THE RISE AND FALL OF DOCTRINE UNDER SECTION 1 OF THE *CHARTER*

*Andrew Lokan**

This article traces the development of doctrine under section 1 of the Charter *from its enactment to the present. Over this 10-year period, the Supreme Court of Canada has approached section 1 in three distinct phases. First, the Court created a seemingly value-neutral test in an attempt to restrain the obvious discretion under the provision. Second, the Court retreated from this test as it became apparent that by the nature of judicial review, section 1 would have to be applied with varying levels of strictness in varying circumstances. Most recently, the Court has virtually abandoned the pretence that there is a coherent doctrine under section 1, and has instead shifted emphasis to establishing hierarchies of infringement under other substantive provisions of the* Charter.

The degeneration of doctrine under section 1 was inevitable given the nature of judicial review, under which the Court is given the contradictory task of safeguarding democracy by denying the will of the majority. The decision on whether to defer to this will or override it must depend in the individual case not upon value-free logical constructs, but upon value-laden judgments and choices between competing priorities. The decline of the section 1 test, and the emergence of an approach similar to the U.S. "categorical" approach to standards of judicial review is to be welcomed, not only because it may produce more coherent jurisprudence, but also because it

Cet article passe en revue la doctrine élaborée en vertu de l'article 1 de la Charte, *depuis l'adoption de la* Charte *jusqu'à présent. Pendant ces dix ans, l'approche interprétative de l'article 1 adoptée par la Cour suprême du Canada a connu trois phases distinctes. La Cour a d'abord créé un test appliquant apparemment une norme fixe d'équation des valeurs, car elle s'efforçait de restreindre la discrétion manifeste qui lui était attribuée par cette disposition. La Cour a ensuite délaissé ce test, alors qu'il devenait évident qu'en raison de la nature de l'examen judiciaire, l'article 1 serait soumis à des degrés d'examen différents suivant les circonstances. Tout récemment, la Cour a pour ainsi dire cessé de prétendre qu'une doctrine cohérente avait été élaborée en vertu de l'article 1, et a plutôt mis l'accent sur une hiérarchisation des atteintes aux droits protégés par d'autres dispositions de fond de la* Charte.

Le déclin de la doctrine élaborée sous le régime de l'article 1 était inévitable, étant donné la nature de l'examen judiciaire qui attribue à la Cour la tâche contradictoire de sauvegarder la démocratie tout en niant la volonté de la majorité. La décision de s'incliner devant cette volonté ou d'y passer outre doit être fondée, dans chaque cas particulier, non pas sur des concepts logiques ne tenant aucun compte des valeurs, mais sur des jugements reposant sur des valeurs ainsi que des choix entre des priorités en conflits. On doit

* Gowling, Strathy & Henderson, Toronto. The author gratefully acknowledges the research assistance of Elizabeth MacPherson, LL.B. (University of Ottawa, 1990).

helps expose the values and policy choices of the judiciary to public comment.

se réjouir du déclin du test de l'article 1 et de la naissance d'une approche semblable à l'approche américaine qui établit des catégories d'examen judiciaire, non seulement parce qu'il pourrait en résulter une jurisprudence plus cohérente, mais aussi parce que cela contribue à soumettre les valeurs et les choix politiques de la magistrature à l'appréciation du public.

I. INTRODUCTION

On 17 April 1992, Canadians celebrated the tenth anniversary of the *Canadian Charter of Rights and Freedoms*[1] — amidst continued unhappiness with the *Charter* by many Québécois, social turmoil engendered in part by the new climate of "inclusiveness" that has both driven and been reinforced by the *Charter*, and wrangling over the "Canada Round" of constitutional reform designed to complete the unfinished business of 1982.

Whether the *Charter* has been a boon to the relatively powerless, or a boondoggle for the ruling elite (including major corporations and the class of lawyers that services them), remains a hotly contested question.[2] But it is universally agreed that the *Charter*, whatever else it may have done, represents a significant shift of power away from elected representatives and onto a sometimes reluctant unelected judiciary.

The question of how to exercise this power, in a manner consistent with our most deeply held views on democracy, has been a central preoccupation of the judiciary ever since. It is trite to observe that the judiciary has been asked to rule on issues and make decisions of an unprecedented nature, deciding such social and economic questions as what, if any, should be the limits of state power to regulate abortion,[3] strikes,[4] Sunday shopping,[5] mandatory retirement,[6] the language of advertising,[7] hate propaganda,[8] and pornography,[9] to name but a few. It is equally trite to observe that in many respects, the judiciary lacks the ability to cope with the new-found responsibility that has been thrust upon them by the *Charter* — at least any more convincingly or competently than the legislatures that they have in part replaced. The more interesting questions, and the ones that will be the focus of this article, are how the judiciary has attempted to cope with this responsibility, how

---

[1] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2] *See, e.g.*, H.J. Glasbeek, *Contempt for Workers* (1990) 28 OSGOODE HALL L.J. 1; J. Fudge, *The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles* (1987) 25 OSGOODE HALL L.J. 485.

[3] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 82 N.R. 1 [hereinafter *Morgentaler*].

[4] *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 [hereinafter *Re Public Service*].

[5] *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M Drug Mart* cited to S.C.R.]; *R.* v. *Edwards Books and Art Ltd*, [1986] 2 S.C.R. 713, 61 N.R. 124 [hereinafter *Edwards Books* cited to S.C.R.].

[6] *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229, 2 C.R.R. (2d) 1 [hereinafter *McKinney* cited to C.R.R.].

[7] *Ford* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [hereinafter *Ford* cited to S.C.R.].

[8] *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, 117 N.R. 1 [hereinafter *Keegstra* cited to S.C.R.].

[9] *R.* v. *Butler* (1992), 134 N.R. 81, 70 C.C.C. (3d) 129 (S.C.C.) [hereinafter *Butler* cited to C.C.C.].

successful they have been in coping, and whether there is any prospect of them managing any better in future.

