balance Between Legislatures and the Courts" (1988) *Pub. Law*, pps. 355-56, Peter H. Russell, "Canada's Charter of Rights and Freedoms: A Political Report" (1988) *Public Law*, pps. 386, 392-93.

292. *Ibid.*

293. *Tremblay v. The Queen* (1987) 1 S.C.R. 265.

Peter H. Russell, *supra*, Note 291, p. 393.

294. *Ibid.*

295. B.L. Strayer, *supra*, Note 291, pps. 357-58.

296. Isabel Grant, *supra*, Note 285, p. 211.

297. Foster and Harvie, *supra*, Note 289, pps. 109-112.

298. See, for example, *Hunter v. Southam, supra* Note 26.

See also Fuerst and Gold, *supra*, Note 287, p. 25.

299. *Ibid.*, pps. 29-32. See also Foster and Harvie, *supra*, Note 289, pps. 101-103.

300. *R. v. Duarte* (or *R. v. Sanelli*) (1990) 1 S.C.R. 30. Participant surveillance refers to a situation where one party consents to the wiretap.

301. *Ibid.*, pps. 40-46.

302. *R. v. Wiggins* (1990) 1 S.C.R. 62.

303. *R. v. Wong* (1990) 3 S.C.R. 36.

304. *R. v. Thompson* (1990) 2 S.C.R. 1111.

305. *Dalia v. U.S.* 441 U.S. 238 (1979).

306. Foster and Harvie, *supra*, Note 289, p. 102.

307. *R. v. Leclair*, (1989) 67 C.R. (3d) 209.

R. v. Brydges, (1990) 1 S.C.R. 190.

R. v. Elshaw, (1991) 3 S.C.R. 24.

308. Foster and Harvie, *supra*, Note 289, p. 104.

309. *R. v. Therens, supra*, Note 74. See also Fuerst and Gold, *supra*, Note 287, p. 27.

310. Foster and Harvie, *supra*, Note 289, p. 105.

311. *R. v. Hebert*, (1990) 2 S.C.R. 151.

R. v. Broyles, (1991) 131 N.R. 118.

See also Foster and Harvie, *Ibid.*, pps. 67-78; Fuerst and Gold, *supra*, Note 287, p. 36; and Joel Pink, "The Charter and Criminal Justice" in G.A. Beaudoin, *supra*, Note 108, pps. 106-107.

312. Knopff and Morton, *supra*, Note 29, pps. 111-112.

Foster and Harvie, *supra*, Note 289, pps. 80-81.

Fuerst and Gold, *supra*, Note 287, p. 36.

313. *Dubois v. R.* (1985) 2 S.C.R. 350.

314. *R. v. Mannion*, (1986) 2 S.C.R. 272.

315. *R. v. Kuldip*, (1990) 3 S.C.R. 618 ruling that the accused's prior testimony can be used to cross-examine him at re-trial when the purpose is to challenge the credibility of the accused (rather than to incriminate him).

See Fuerst and Gold, *supra*, Note 287, p. 36.

316. Foster and Harvie, *supra*, Note 289, pps. 84-85.

317. Fuerst and Gold, *supra*, Note 287, p. 35.

Foster and Harvie, *supra*, Note 289, pps. 92-97; and Peter Hogg, *supra*, Note 108, pps. 83-88.

Motor Vehicle Reference (reading a substantive element into Section 7) held that absolute liability denied the principles of fundamental justice where the offense carried a penalty of imprisonment (a deprivation of liberty). Such an offense which did not require an element of *mens rea* violated Section 7 and was unconstitutional. In *R. v. Vaillancourt* (1987) 2 S.C.R. 636, the Court held that the felony murder rule violated fundamental

justice. It was not enough for the accused to have *mens rea* regarding the underlying offense (in this case robbery). He had to have the *mens rea* in relation to the death to satisfy the conditions of Section 7's fundamental justice. Yet it was not yet concluded in this case whether the element of *mens rea* required was subjective foreseeability (that he actually foresaw the likelihood of death), or just objective foresight (ought to have foreseen the likelihood of death). It was in *R. v. Martineau* (1990) 2 S.C.R. 1633 where the Court set the standard at subjective foreseeability. This is due to the social stigma associated with the crime.

318. B.L. Strayer, *supra*, Note 291, pps. 362-64.

Foster and Harvie, *supra*, Note 289, p. 92.

319. *R. v. Vaillancourt, supra*, Note 317.

320. *R. v. Martineau, supra*, Note 317; *R. v. Rodney* (1990) 2 S.C.R. 687; *R. V. Luxton* (1991) 2 S.C.R. 711.

321. Peter Hogg, *supra*, Note 108, p. 86-88.

322. *R. v. Logan* (1990) 2 S.C.R. 731.

See Peter Hogg, *Ibid.*, p. 87, and Fuerst and Gold, *supra*, Note 287, p. 35.