The relationship of these questions to section 1 of the *Charter* will be obvious. The interpretation and application of section 1, in which *Charter* infringements (as found by the courts) are tested for their "reasonableness", go straight to the core question of when it is appropriate for courts to intervene in the political decision-making process. Given a broad discretion to choose when and when not to intervene by the text of section 1,[10] the courts must grope their way towards articulating standards and principles to guide them. Since judges do not have the benefit of owing their office to a (visible) constituency, these standards and principles must be ones of general application, so as to exclude any suggestion that they merely reflect the personal opinions and prejudices of their authors (who, unlike elected politicians, are not ostensibly selected for their personal opinions and prejudices). Thus, the discretion vested in the judiciary under the *Charter*, and more particularly section 1, spawns doctrine — the articulation of those considerations that are by definition relevant not just to one case, but to all like cases.[11]

The project of doctrine-spinning has been one of the most notable features of *Charter* jurisprudence over the past decade. Each provision has its seminal case in the Supreme Court of Canada, with a complex and lengthy judgment or series of judgments setting forth a history of

---

[10] The text of s. 1 of the *Charter* is:

> 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.

The scope for the exercise of judicial discretion in these words is obvious. Note, however, that the problem of developing standards and principles of judicial review of legislative action is in no way dependent on the text. As will be seen below, U.S. courts have faced the same dilemmas under the *Bill of Rights* (being U.S. CONST. amends I-X), despite the lack of qualifying language in most substantive provisions and the lack of any provision analogous to s. 1. *See* notes 34 to 45, *infra*, and accompanying text.

[11] Section 1 has been the focus of a great deal of academic literature, analysing both the specific holdings of the courts under the provision and the more general theme of the legitimacy of judicial review. *See, e.g.*, R.M. Elliot, *The Supreme Court of Canada and Section 1 — The Erosion of the Common Front* (1987) 12 QUEEN'S L.J. 277; T.J. Christian, *The Limited Operation of the Limitations Clause* (1987) 25 ALTA L. REV. 264; S.R. Peck, *An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms* (1987) 25 OSGOODE HALL L.J. 1; L.E. Weinrib, *The Supreme Court of Canada and Section One of the Charter* (1988) 10 SUP. CT L. REV. 469; B. Slattery, *A Theory of the Charter* (1987) 25 OSGOODE HALL L.J. 701; E.R. Alexander, *The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms* (1990) 40 U.T.L.J. 1; E.P. Mendes, *In Search of a Theory of Social Justice; The Supreme Court Reconceives the Oakes Test* (1990) 24 R.J.T. 1; J. Cameron, *The Original Conception of Section 1 and its Demise: A Comment on* Irwin Toy Ltd *v.* Attorney-General of Quebec (1989) 35 MCGILL L.J. 253; P.G. Murray, *Section One of the* Canadian Charter of Rights and Freedoms*: An Examination at Two Levels of Interpretation* (1989) 21 OTTAWA L. REV. 631; P.W. Hogg, *Interpreting the Charter of Rights: Generosity and Justification* (1990) 28 OSGOODE HALL L.J. 817; P.W. Hogg, *Section 1 Revisited* (1991) 1 N.J.C.L. 1.

the provision in Canadian (and, where applicable, U.S. or international) law, an examimination of the values said to be protected by the provision, perhaps a brief foray into its philosophical underpinnings, and culminating in a two-, three- or four-part test to be applied in all subsequent cases.[12] And of all provisions, doctrine has been created most enthusiastically around section 1.[13]

If the spinning of doctrine and the creation of seemingly value-neutral tests have been the natural responses of the judiciary to the new powers given to them by the *Charter*, it cannot be said that the project has been particularly successful. This has been the case not because of any lack of willingness or ability on the part of the courts, but because there is an inherent contradiction in the task that the courts are asked to perform — to ensure democracy by denying democracy. Put in terms of the language of section 1, the rights and freedoms of the *Charter* are to be guaranteed (i.e. the judiciary must intervene on behalf of those whom the political process has failed) subject to "reasonable limits" (the judiciary must not unduly restrain the political process).

When this basic contradiction is understood, it is hardly surprising to learn that the doctrine itself is highly unstable, indeterminate, malleable and riven with contradictions. Furthermore, at the very centre of the doctrinal test — the point where the court asks itself just how strict a standard of judicial review it should apply — the prevarication becomes most intense.[14] And the response of the courts to their fundamental difficulty is to spin yet more doctrine, so that we now have qualifications, subcategories and subtests within the section 1 test. To the extent that these subcategories and further tests help at all in the resolution of cases — and it is arguable that in many cases they resolve little or nothing — they do so by abandoning the claims of the section 1 test to being derived from logic and to being a test of general application. Thus, we are left with a series of *ad hoc* classes or categories of cases, which reflect nothing more or less than the judges' estimates

---

[12] Examples would include, in chronological order, *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [hereinafter *Hunter*] (s. 8); *Big M Drug Mart*, *supra* note 5 (s. 2(a)); *Reference Re s. 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 (s. 7); *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 65 N.R. 87 [hereinafter *Oakes* cited to S.C.R.] (s. 1); *Re Public Service*, *supra*, note 4 (s. 2(d)); *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (s. 15); *Irwin Toy Ltd* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy* cited to S.C.R.] (s. 2(b)).

[13] *Oakes* has been followed, qualified, contradicted and compromised by many subsequent cases, including notably *Edwards Books*, *supra*, note 5; *R.* v. *Jones*, [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569 [hereinafter *Jones* cited to S.C.R.]; *United States* v. *Cotroni*; *United States* v. *El Zein*, [1989] 1 S.C.R. 1469, 96 N.R. 321 [hereinafter *Cotroni* cited to S.C.R.]; *Edmonton Journal* v. *Alberta (A.G.)*, [1989] 2 S.C.R. 1326, 102 N.R. 321 [hereinafter *Edmonton Journal* cited to S.C.R.]; *Irwin Toy supra*, note 12; *Keegstra*, *supra*, note 8; and *McKinney*, *supra*, note 6.

[14] *See, e.g.*, the comparison between *Oakes* and subsequent cases on the meaning of the "minimum impairment" branch of the s. 1 test; notes 55 to 65 *infra*, and accompanying text.

of the prevalent values of the community.[15] The power of reasoning, which is supposed to differentiate the judiciary from other institutions of government (and thereby justify the use of courts to make such decisions in the first place) descends more and more from the lofty plane of logic to a lower level of precedent-based comparisons and analogies to previous fact situations.