323. See Isabel Grant, *supra*, Note 285.

324. *Ibid.*, p. 209.

325. *R. v. Creighton* (1993) 3 S.C.R. 3.

R. v. Gosset (1993) 3 S.C.R. 76.

Isabel Grant, *supra*, Note 285, pps. 217-223.

326. *R. v. Harbottle* (1993) 3 S.C.R. 306.

327. Isabel Grant, *supra*, Note 285, pps. 211, 265.

328. *R. v. Gosset* (1993) 3 S.C.R. 76.

R. v. Felawka (1993) 4 S.C.R. 199.

R. v. Hasselwander (1993) 2 S.C.R. 398.

R. v. Finlay (1993) 3 S.C.R. 103.

See Isabel Grant, *Ibid.*, pps. 265-269.

329. *Ibid.*, pps. 211, 264-65.

330. *R. v. Naglik* (1993) 3 S.C.R. 122.

See Isabel Grant, *Ibid.*, pps. 234-36.

331. Isabel Grant, *Ibid.*, p. 204.

332. *Ibid.*, pps. 203, 218-224.

R. v. Heywood (1994) C.C.C. 3(d) 481.

333. *Ibid.*, p. 523.

334. Isabel Grant, *supra*, Note 285, p. 222.

335. David Beatty, *supra*, Note 35, p. 191.

Don Stuart, *supra*, Note 218.

Clifton and Dassios, *supra*, Note 136 and Foster and Harvie, *supra*, Note 289, p. 107.

336. V. Gauthier, "The Charter, the Right to Counsel and the Breathalyser", (1990) 50 R. du. B. 163.

337. Don Stuart, *supra*, Note 218.

Don Stuart, *supra*, Note 168, pps. 399-401.

R.J. Delisle, "Confusion on Evidentiary Burdens" (1995) 34 C.R. 402 and Yves De Montigny, "Droits Fondamentaux et Projets de Societé: Une réconciliation pour le moins turmultueuse" (1995) 26 R.G.D. 99.

338. *Ibid.*

339. *R. v. Laba, supra*, note 169.

340. *R. v. Genereux* (1992) 88 D.L.R. (4th) 110.

See Clifton and Dassios, *supra*, Note 136, p. 305.

341. *R. v. Schwartz* (1988) 55 D.L.R.

342. *R. v. Whyte* (188) 64 C.R. (3d) 123.

343. *R. v. McNally* (1989) 13 M.V.R. (2d) 322.

344. *R. v. Nagy.*

345. *R. v. Chaulk* (1991) 2 C.R. (4th) 1.

346. *Ibid.*, pps. 31-32.

347. *Ibid.*

348. Don Stuart, *supra*, Note 218, p. 116.

349. *Ibid.*, p. 116.

Don Stuart, *supra*, Note 168, p. 400.

350. *R. v. Chaulk, supra*, Note 345, p. 74.

351. *Ibid.*, p. 75.

352. *R. v. Ratti* (1991) 2 C.R. (4th) 293 (S.C.C.).

R. v. Romeo (1991) 2 C.R. (4th) 307. (S.C.C.).

353. *R. v. Slavens* (1991) 5 C.R. (4th) 204. (S.C.C.).

354. Clifton and Dassios, *supra*, Note 136, pps. 299-300.

355. *R. v. Skinner* (1990) 1 S.C.R. 1235.

R. v. Stagnitta (1990) 1 S.C.R. 1226.

Prostitution Reference, supra, Note 150.

R. v. Downey, supra, Note 150.

356. *R. v. Pearson* (1992) 3 S.C.R. 665.

357. *R. v. Genereux, supra*, Note 340.

358. Clifton and Dassios, *supra*, Note 136, p. 305.

359. *R. v. Genereux, supra*, Note 340, p. 150

360. *R. v. Doyle* (1992) N.W.T.R. 81.

361. *R. v. Seaboyer* (1991) 7 C.R. (4th) 117.

362. *R. v. Daviault* (1994) 3 S.C.R. 63.

363. See Isabel Grant, *supra*, Note 286, pps. 203-04, 249.

364. *R. v. Peck* (1994) 21 C.R.R. (2d) 175.

R. v. George (1994) 90 C.C.C. (3d) 502.

365. *R. v. Laba, supra*, Note 169.

366. Don Stuart, *supra*, Note 168.

R.J. Delisle, *supra*, Note 337.

367. *Ibid.*

368. Foster and Harvie, *supra*, Note 289, pps. 99-100.

Fuerst and Gold, *supra*, Note 287, p. 27.

369. *R. V. Hufsky* (1988) 1 S.C.R. 621.

370. *R. v. Thomsen* (1988) 1 S.C.R. 640.

371. *R. v. Mitchell* (1994) 35 C.R. (4th) 282.

372. *R. v. Ladouceur* (1990) 1 S.C.R. 1257.