The story of section 1 over the first decade of the *Charter* has been one of a series of phases reflecting this progression. For the first few years under the *Charter* the courts — with the Supreme Court of Canada leading the charge — enthusiastically embraced their new role, surprising many pundits with their activism in comparison to the experience under the *Canadian Bill of Rights*.[16] This entailed a period of doctrine building (from 1982 to about 1986) which culminated in the *Oakes* test, a heroic but ultimately unsuccessful attempt to mask the arbitrariness of the Court's exercise of its new-found power.

Self-doubt began to creep in as the doctrine came to be applied to a wider variety of situations, and was found wanting. For the next couple of years (from about 1986 to 1989) the Court attempted to resolve the contradictions by elaborating on and qualifying the test, adding further layers of doctrine. This is the era of cases including *Edwards Books*, *Jones*, and *Cotroni*. By no coincidence, this was also a time in which the Court was rethinking its earlier activism.

More recently (from about 1989 to the present), the Court has changed its approach. The emphasis has been on subdividing and classifying, and relating the application of the section 1 test to the specific context of the case, under the glorified label of "the contextual approach"[17] — so that there is not now one section 1 test, but an infinite number of different tests which depend almost entirely on factual context. "Doctrine", as such, has declined greatly in its significance to section 1. Moreover, as recognition of the essential indeterminacy of section 1 doctrine has spread, there has been a shift towards attempting

---

[15] In many cases these estimates might accurately reflect prevailing community values, but if so it is more by accident than by design. Unlike elected politicians, judges are accountable to the public for the accuracy of their assertions as to what constitutes the public good only in the broadest of senses. Too often, one suspects, judges' estimates of community values simply reflect their own.

In *Butler*, *supra*, note 9 at 178, Justice Gonthier (concurring) frankly admitted that courts in fact make moral judgments based on their sense that "a wide consensus among holders of different conceptions of the good" exists. Justice Gonthier cites R. Dworkin, *Liberty and Moralism* in TAKING RIGHTS SERIOUSLY (London: Gerald Duckworth & Co., 1977) 240 at 255 for a description of how a legislator attempts to divine a moral consensus, and ascribes the same role to the judiciary. While Justice Gonthier's admission is refreshingly candid, he fails to account for the legitimacy of the courts' second-guessing the legislature in making such a determination.

[16] R.S.C. 1985, App. III.

[17] First enunciated by Wilson J. in *Edmonton Journal supra*, note 13.

to resolve the problem of judicial review by building doctrine under the other provisions of the *Charter*.[18]

This story of the rise and fall of doctrine under section 1 is of interest for a number of reasons. Specifically, it helps us to understand the direction of future adjudication under section 1. Moreover, it provides us with insight into the process of growth and decay of doctrine that may well play out under other key sections of the *Charter*, such as sections 2 and 15.[19] But more generally, it helps us to understand what has happened as a result of the transfer of power from the legislative to the judicial branch. In so doing, it may assist us in rethinking our expectations of the nature of the judicial process, so that we are less inclined to place such a heavy burden on our judiciary, and more inclined to do more of the real work of defining democracy ourselves.

This article will examine the three stages of the Supreme Court of Canada's treatment of section 1, outlined above, and attempt to draw some conclusions from the pattern which emerges. We begin by analysing the first stage, the period leading up to the *Oakes* test.

II. THE GROWTH OF THE *OAKES* TEST

For the first few years under the *Charter*, the Supreme Court of Canada appeared to have been motivated by the concern that it not be viewed as unduly restrictive and deferential, as it had under the *Canadian Bill of Rights*. This entailed adopting a broad approach to the interpretation of the substantive provisions, and also ensuring that section 1 not be used as a rubber stamp to justify every infringement that the Court happened to find. At the same time, there was a need to dispel any suspicion that section 1 would be used on an *ad hoc* basis. Hence the development of a test that, on its face at least, appeared both strict and certain.

A. *The Development of the Test*

The first *Charter* case to reach the Supreme Court of Canada, *Law Society of Upper Canda* v. *Skapinker*,[20] did not technically reach the stage of section 1 analysis at all, no infringement having been found of the substantive right in issue. Nevertheless, the Court took the opportunity to make *obiter* comments on one of the themes that was to figure prominently in section 1 doctrine — the standard of sufficiency of evidence to justify an infringement. The Court noted that the record

---

[18] Examples would include the development of "internal limits" and nascent categories to freedom of expression under s. 2, and the attempts to differentiate between "distinction" and "discrimination" under s. 15. *See* notes 72 to 101, *infra*, and accompanying text.

[19] Or for that matter, constitutional provisions that have yet to be enacted (such as the distinct society clause) which themselves reflect internal contradictions.

[20] [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161 [hereinafter *Skapinker* cited to S.C.R.].

offered on this point was "minimal", and commented that without more, it "would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified".[21]

Later, in *Big M Drug Mart*,[22] the Court began to elaborate on the general approach to be taken under section 1. For the first time, a test is set out:

> At the outset, it should be noted that not every government interest or policy objective is entitled to s. 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 interest 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.[23]

Thus, the two main elements of section 1 are introduced: 1) identifying a valid purpose; and 2) determining whether the purpose is achieved by means which impair as little as possible the right or freedom in question.

One might have thought that these cases set out the essential elements of the justificatory process envisaged by section 1, and that cases following could gradually work out whether the process would be the same in all cases; and if not, what additional considerations should be taken into account in which circumstances. However, the Court chose in *Oakes* to collect and elaborate on the doctrine set out in the cases, in what was clearly intended to be a comprehensive statement of the approach to be taken under section 1. This statement comprised not only the elements of the test, but also the burden and standard of proof to be applied in justifying *Charter* infringements. Furthermore, it is set out in a context which is deliberately free of any factual context.

The *Oakes* test itself has become so familiar[24] that we tend to overlook the amount of emphasis placed in the case on the standard of proof to be met. Following *Skapinker*, *Oakes* reviews the doctrine relating to the burden of proof, and reaches the following conclusions:

1) that the burden of proof is on the party seeking to uphold the violation; and

2) that the "degree of probability" within the civil standard of proof required to justify an infringement is high.

On this second point, the Court particularly removes itself from the context of the infringement, reaching its conclusion purely as a matter of logic. Indeed, but for the caveat in the last sentence, one might even

---

[21] *Ibid.* at 384.

[22] *Supra*, note 5.

[23] *Ibid.* at 352.

[24] Aptly described by Hogg as having "taken on some of the character of holy writ": *see Section 1 Revisited*, *supra*, note 11 at 3.

accuse the Court of going out on a limb in announcing the priority of the *Charter* over competing claims:

> Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit....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 s. 1 analysis are obvious or self-evident.[25]

That same priority of *Charter* rights over other competing values is then announced for each of the elements that make up the actual *Oakes* test. First, as set out in *Big M Drug Mart*, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The commentary to this requirement is:

> The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[26]

Once again, the theoretical priority of the *Charter* is stressed to a remarkable degree — especially remarkable considering that the Court has almost never seriously questioned the sufficiency of governmental objectives in *Charter* cases since *Oakes*.[27]

This abstract tone, coupled with an insistence on the theoretical priority of the *Charter*, is continued as the Court sets out the constituent elements of the proportionality test: that the law be "rationally connected" to its objective, that it impair the right infringed "as little as possible", and that the "deleterious effects" of the law not outweigh the importance of the objective:

> Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important 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

---

[25] *Oakes*, *supra*, note 12 at 138.
[26] *Ibid.* at 138-39.
[27] *See* notes 46 to 49, *infra*, and accompanying text.

> freedom in question....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".[28]

The justification for this tripartite division of the proportionality test is hard to fathom, unless it was simply to make an arbitrary exercise appear more clinical. In actual application, the "rational connection" branch has not really been applied independently of the "minimum impairment" branch. As for the "deleterious effects" component, it too receives a surprising amount of emphasis in the *Oakes* judgment, considering its complete lack of application since:

> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 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.[29]

Given that we have yet to receive a concrete application of this component of the test from the Court, it is tempting to dismiss this language as mere surplusage.[30] More realistically, though, it appears to be an attempt to reserve a residual discretion to the Court to strike down a law despite strong arguments that the test had been met.

Amidst all the doctrine-spinning — always of course in terms that meant that ultimately, the doctrine would have little or no meaning[31] — the Court apparently viewed its role as laying the groundwork for an insistence of the priority of the *Charter* over other competing values. That assumed priority (subject to a few escape-hatches that are probably part of the standard set of judicial reflexes) runs all through this first set of cases. A *Charter* infringement must be justified by "clear and convincing" evidence. Only a "pressing and substantial" objective will suffice. The means chosen must impair the *Charter* "as little as possible". And even the final reservation of discretion under "deleterious

---

[28] *Oakes*, *supra*, note 12 at 139.
[29] *Ibid.* at 139-40.
[30] *See, e.g.*, *Section 1 Revisited*, *supra*, note 11 at 23-24.
[31] *See* notes 46 to 50, *infra*, and accompanying text.

effects" seems aimed not at the possibility that the test will prove too strict, but the possibility that there will be occasions when the Court will want to strike down a law despite the test having been met. Furthermore, the complete separation of the doctrine from any factual context makes the test appear definite and logical, holding out the promise that it may be applied in a manner divorced from the values and opinions of the person applying it.

Oakes marks the high point not only in terms of the strictness of the test, but also in terms of the Court's evident faith in its ability to solve the problem of judicial review. For if one assumes the priority of the *Charter* over competing values, then one has clearly opted for intervention over restraint.[32] As will be described below, both this strictness and this faith in logical constructs to determine *Charter* outcomes rapidly began to deteriorate. But before setting out the story of what happened after *Oakes*, we will examine the sources of the *Oakes* doctrine, and the question of whether it ever had any definite content. This begins with a brief examination of U.S. constitutional law.

B. *Antecedents to the* Oakes *Test in U.S. Law*

Those who are familiar with U.S. constitutional law will recognize in the formulation of the section 1 test some echoes of the doctrine set out by the U.S. Supreme Court in its jurisprudence under the *Bill of Rights*.[33] Specifically, phrases such as "pressing and substantial objective", "rational connection", and "least restrictive means" (or their near equivalents) all carry significance as part of the language of justifying infringements of rights protected under the U.S. Constitution.

Much has been made of the fact that Canada's *Charter* contains an explicit justificatory provision in section 1, while the U.S. *Bill of Rights* speaks in absolute terms. Nevertheless, the U.S. Supreme Court has interpreted many of the provisions of the *Bill of Rights* as being subject to implied limits, so that they may be infringed provided certain standards are met. These standards, however, have developed in such a way that they are grouped into categories — so that while some infringements require a high level of justification or scrutiny, others are virtually rubber-stamped. Often, the differing levels of scrutiny have arisen as a result of the right in question receiving a more expansive interpretation

---

[32] A conclusive presumption in favour of intervention when constitutional rights are infringed offers the illusion of solving the problem of judicial review. The solution is illusory, however, because it simply shifts the problem of judicial review from being a question of "what justification suffices?" to being a question of "assuming that when a right is infringed the priority of the right must be upheld, what constitutes an infringement?" From time to time this has been advocated in the U.S. as a preferable approach to "balancing" rights against other interests: *see, e.g.*, A. Meiklejohn, *The First Amendment is an Absolute* (1961) SUP. CT REV. 245. Meiklejohn advocated absolute protection of speech under the First Amendment, but would have limited this protection to "political" discourse.

[33] U.S. CONST. amends I-X.

— so that for example, commercial speech, which was originally excluded from protection under the First Amendment guarantee of free speech, is now included but limits on commercial speech are subject to relatively lenient scrutiny.[34] There exists, therefore, a variety of justificatory tests under U.S. constitutional law, ranging from "strict scrutiny" to "minimum rationality".

The actual test constructed by our Court in *Oakes* is a hybrid of various U.S. tests. Generally, the two main requirements of 1) a valid purpose; and 2) least restrictive means for achieving that purpose, first set out in *Big M Drug Mart*, are similar to the test set out for "incidental" infringements of free speech in *United States* v. *O'Brien*.[35] The test set out in *O'Brien*, applicable to any government measure which curtails speech but does not avowedly aim at particular speech for its content, is whether "an important or substantial government interest that is unrelated to the suppression of free expression" has been shown, and if so whether the measure constitutes the least restrictive means of achieving its purpose.