373. *Delaware v. Prouse* 440 U.S. 648 (1979).

See Foster and Harvie, *supra*, Note 289, p. 99.

374. *R. v. Wilson* (1990) 77 C.R. (3d) 137.

375. *R. v. Mellenthin* (1992) 3 S.C.R. 615.

376. *R. v. Montour* (1995) 2 S.C.R. 416.

377. Peter Hogg, *supra*, Note 108, pps. 81-83.

Andrew Lokan, *supra*, Note 128, pps. 187-88.

Kent Roach, "Developments in Criminal Procedure: The 1993-94 Term" (1995) 6 S.C.L.R., pps. 340-41.

378. *R. v. Wholesale Travel* (1991) 3 S.C.R. 154.

See Hogg, *Ibid.* and Lokan, *Ibid.*

379. *Thompson Newspapers Ltd. v. Canada* (1991) 1 S.C.R. 425.

See Lokan, *Ibid.*

380. *Comité Paritaire de l'industrie de la Chemise v. Potash* (1994) 2 S.C.R. 406.

381. The offense of false or misleading advertising in the Competition Act was not considered a true crime, but was rather distinguished as a regulatory or public welfare offense. It was expressed that with a true crime inherently wrongful conduct is punished, whereas a regulatory offense does not touch upon moral blameworthiness, attracting less social stigma (although this particular offense did involve a maximum five year imprisonment). Evenso, regarding such a regulatory offense fundamental justice does not require that the offense contain an element of *mens rea* with the burden on the Crown to prove it (as in a true criminal offense). Rather, the degree of reasonable care is cast on the defendant to prove.

See Peter Hogg, *supra*, Note 108, pps. 81-83.

382. *Thomson Newspapers, supra*, Note 379, p. 596.

383. Joel Bakan and others, *supra*, Note 63, pps. 103-04.

384. Kent Roach, *supra*, Note 377, p. 341.

385. Joel Bakan, *supra*, Note 63, p. 104.

386. Bertha Wilson, "The Making of a Constitution: Approaches to Judicial Interpretation" (1988) P.L. at 374. The international instrument which has "directly" served as a model for the Charter is the international Covenant on civil and political rights.

See José Woehrling, *supra*, Note 123, p. 465.

387. José Woehrling, *Ibid.*, p. 485. To justify the legitimacy of recourse to the European Convention and its jurisprudence the argument of "Le contexte d'adoption elargi de la charte", is appropriate. The argument of "Le Contexte d'adoption immédiat" applying to texts which directly served as a model for the Charter has not applied to the European Convention. The international pact on civil and political rights has been given such recognition as the document which directly served as a model for the Charter. Nevertheless, we can imagine a recourse to a larger context, which although did not directly constitute the model for the Charter, are part of a tradition of human rights protection (contexte elargi). This international context includes instruments such as the European Convention and its judicial interpretations. The international human rights instruments have influenced each other reciprocally and result from a common tradition, influencing the Canadian constituent, regardless of whether Canada is tied to the particular convention or not. The European Convention is actually the most cited of the international material. (the democratic norm argument; the comparative process in Section 1 referred to earlier; *supra*, Note 123 is also appropriate, although less used).

See José Woehrling, pps. 465-504.

388. *Ibid.*, p. 485.

389. Peter Hogg, "Section One of the Canadian Charter of Rights and Freedoms", in Armand de Mestral, *supra*, Note 123, p. 6.

390. G.A. Beaudoin, "Limitations clause" in G.A. Beaudoin, and W.S. Tarnopolsky, The Canadian Charter of Rights and Freedoms, (Toronto: Carswell, 1982) p. 9.

391. *Ibid.*

392. Edwin Baker, *supra,* Note 155, p. 76.

393. *Marbury v. Madison, supra*, Note 1.

394. Edwin Baker, *supra*, Note 155, p. 76.

395. *Ibid.*. p. 77.

396. *Ibid.*, p. 81.

397. Albert Bleckmann and Michael Bothe, "General Report on the Theory of Limitations on Human Rights", in Armand de Mestral, *supra*, Note 123, p. 107.

398. Edwin Baker, *supra*, Note 155, p. 81.

399. *Ibid.*, p. 80-91.

400. Peter Hogg, *supra*, Note 389.

401. Edwin Baker, *supra*, Note 155, p. 83.

Geoffrey Stone, *supra*, Note 155.

402. Knopff and Morton, *supra*, Note 29, pps. 40-42.

403. José Woehrling, *supra*, Note 123, p. 453.

404. Skapinker, *supra,* Note 91.

405. José Woehrling, *supra*, Note 123, pps. 454, 473.

406. D. Turp, "Le recours au droit international aux fins de l'interpretation de la Charte canadienne des droits et libertés: un bilan jurisprudentiel" (1984) 18 R.J.T., p. 364.

407. José Woehrling, *supra*, Note 123, p. 487.

408. *Ibid.*, p. 344.