The insistence on a "valid purpose" in *Big M Drug Mart* must be understood in its context. *Big M Drug Mart* is a case involving freedom of religion, and the purpose of the impugned legislation was interpreted as being "one which compels religious observance"[36]. This brought it squarely in line with U.S. cases involving the establishment clause of the First Amendment, under which it has been consistently held that any enactment with the purpose of advancing one particular religion is *per se* invalid.[37] Despite the fact that the *Charter* contains no establishment clause, due to the obvious establishment of Protestant and Catholic religions elsewhere in the Constitution,[38] the Court found that the purpose alone prevented the legislation from being saved by section 1:

> The characterization of the purpose of the Act as one which compels religious observance renders it unnecessary to decide the question of whether s. 1 could validate such legislation whose purpose was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced.[39]

---

[34] *See*, L.H. Tribe, AMERICAN CONSTITUTIONAL LAW 2nd ed. (New York: Foundation Press, 1988) at 931-34.

[35] 391 U.S. 367 (1968) [hereinafter *O'Brien*].

[36] This finding was occasioned by the neat argument that, in order for the federal government to have had jurisdiction to enact the law in the first place, it must come within the criminal law power and therefore involve a matter of public morals. Advancement of Christianity was a matter of public morals, but alternative "secular" justifications such as the need for a common pause day were not. Needless to say, this kind of situation, in which the range of potential valid purposes is dramatically narrowed by jurisdictional considerations, will be rare in *Charter* cases.

[37] The currently accepted test is set out in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) under which laws must have a secular purpose, a primarily secular effect, and absence of excessive entanglement between church and state.

[38] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93.

[39] *Big M Drug Mart*, *supra*, note 5 at 353.

In *O'Brien*, however, the "purpose" branch of the test is used not to determine whether the provision is *per se* invalid, but rather to differentiate the case from the line of cases in which the purpose is explicitly to restrict a meaning or viewpoint based on the apprehended harm that will be caused by its expression, which under First Amendment law attracts a higher standard of scrutiny.[40] Under this standard, the state must show that a law is necessary and narrowly tailored to serve a "compelling" state interest.[41]

Within other classifications of U.S. constitutional law, evaluation of purpose plays a different and generally more modest role. For "intermediate scrutiny" of certain legislative distinctions (such as those based on gender), the state must show an "important" objective, though not one which is "compelling". This requirement has occasionally been used to strike down legislation, as for example in *Reed* v. *Reed*,[42] where the objective of reducing workload of probate courts was held insufficient to justify a statutory preference for men as intestate administrators.[43] And for the most lenient "minimum rationality" review, under which the U.S. Supreme Court is generally extremely deferential, the Court has on a very few occasions held that an enunciated purpose was not legitimate.[44] For the most part, however, the Court has deferred to legislative judgment as to what is or is not an important purpose, absent the special circumstances that invoke "strict scrutiny".

The investigation of legislative purpose, then, has several roles in U.S. constitutional law. In a very few cases, such as an attempt to favour one religion over others, the purpose is regarded as *per se* invalid. In other cases, purpose is itself used to classify legislation according to the level of scrutiny it must face — for example, to distinguish between the "strict scrutiny" of explicit content-based restrictions on free speech, and the more relaxed scrutiny of restrictions that only incidentally affect speech. Within the various levels of scrutiny, the standard which the government's objective must meet is variously described as "compel-

---

[40] The Supreme Court of Canada adopted a similar distinction for freedom of expression cases in *Irwin Toy*, *supra*, note 12. Where an enactment aims explicitly at expression based on its content, s. 2(b) will be automatically infringed. Where, however, an enactment affects expression only incidentally to achieving an unrelated purpose, one who asserts an infringement must first show that the affected expression somehow implicates the values protected by freedom of expression, being truth, democracy, and self-fulfillment. The significance of this division, however, is open to question since the Court's later acceptance, in *Keegstra*, of the proposition that even explicit content-based restrictions can be justified under s. 1 with reference to those same values. *See* note 80, *infra*, and accompanying text.

[41] *Perry Education Assn* v. *Perry Local Educators' Assn*, 460 U.S. 37 (1983).

[42] 404 U.S. 71 (1971).

[43] Some justices of the Supreme Court of Canada similarly rejected "administrative convenience" as justifying a *Charter* breach in *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 58 N.R. 1 [hereinafter *Singh*].

[44] AMERICAN CONSTITUTIONAL LAW, *supra*, note 34 at 1441-43. These last cases are viewed by Tribe as an aberration, resulting from dissatisfaction with existing equal protection doctrine — i.e., cases in which the Court is covertly applying heightened scrutiny.

ling", "important", or "legitimate", according to the strictness of the scrutiny.

In *Oakes*, the Supreme Court of Canada adopted the "valid purpose" requirement of *Big M Drug Mart*, and defined it as meaning a purpose that was "pressing and substantial". This was done, however, without reference to the various nuances that exist in U.S. law. In the result, a "one size fits all" standard is announced, which has made it difficult for this branch of the test to have any integrity. And indeed, this branch of the test has been almost universally ignored since *Oakes*.[45] Despite the language of *Oakes*, the Court will usually adopt whatever plausible-sounding objective is put forward by counsel seeking to uphold the law, and proceed to the proportionality requirement. In effect, the approach to legislative purpose of the lowest levels of scrutiny has been transplanted into Canadian law.

Even more confusing is the insistence on both "rational connection" and "minimum impairment" under the *Oakes* test. Like the concept of an objective of sufficient importance, these two concepts are well known to U.S. law — where, however, they exist as *alternative* standards of judicial review, not different components of the same standard. Generally, those infringements of the *Bill of Rights* which under U.S. law are judged to be less deserving of judicial intervention, such as legislative distinctions not linked to traditional discrimination, are required only to have some rational basis in order to be justified. On the other hand, those infringements which are traditionally viewed as going to the core values that the rights protect, such as race-based classifications or content-based restrictions on speech, involve a higher showing that no reasonable alternative existed for meeting the government's objective. And indeed, no case in the Supreme Court has yet turned exclusively on the "rational connection" branch of the test — hardly surprising given the difficulties in finding that the stricter standard had been met while the more relaxed one had not. Though the blurring of these two concepts may not have been deliberate, it is revealing. The existence of these two contrasting standards under the one test is illustrative of the entire subsequent history of the test — for whatever the Court may say on paper, at times it applies a standard of mere "rational connection", while at other times it applies a standard of "minimum impairment".