409. *Ibid.*, p. 485.

410. *McColloch v. State of Maryland,* 17 U.S. 316 (1819).

411. José Woehrling, *supra*, Note 123, p. 499.

412. *Ibid.*, p. 503.

413. *Ibid.*, p. 504.

414. *Ibid.*

415. *Big M Drug Mart, supra*, Note 25, p. 332.

416. See *Ford v. Quebec (A.G.), supra*, Note 23, p. 758 citing *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) at p. 564. The particular U.S. test (similar to *Oakes*) applied to the means chosen to achieve the governmental interest, is quoted as follows in *Ford*:

> "The State must asert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for government's purpose. Second, if the governmental interest could be served as well as by a more limited restriction on commercial speech, the excessive restrictions cannot survive."

417. José Woehrling, *supra*, Note 123.

418. Knopff and Morton, *supra*, Note 29, pps. 41-49.

419. B.J. Cameron, "The First Amendment and Section 1 of the Charter" (1990) 1 M.C.L.R., p. 61.

See also P.A. Bender, "Justifications for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks about the Proper Role of Section One of the Charter" (1983) *Man. L.J.*, p. 669.

420. Geoffrey Stone, *supra*, Note 155, p. 175.

421. *Gitlow v. New York*, 268 U.S. 652 (1925). See Geoffrey Stone, *Ibid.*, p. 175.

422. Geoffrey Stone, *Ibid.*, p. 176, also see C. Wolfe, The Rise of Modern Judicial Review, (New York: Basic Books Inc., 1986, p. 119).

423. *United States v. Carolene Products, supra*, Note 216.

424. *Ibid.*, see Drew S. Days, "Equality Rights in the United States", in A. De Mestral, *supra*, Note 123, p. 241.

425. Geoffrey Stone, *supra*, Note 155, p. 179.

426. *Roe v. Wade*, 410 U.S. 113 (1973) see C. Wolfe, *supra*, Note 422, pps. 272-317.

427. G. Stone, *supra*, Note 155, p. 177, citing *Landmark Communications Inc. v. Virginia* 435 U.S. 829 (1978) p. 843.

428. G. Stone, *Ibid.*, p. 178.

429. The 14th Amendment does not extend to acts carried out under federal authority. However, the 5th Amendment containing a due process clause binds the federal government. Equal protection has thus been implied into the due process of the 5th Amendment (as have been other rights), a provision which acts on Congress as a limit on substantive legislation. Concerning the right of equality, it seeks the same end as the equal protection clause. The right to equal justice under the law and equality of right is covered by both clauses. Equal protection analysis concerning the 5th Amendment is the same as under the 14th Amendment. Both clauses are said to overlap, for a discriminatory law which violates equality may amount to a deprivation of due process.

See Bernard Schwartz, Constitutional Law, (New York: MacMillan Publishing Co. Inc., 1979) p. 362.

430. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

431. Drew Days, *supra*, Note 424, pps. 240-242.

For race and national origin see *Hernandez v. Texas*, 347 U.S. 475 (1954), *Loving v. Virginia*, 388 U.S. 1 (1967), *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879 (1984).

For alienage, see *Graham v. Richardson* 403 U.S. 365 (1971) although the courts have swayed to a certain degree in upholding certain employment restrictions on resident aliens using a less strict review.

The U.S. Supreme Court has ascertained various criteria examined in order to determine whether a particular class is suspect. They are: a class history of purposeful unequal treatment, immutability of the trait that distinguishes the class, present political powerlessness of the class, and the existence of stereotyped class characteristics unrelated to the class's abilities to participate in society, that result in the imposition of unique disabilities on the class. Generally, these criteria are used to determine if the class can be considered a "discrete and insular" group. See June Ross, *supra*, Note 235, pps. 443-44.

Recall that similar criteria were used in Canada until recently to determine "analogous" status to establish a violation, whereas in the United States the criteria is used to establish a strict scrutiny justification. The practical result is similar nevertheless, for should a restriction not meet strict scrutiny, it will probably be upheld anyway under the deferential minimal rationality test. So too in Canada was the provision upheld when the

discrete and insular minority criteria was not met to achieve analogous status, although in the latter case due to definitional exclusion.

432. Geoffrey R. Stone, *supra*, Note 155, p. 178.

433. Edwin Baker, *supra*, Note 155, p. 82; Drew Days, *supra*, Note 424, pps. 257-60; and June Ross, *supra*, Note 235, p. 440.

434. E. Baker, *Ibid.*, Drew Days, *Ibid.* p. 242.

435. For illegitimacy as a classification falling under intermediate scrutiny, see *Levy v. Louisiana* 391 U.S. 68 (1968) where the Court struck down a state law that denied unacknowledged, illegitimate children the right to recover for the wrongful death of their mother.

See also *Pyler v. Doe*, 457 U.S. 202 1982 striking down a state law denying illegal alien children free public education available to other children in the state.

See Drew Days, *supra*, Note 424, p. 243.

436. June Ross, *supra*, Note 235, p. 446.

437. Drew Days, *supra*, Note 424, pps. 242-43.

438. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

439. *Craig v. Boren*, 429 U.S. 190 (1976).

See June Ross, *supra*, Note 235, p. 445.

440. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)

Heckler v. Mathews

E. Baker, *supra*, Note 155, p. 82.

441. E. Baker, *Ibid.*

June Ross, *supra*, Note 235, p. 442.

442. E. Baker, *Ibid.*

For minimal rationality review in economic regulation see:
Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949)
Williamson v. Lee Optical, Inc. 348 U.S. 483 (1955)
New Orleans v. Dukes, 427 U.S. 297 (1976)
United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

443. June Ross, *supra*, note 235, p. 442.

444. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). See Drew Days, *supra*, Note 424, pps. 246-47, and A.T. Mason, American Constitutional Law, (New Jersey: Prentice-Hall Inc.), p. 613.

445. G. Stone, *supra*, Note 155, p. 178.

446. June Ross, *supra*, Note 235, pps. 448-49.

José Woehrling, *supra*, Note 24, p. 15.

447. Woehrling, *Ibid.*, pps. 14-16.

448. *Ibid.*, p. 16.

449. *Ibid.*, p. 17.

450. B.J. Cameron, *supra*, Note 419, p. 110.

451. José Woehrling, *supra*, Note 24, p. 17.

452. R. Langlois, "Les clauses limitatives dans chartes canadienne et Quebecoise des droits et libertés et la fardeau de la preuve", in D. Turp and G.A. Beaudoin (eds.) Perspectives Canadiennes et Européennes des droits de la personne, (Cowansville: Les Editions Yvon Blais, Inc., 1986) p. 170.

453. José Woehrling, *supra,* Note 24, p. 15.

454. *Ibid.*

455. *Ibid.*, p. 11, *Black c. Law Society of Alberta, supra*, Note 138.

456. *Ibid.*, p. 12.

457. P. Béliveau, *supra*, Note 21, p. 56, *Big M Drug Mart, supra*, Note 25.

458. José Woehrling, *supra,* Note 24, p. 25.

459. *Ibid.*, p. 22.

460. *Irwin Toy, supra*, Note 40, p. 163.

461. B.J. Cameron, *supra*, Note 419, p. 78.

See *United States v. Carolene Products, supra*, Note 213.

462. José Woehrling, *supra*, Note 24, p. 28.

463. *Ibid.*

464. *Ibid.*, p. 30.

465. See, for example, *Stoffman c. Vancouver General Hospital, supra,* Note 230, *University of Alberta v. Alberta, Bell v. C.H.R.C.* and *Cooper v. Canada, supra,* Note 231.

466. *Ibid.*

467. *Ibid.*, p. 31.

468. *Ibid.*

469. B. Wilson, *supra*, Note 386, p. 374.

470. Knopff and Morton, *supra*, Note 29, p. 40.

471. B.J. Cameron, *supra*, Note 419, p. 70.

472. *Ibid.*, p. 72.

473. G. Stone, *supra*, Note 155, p. 178.

See also B.J. Cameron, *Ibid.*, p. 112.

474. G. Stone, *Ibid.*, p. 178.

See also R. Colker, *supra*, Note 132, p. 101.

475. B.J. Cameron, *supra,* Note 419, p. 120.

476. *Ibid.*, p. 113.

477. R. Colker, *supra* Note 132, p. 101.

478. *Ibid.*

479. *Police Department of Chicago v. Mosley*, 408 U.S. 92, S.Ct. 2286 (1972)

B.J. Cameron, *supra*, Note 419, p. 106.

480. *Ibid.*, p. 67.

481. *Ibid.*, p. 110.

482. *Ibid.*, pps. 108, 111.

483. *Ibid.*, p. 110.

See *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37. 103 S.Ct. 948 (1983).

484. Cameron, *Ibid.*, p. 111.

485. *Ibid.*, pps. 111, 122.

486. *Federal Communications Comm. v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026 (1978).

487. Cameron, *supra*, Note 419, p. 123.

488. *Ibid.*, p. 112.

489. Knopff and Morton, *supra*, Note 29, pps. 48-49.

490. *Ibid.*

491. *R. v. Keegstra, supra*, Note 256.

Ruth Colker, *supra*, Note 132, p. 110.

492. *Ibid.*, pps. 110-11.

493. Knopff and Morton, *supra*, Note 29, p. 49.

494. G. Stone, *supra*, Note 155, p. 174.

495. *Ibid.*, p. 182.

496. John Tait, Le Droit à une societé libre et démocratique, in Droit de la personne, *supra*, Note 24, p. 85.

497. *Prohibitions del Roy* (1608), 12 Co. Rep. 63, 77 E.R. 1342 (K.B.).