---

[45] Lack of sufficiency of government objective has only been applied squarely to prevent validation of a *Charter* infringement in two cases: *Big M Drug Mart*, *supra*, note 5; and *A.G. (Quebec)* v. *Quebec Protestant School Boards*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321. There is also some suggestion (pre-*Oakes*) in *Singh*, *supra*, note 43 that a desire to avoid financial or administrative difficulties cannot amount to an objective sufficient to justify infringing a *Charter* right. If this ever was a rule, it may be regarded as overruled by the holding in *R.* v. *Lee*, [1989] 2 S.C.R. 1384, 104 N.R. 1 that denying the right of an accused to a jury trial when he or she had caused the expense of empanelling a jury and then failed to show up, was justifiable under s. 1. Finally, in *R.* v. *Zundel* (27 August 1992), No. 21811 (S.C.C.) [unreported] a majority of the Court held no objective of pressing and substantial concern had been identified capable of saving the "spreading false news" provision of the *Criminal Code*: at 22-28 *per* McLachlin J.

Singling out these particular tests, from among a complex structure of interlocking and overlapping doctrines in U.S. constitutional law, is quite arbitrary. But more fundamentally, on close examination the *Oakes* test as a logical construct can be found to be largely devoid of content. It is to this examination that we now turn.

C. *The Content of the* Oakes *Test*

The major problem with the *Oakes* test, as set out in its "logically pure" form, is that it simply purports to announce a standard of judicial review, without reference to any of the factors that may go to how strict that standard should be. The purported standard exists in a vacuum. When it comes to be applied and given definition, it gives no guidance as to when the *Charter* must give way to competing values.

If we first consider the criterion of "valid purpose" or "pressing and substantial objective", we will see that these words give us no hint as to what does or does not qualify. As a general proposition, if it is presupposed that legislation found to have infringed a *Charter* right has or at one time had the support of a majority of elected representatives, then it is quite problematic for a court to rule, without the benefit of some clear textual authority, that the purpose of the legislation is either valid or invalid.[46] A court could not easily, for example, hold that promoting a common pause day is an invalid purpose while protection of workers from exploitation is a valid purpose — when the government of the day has itself defined the objective or objectives of the law. And indeed, it has turned out to be extremely rare that section 1 cases have turned on whether the purpose was valid or not. This branch of the *Oakes* test tends to be *pro forma.*

It is only once factors have been established which evoke those special circumstances in which a court should more actively question legislative purpose that this test has any real content. For while it may be inconsistent with democratic ideals for courts to question legislative purposes generally, to defer as a matter of course invites abuse. In some circumstances, requiring an impeccable purpose may be necessary because of suspicions that the government's unstated true purpose is at odds with core constitutional values.[47] In other cases, to defer to any suggested government objective allows the proportionality requirement to be easily circumvented. Depending on how the objective is defined, it becomes a simple matter to argue that the means chosen to achieve it either were or were not the least restrictive means available. In *Irwin*

---

[46] Many of the U.S. cases striking down laws as having an invalid purpose can be explained in terms of textual authority. For example, the establishment clause of the First Amendment clearly precludes the legitimacy of an objective of advancing one religion at the expense of others.

[47] *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (the "Pentagon Papers" case), in which an alleged threat to national security was held not to justify a prior restraint on publishing politically sensitive details on U.S. involvement in Vietnam.

Toy, for example, the Supreme Court of Canada accepted the objective of the law in question as being to prevent children under thirteen from being manipulated by television advertising aimed primarily at them. A ban on television advertising aimed primarily at children under thirteen was adjudged to be just the thing to achieve this objective.[48]

Having failed to identify those circumstances which require closer examination of government purpose, the Supreme Court of Canada has generally yielded this territory to the governments which argue before it. Knowing that it would be intolerable to hold that objectives asserted by governments were insufficient or inaccurate in some cases, the Court has shied away from this enquiry in almost all.[49] This in turn exacerbates the malleability of the proportionality requirement.

Similarly, the failure to articulate factors going to the question of whether the means chosen to achieve the objective will be subjected to a high or low standard of review leaves the rational connection and minimum impairment tests virtually meaningless. For having found a *Charter* infringement, and having accepted that the legislators had a valid reason for the infringement, the Court cannot possibly accept that any conceivable way of avoiding or diminishing the infringement will result in the legislation being struck down. The ingenuity of counsel being what it is, this would almost always result in the law being struck down. Some level of deference to the role and function of the legislature must always be shown. The questions that remain are, how much and when?

---

[48] This circular reasoning is pointed out by Hogg in *Section 1 Revisited, supra*, note 11 at 6. It is not suggested that U.S. constitutional law has been free from such manipulation, though the scope for manipulation does seem greater where the Court gives a large measure of deference to the state's announced objectives. In *O'Brien* itself, for example, a similar technique was used. At issue was an enactment forbidding the destruction of draft cards at a time when many were burning their cards as a protest to the Vietnam War. Despite evidence that the true purpose of the enactment was to stifle a particularly successful form of protest, the Court characterized the purpose of the enactment as being to preserve draft cards which were by definition government property. Having defined this as the objective, the Court proceeded to reach the unsurprising conclusion that the prohibition on their destruction achieved this objective using the least restrictive means available.

[49] That is not to say that the Court is unwilling to partake in a little judicious recasting of the objective for the purposes of setting up the "proportionality" part of the test. In *Ford, supra*, note 7 at 778, for example, the Court defined the objective of the prohibition on using languages other than French on a commercial sign as being "to assure that the '*visage linguistique*' of Quebec would reflect the predominance of the French language". Quebec had argued more generally that the restriction on English was necessary to counteract the pressures leading young francophones to learn English, anglophones to conclude that learning French was unnecessary, and immigrants to assimilate into the anglophone community, and had submitted materials that supposedly demonstrated the reality of those pressures. By casting the goal more specifically as being to reflect the *predominance* of French, the Court was able to find that while a law requiring French to be predominant on signs might have been justified by the materials, a law requiring the exclusive use of French was not (at 778-80). But while the Court may in fact preserve for itself the discretion to use the legislative objective branch to invalidate laws, it does so by a process which is hidden.