See Morris Manning, *supra*, Note 6, p. 116.

498. *Ibid.*, p. 58.

499. Dr. Bonham, (1610), 8 Co. Rep. 113, p. 118, 77 E.R. 646.

500. Barry L. Strayer, *supra*, Note 2, p. 2 (see also Manning, *supra*, Note 6, p. 116).

501. *Day v. Savadge* (1614), Hob. 85.

502. *City of London v. Wood* (1701), 12 Mod. 669, p. 687 E.R. 1592.

See Morris Manning, *Ibid.*, p. 57.

503. *Ibid.*, p. 58. See also Anne Bayefsky, "The Judicial Function under the Canadian Charter", 1987, 32 *McGill Law Journal*, p. 819.

504. Barry Strayer, *supra*, Note 2, pps. 3-4.

505. *Marbury v. Madison, supra*, Note 1.

506. Barry Strayer, *supra*, Note 2, pps. 3, 4.

507. B. Strayer, *supra*, Note 291, p. 349.

508. *Ibid.*, B. Strayer, *supra*, Note 2, pps. 4, 5.

509. Knopff and Morton, *supra*, Note 29, p. 19.

510. A. Bayefsky, *supra,* Note 503, pps. 3, 4.

511. Henry J. Abraham, The Judicial Process, (New York: Oxford University Press, 1986) p. 322.

512. Christopher Wolfe, *supra*, Note 422, p. 74.

513. H.J. Abraham, *supra*, Note 511, pps. 320, 321.

514. Alexander Hamilton, The Federalist Papers, see for Comments C. Wolfe, *supra*, Note 422, p. 74.

515. *Ibid.*, p. 76.

516. H.J. Abraham, *supra*, Note 511, p. 321.

517. *Ibid.*, p. 321.

518. C. Wolfe, *supra*, Note 422, p. 75.

519. *Ibid.*, p. 76.

520. *Ibid.*, p. 80.

521. *Marbury v. Madison, supra*, Note 1, pps. 177, 178.

522. H. McConnell, "The Judges, the Courts, and the Constitution: A Third Branch of Government for Canada?" (1988) 52 *Saskatchwan Law Review*, p. 335.

523. Knopff and Morton, *supra*, Note 29, pps. 101-102.

B.M. McLachlin, *supra*, Note 6, p. 550.

524. *Ibid.*

525. Knopff and Morton, *supra*, Note 29, p. 102.

526. *Ibid.*, pps. 112-13.

See also Peter Hogg, *supra*, Note 108, p. 74.

527. B. Strayer, *supra*, Note 291, p. 366, Knopff and Morton, *supra*, Note 29, p. 116.

528. Dred Scott, 19 Howard 393 (1857).

529. *Lochner v. New York*, 198 U.S. 45 (1905).

530. B. Strayer, *supra*, Note 291, pps. 366-67.

531. *Ibid.*, p. 367.

532. Knopff and Morton, *supra*, Note 29, pps. 114-15.

533. *Roe v. Wade, supra*, Note 426.

534. Jacques Gosselin, La Légitimité du Contrôle judiciare sous le régime de la Charte, (Cowansville: Les Editions Yvon Blais, 1991), p. 128.

535. *Ibid.*, p. 127 citing J. Agresto.

536. C. Wolfe, *supra*, Note 422, p. 94.

537. Knopff and Morton, *supra*, Note 29, p. 177.

538. Jacques Gosselin, *supra*, Note 534, p. 133, Peter Hogg, The Charter of Rights and American Theories of Interpretation, (1987) 25 *Osgoode Hall Law Journal*, p. 91. Anne Bayefsky, *supra*, Note 503, p. 794, citing P. Brest. Patrick J. Monahan, Judicial Review and Democracy, (1987) 21 *U.B.C. Law Review*, p. 115.

539. P. Brest, "The Misconceived Quest for Original Understanding" (1980) 60 *Buffalo University Law Review*, p. 204.

540. P. Hogg, *supra*, Note 538, p. 92.

541. *Ibid.*, p. 95.

542. J. Gosselin, *supra*, Note 534, p. 134.

543. P. Hogg, *supra*, Note 538, p. 95, see also *Roe v. Wade, supra*, Note 426.

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600. J. Whyte, *supra*, Note 597, p. 9.

601. Knopff and Morton, *supra*, Note 29, pps. 138, 197.

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602. Hogg, *Ibid.*

603. Knopff and Morton, *supra*, Note 29, pps. 138, 197.

604. *Ibid.*, pps. 167, 168.

605. *Ibid.*, pps. 140, 144.

606. *Ibid.*, pps. 169-196.

607. *Ibid.*, p. 197.

608. *Ibid.*, p. 197.

609. *Ibid.*, p. 198.

610. *Ibid*, pps. 197, 200.