Unlike the case with review of the government objective, however, the Court has not chosen to defer on the proportionality requirement as a matter of course. Indeed, if it did it would be abandoning the task of judicially reviewing legislation, because there is no further branch of the test on which to make its stand. Rather, it has been compelled to apply this branch of the test inconsistently, and then seek to reconcile the stricter applications with the more lenient ones. What happened in the next set of cases was that the presumed priority of *Charter* claims, set out in *Oakes*, began to collide with the expansive interpretation of substantive rights set out in *Big M Drug Mart* and *Hunter*.[50] Simply put, the Court began to see a wider range of situations in which *Charter* violations were alleged. As the Court began to confront this broader range, the section 1 test came back to haunt them. Their answer was to create doctrine designed to "clarify" their earlier pronouncements. It is to this second installment of doctrine-spinning that we now turn.

III. THE "CLARIFICATION" OF THE *OAKES* TEST

It took little time for the Court to be faced with the question of just how strictly they were going to apply the criteria set out in *Oakes*. First to engage the Court's attention was the question of sufficiency of evidence. In *Jones*, the appellant refused to have his children educated in a public school as required by statute, on religious grounds. He also refused to apply for an exemption under the statute. In a concurring opinion upholding the statute, La Forest J. dealt with the argument that the government had failed to discharge its onus of establishing that the infringement of freedom of religion which he found under the statute was justified:

> Counsel for the appellant placed considerable reliance on Dickson J.'s statement....that the onus of establishing that a limitation to a *Charter* right is justified is on the person who seeks to do so. But more recently, in *R. v. Oakes*....the Chief Justice made it clear that this is so only "[w]here evidence is required in order to prove the constituent elements of a s. 1 inquiry"....I do not think such evidence is required here. A court must be taken to have a general knowledge of our history and values and to know at least the broad design and workings of our society. We are not concerned with particular facts.
>
> No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens. Nor is evidence necessary to establish the difficulty of administering a general provincial educational scheme if the onus lies on the educational authorities to enforce compliance. The obvious way to administer it is by requiring those who seek exemptions from the general scheme to make application for the purpose. Such a requirement constitutes a reasonable limit on a parent's religious convictions concerning the upbringing of his or her children.[51]

---

[50] *Supra*, note 12. *See generally Interpreting the Charter of Rights: Generosity and Justification*, *supra*, note 11.

[51] *Supra*, note 13 at 299-300.

This is in direct contrast to the dissenting judgment of Wilson J., who focused exactly on the government's failure to discharge its burden as the reason for not upholding the statute under section 1.[52] While this was only a concurring judgment, shortly thereafter a majority of the Court cited the same language in *Oakes* for the proposition that secondary picketing could be limited in the circumstances of the case,[53] despite admitting that the factual record was scanty, no picketing having in fact occurred.[54]

The Court's "clarification" of *Oakes* was even more striking in relation to the "minimum impairment" test. In *Edwards Books*, a secular statute banning Sunday shopping was in issue. Since *Big M Drug Mart* had effectively already decided that freedom of religion was infringed by such a statute, the crux of the case was whether the statute could be justified under section 1. Although the statute contained a "sabbatarian exemption" for stores with seven or fewer employees, it was argued that various alternatives might impair the freedom of religion of retailers less. Chief Justice Dickson, for the majority, wrote in *Edwards Books*:

> In balancing the interests of retail employees to a holiday in common with their family and friends against the s. 2(a) interests of those affected the Legislature engaged in the process envisaged by s. 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.[55]

In other words, in applying section 1 it is appropriate for courts to show a certain amount of deference to the legislature. This marks a dramatic shift in emphasis from *Oakes* and other cases, in which the primary role envisaged for the courts was that of champion of *Charter* rights. From this point on, the courts are also to have the contradictory role of deferring to legislative judgment as to what is reasonable.

Not only did the Court place a new emphasis on deference, it also took pains to stress that the "doctrine" under section 1 was not really doctrine, but a set of considerations that must be applied flexibly. As Chief Justice Dickson noted, "[b]oth 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."[56]

---

[52] *Ibid.* at 322-23.

[53] *RWDSU* v. *Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573 at 590, 71 N.R. 83 at 103 [hereinafter *Dolphin Delivery*]. *See also BCGEU* v. *British Columbia (A.G.)*, [1988] 2 S.C.R. 214 at 231, 53 D.L.R. (4th) 1 at 12-13 reaching the same conclusion for primary picketing of a courthouse.

[54] *Dolphin Delivery*, *ibid.* at 581.

[55] *Supra*, note 15 at 781-82. La Forest, concurring, stressed the point even more at 794-95:

> 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.

[56] *Ibid.* at 768-69.

This theme was taken up with a vengeance in *Cotroni*, a case upholding the constitutionality of extraditing Canadians to the U.S. for crimes committed wholly or partially in Canada. Once an infringement of section 6 of the *Charter* (right to remain in Canada) had been found in the practice of extradition in general, it was argued that in the circumstances of the case, the right would be infringed less (in fact, not at all) if Canadians were prosecuted in Canada for these crimes rather than being extradited. Obviously, some serious backpedalling would be required if the Court was even to pretend it was still applying the "minimum impairment" test as set out in *Oakes*. La Forest J., for the majority, responded to the argument:

> 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 to be applied. It must be remembered that the language of the *Charter*, which allows "reasonable limits", invites a measure of flexibility.
>
> In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature. As the Ontario Court of Appeal put it in *Re Federal Republic of Germany and Rauca....*: "In approaching the question objectively, it is recognized that the listed rights and freedoms are never absolute and that there are always qualifications and limitations to allow for the protection of other competing interests in a democratic society."[57]

The retreat from *Oakes*, however, did not lead to a reformulation of the test, or a new statement of the standard to be applied which, while less stringent than *Oakes*, at least gave some guidance as to how to approach the problem. In certain cases, the Court — or at least some members of the Court — continued to be as interventionist as ever.[58] What it led to was what one scholar has called "the erosion of the common front",[59] whereby the Court has become sharply divided according to the issues presented to it and the predilections of the various members of the Court.

The problems that this creates for the legitimacy of judicial review under the *Charter* did not go unnoticed by the members of the Court. After all, if the state of the doctrine under section 1 is simply that sometimes one defers to the legislature and sometimes one does not, and that none of the enunciated tests are to be applied "mechanistically", but rather with a measure of flexibility and discretion, then the doctrine has

---

[57] *Cotroni*, *supra*, note 13 at 1489-90.