611. B. Siegan, *supra*, Note 593, p. 167.

612. Knopff and Morton, *supra*, Note 29, p. 206.

613. B. McLachlin , "The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?" (1990) 39 U.N.B.L.J. p. 58.

614. Knopff and Morton, *supra*, Note 29, pps. 208-220.

615. *Ibid.*, p. 227.

616. *Ibid.*

See John Agresto, The Supreme Court and Constitutional Democracy, (Ithaca, N.Y. Cornell Univesity Press, 1984), p. 105.

617. Knopff and Morton, *Ibid.*, Agresto, *Ibid.*, p. 134.

618. Knopff and Morton, *Ibid.*, p. 228.

S. 33 of the *Charter*, referred to as "the Notwithstanding Clause" reads as follows:

> 33.(1) Parliament or the legislature of the province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in Section 2 or Sections 7 to 15 of this *Charter*.
>
> (2) An Act or provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this *Charter* referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

619. *Ibid.*, p. 229.

620. L. Tribe, *supra,* Note 544.

621. J. Gosselin, *supra*, Note 534, p. 129.

622. B.L. Strayer, *supra*, Note 291, p. 364.

623. Strayer, *Ibid.*

J. Gosselin, *supra*, Note 534, p. 129.

624. *Baker v. Carr*, 369 U.S. 186 (1962), *Wesberry v. Sanders*, 376 U.S. 1 (1964), *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

See Knopff and Morton, *supra*, Note 29, pps. 332-34.

625. See *Dixon v. B.C. (A.G.)* 189 4 W.W.R. 393 and *Carter v. Saskatchewan (A.G.)* S.C.C. 1991.

See Knopff and Morton, *supra*, Note 29, pps. 334-373.

The one-man/one-vote is not supported in Canada where traditionally non population factors have been balanced with population factors in the adjustment of constitutency boundaries. This was to ensure that various community interests and classes would be fairly represented, as population size considerations alone did not necessarily ensure fair and effective representation, especially for rural areas.

The Supreme Court has consequently interpreted Section 3 of the Charter as guaranteeing the right to cast a ballot, in addition to the right to fair and effective representation. However, the latter is to be achieved by the "relative equality of voting power", rather than complete voter parity. As a result, the population of electoral districts cannot exceed a 25% variation rule. "Variable apportionment" respecting this standard is permitted, as expressed by Justice McLachlin in *Dixon v. B.C.* and later confirmed in *Carter v. Saskatchewan*. The Canadian Court has thus not endorsed a highly activist position regarding voting rights as exists in the United States, nor has it adopted a political questions doctrine.

Presently the view in Canada is that voter parity does not always guarantee effective representation. Consequently, at the definitional stage of Section 3 equality factors and non population considerations are balanced. As a result, certain deviations (25% and under) need not even be considered a violation of Section 3 and do not necessareily require justification under Section 1. (*Carter v. Saskatchewan*).

Several considerations may have prompted the less activist position in Canada aside from tradition. In 1964 federal reforms had prevented large deviations in federal constituencies (over 25%) and the adjustment of boundaries was put in the hands of independent commissions. This was unlike the situation in the United States where the courts were faced with overwhelming deviations in constituencies and where drawing boundaries was left in the hands of the government at hand, prompting concerns over partisan gerrymandering.

626. Knopff and Morton, *supra*, Note 29, p. 334.

627. *Ibid.*, pps. 347-48.

628. *Ibid.*, p. 333.

629. B. McLachlin,

630. P. Russell, *supra*, Note 8, p. 428.

631. B. McLachlin, *supra*, Note 613, p. 51.

B. McLachlin, *supra*, Note 6, pps. 545-46.

632. P.J. Monahan, "Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada", (Toronto: Carswell, 1987).

See also Knopff and Morton, *supra*, Note 29, pps. 152-53.

633. P. Russell, *supra*, Note 8, pps. 434-435.

634. Knopff and Morton, *supra*, Note 29, p. 155.

635. *Operation Dismantle Inc. v. The Queen* (1985) 1 S.C.R. 441.

636. B. McLachlin, "The Charter of Rights and Freedoms: A Judicial Perspective" (1989) 23 *U.B.C. Law Review*, p. 583.

637. B. McLachlin, *supra*, Note 6, p. 547.

638. B. McLachlin, *supra,* Note 6, p. 554.

T.J. Christian, "The Limited Operation of the Limitations Clause" (1987) 25 *Alta. L.R.* 276-77.

B.L.Strayer, *supra*, Note 291, p. 354.

639. B. McLachlin, *Ibid.*

640. *Ibid.*

641. T.J. Christian, *supra*, Note 638, pps. 276-77.

642. *Motor Vehicle Reference, supra*, Note 21, p. 497.

643. Skapinker, *supra*, Note 91.

See E.R. Alexander, "The Supreme Court and the Canadian Charter of Rights and Freedoms", (1990) 40 *University of Toronto L.J.*, pps. 2-3.

644. *R. v. Holmes* (1988) 50 D.L.R. (4th) 680.

645. E.R. Alexander, *supra*, Note 643, p. 26.

B. McLachlin, *supra*, Note 6, p. 581.

646. L. Trackman, *supra*, Note 245, p. 40.

T. Wade, *supra*, Note 246, pps. 130-33.

647. B. McLachlin, *supra*, Note 613, p. 52.

648. T. Wade, *supra*, Note 246, pps. 130-33.

See also Trackman, *supra*, Note 245.

649. B. McLachlin, *supra*, Note 6, pps. 555-58.

See *Edwards Books, supra*, Note 137.

650. *Ibid.*, pps. 554-57.

651. B. McLachlin, *supra*, Note 6, p. 554.

B.L. Strayer, *supra*, Note 291, pps. 352-53.

B. Wilson, *supra*, Note 386, p. 375.

P. Hogg, *supra*, Note 538, p. 89.

M. Manning, *supra*, Note 6, p. 37.

652. B. McLachlin, *supra*, Note 636, p. 581.

653. Elliot, *supra*, Note 90, p. 281.

654. McKinney, *supra*, Note 62, p. 356.

655. P. Hogg, *supra*, Note 538, pps. 97, 113.

656. *Motor Vehicle Act, supra*, Note 21.

657. P. Russell, *supra*, Note 291, p. 395.

658. B. Wilson, *supra*, Note 386, p. 374.

659. Knopff and Morton, *supra*, Note 29, p. 132.

660. Skapinker, *supra*, Note 91.

See E. Alexander, *supra*, Note 645, p. 3.

661. *Hunter v. Southam, supra*, Note 26, p. 145.

Alexander, *Ibid.*

662. *Edwards v. A.G. Canada* (1930) 1 D.L.R. 98.

663. *Big M Drug Mart, supra*, Note 25, p. 294.

664. P. Hogg, *supra*, Note 538, p. 113.

665. *Ibid.*

666. B. McLachlin, *supra,* Note 6, p. 547.

667. See Note 651.

668. B. McLachlin, *supra*, Note 613, pps. 48-49.

B. Strayer, *supra,* Note 291, pps. 352-53.

669. B. McLachlin, *Ibid.*

B.L. Strayer, *supra*, Note 291, pps. 352-53.

B. Wilson, *supra,* Note 386, p. 375.

670. A. Bayefsky, *supra*, Note 503.

671. M. Manning, *supra*, Note 6, p. 37.

672. P. Monahan, *supra*, Note 538.

673. J. Gosselin, *supra*, Note 534, pps. 174-79, 221.

See for example A. Bayefsky, *supra*, Note 503, B. Strayer, *supra*, Note 291, and Andrew Petter, Alan Hutchison, "Rights in Conflict: The Dilemna of Charter Legitimacy" (1989) 23 *U.B.C. Law Review.*

674. Knopff and Morton, *supra*, Note 29, p. 197.

675. *Ibid.*, pps. 199-200.

676. *Ibid.*, p. 200.

677. *Ibid.*, pps. 199-201.

678. *Ibid.*, pps. 201-203.

679. P. Hogg, *supra*, Note 601, p. 201.

680. Knopff and Morton, *supra*, Note 29, pps. 228-29.

681. *Ibid.*, p. 228.

682. *Ibid.*, p. 227.

683. Monahan, *supra*, Note 220, pps. 117-18.

684. Morton and Withey, *supra*, Note 221, P. Russell, *supra*, Note 291, pps. 391-393.

685. Strayer, *supra*, Note 291, pps. 357-58.

686. *R. V. Morgentaler*, (1988) 1 S.C.R. 30.

See Knopff and Morton, *supra*, Note 29, p. 274.

687. Strayer, *supra*, Note 291, pps. 356-57, 364-65; P. Russell, *supra*, note 291, p. 390; *Operation Dismantle, supra*, Note 635.

688. P. Russell, *Ibid.*

689. Strayer, *supra*, Note 291, p. 356.

See for example, *Cotroni, supra*, Note 205, and *Re Federal Republic of Germany* and *Rauca* (1983) 145 D.L.R. (3d) 638.

690. Monahan, *supra*, Note 220, pps. 118-19.

691. P. Russell, *supra*, Note 291, p. 398.

692. *Ibid.*

693. B. Strayer, *supra*, Note 291, p. 356.

694. B. McLachlin, *supra*, Note 613, p. 58.

695. R. Abella, "Public Policy and Canada's Judges: The Impact of the Charter of Rights and Freedoms" (1986) 20 *Law Society of Upper Canada*, p. 228.

696. M. Manning, *supra*, Note 6, pps. 63, 66.

697. *Ibid.*, pps. 62-66.

698. B. McLachlin, *supra*, Note 613, p. 56.

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