[58] *See, e.g., Ford*, *supra*, note 7; *Black* v. *Law Society of Alberta*, [1989] 1 S.C.R. 591, 63 D.L.R. (4th) 98; *R.* v. *Seaboyer*; *R.* v. *Gayme*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321 [hereinafter *Seaboyer*]; and the judgments of Wilson J. in *Edwards Books*, *supra*, note 5 and *RWDSU* v. *Saskatchewan*, [1987] 1 S.C.R. 460, 74 N.R. 321 for "strict" application of the test.

[59] Elliot, *supra*, note 11.

utterly failed in its promise of justifying judicial review of legislative acts. What was needed, if the promise of doctrine was to be revived, was *more* doctrine to guide the courts in when section 1 would present its "hard" face and when its "soft" face.

The Court's first explicit attempt to differentiate between the two faces of section 1 was in *Irwin Toy*. Once again, this case called for some fudging on the issue of whether a restriction on freedom of expression (an outright ban on television advertising directed at children under thirteen) could be said to impair the freedom as little as possible. Dickson C.J.C. and Lamer and Wilson JJ., writing together as a plurality, commented:

> 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 courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's 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 and Art Ltd....*).
>
> 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 ss. 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 principles 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....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.[60]

The trouble with this theory, if it is taken to be anything more than a plea to recognize the limits of the Court's current institutional compe-

---

[60] *Irwin Toy*, *supra*, note 12 at 993-94. The theory presented can be related to the theory that judicial review exists to protect "discrete and insular minorities", set out in the famous footnote 4 of the U.S. Supreme Court's judgment in *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938) and endorsed to some extent by our Court in *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1333, 39 C.R.R. 306 at 337 [hereinafter *Turpin* cited to C.R.R.]. Conversely, where legislation arguably aims at furthering the position of a "discrete and insular minority", it should not face a high level of constitutional scrutiny.

tence,[61] is that it proves no more determinate than the earlier section 1 doctrine when carefully scrutinized. How, for example, does one characterize the infringement of rights of the accused in a rape-shield law?[62] Or a criminal provision banning hate propaganda?[63] In each of these two cases, the impugned law aimed to protect not just society at large, but a smaller and assumedly vulnerable group within society. Yet in each of these cases the Court was markedly split on section 1. And even when a legal right is infringed in a criminal law setting where the law is imposed for the general good of society, as for example a provision authorizing random breath tests, the Court is no more able to decide whether it is applying section 1 strictly or leniently, or why.[64] For this reason, the *Irwin Toy* theory seems destined to remain more a tool of advocacy, to be wielded when convenient, than a significant part of section 1 doctrine.[65]

The Court has made a final doctrinal effort — if it can be described as such — to solve the problem of judicial review in *Edmonton Journal*[66] and cases following it.[67] There Wilson J. announced a new approach to *Charter* methodology, particularly apposite to section 1, which she has labelled "the contextual approach" and describes as follows:

> 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

---

[61] Institutional competence, I would argue, is not inherent but is rather a function of the type of case that judges have been exposed to in past. For example, the U.S. Supreme Court has built up expertise in such areas as economic regulation through antitrust law, that would not be possessed by its Canadian counterpart. Our Court would have an appreciation of the workings of government through division of powers cases that would not be shared by courts in unitary states. There is no reason why the courts should not develop the expertise they need to adjudicate all *Charter* claims effectively.

[62] *See Seaboyer*, *supra*, note 58.

[63] *See Keegstra*, *supra*, note 8. Note that *Keegstra*, in addition to being a freedom of expression case, also involved infringement of the accused's legal right to the presumption of innocence, because the statute imposed a reverse onus of proving the truth of the statements that were the subject of the prosecution.

[64] *R.* v. *Ladouceur*, [1990] 1 S.C.R. 1257, 108 N.R. 171.

[65] *See, e.g.*, the radically different approaches to *Irwin Toy* in La Forest J.'s and Wilson J.'s s. 1 analyses in *McKinney*, *supra*, note 6 at 39-42 (La Forest J., upholding) and at 123-30 (Wilson J., striking down). L'Heureux-Dubé J., in a separate dissenting opinion, did not even mention *Irwin Toy*.

[66] *Supra*, note 13.

[67] *See, e.g.*, *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 [hereinafter *Rocket* cited to S.C.R.]; *Keegstra*, *supra*, note 8.

> therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.[68]

Put crudely then, how strictly one applies section 1 is all a matter of context. There is a section 1 test for restrictions on disclosing details of matrimonial disputes, and a different section 1 test for restrictions on political discourse. In fact, there are no limits to the number of different section 1 tests there can be from this point on.

The end result of a massive attempt to "clarify" the *Oakes* test, then, is a statement that "it all depends". For all the doctrine that has been spun around the simple words "reasonable limits", we are no further ahead in solving the problem of judicial review. Indeed, the Court seems to have quietly recognized this fact, because in more recent judgments — despite the fact that their length has, if anything, been increasing — the Court has been less inclined to pontificate on the meaning to be given to the section 1 test. The Court has moved onto other things. It is to these other things, and their relationship to section 1, that we now turn.

IV. The Decline of Doctrine Under Section 1

Having tacitly accepted that doctrine has failed its appointed task under section 1 of giving the Court guidance as to when and when not to intervene in the legislative process, the Court still faces its initial problem. It still has no answer to the problem of judicial review; no answer to the question of when, in a battle between those claiming *Charter* infringements and those asserting the will of the majority, it is appropriate to defer. Yet it still must operate on the assumption that *Charter* cases can be decided according to principles and not prejudices. Somewhere, the Court must find convincing justification for allowing some claims and not others, or it will lose the high degree of respect in which it is currently held by the Canadian population.[69]

The context-dependent approach announced in *Edmonton Journal* invites the Court to look elsewhere than section 1 for that justification. It recognizes "that a particular right or freedom may have a different value depending on the context".[70] For example, political expression may deserve greater protection than disclosure of the details of a matrimonial dispute. In other words, under this approach one looks to the right or freedom itself, and classifies the infringement as requiring a high degree of justification, a low degree of justification, or something in between. This, of course, requires the Court to examine the right or freedom itself,

---

[68] *Edmonton Journal*, *supra*, note 13 at 1355-56.

[69] There are some signs already that this is happening. Take, for example, the criticism that the Court has encountered over such highly publicized decisions as *Ford*, *supra*, note 7; *Seaboyer*, *supra*, note 58; and *R.* v. *Askov*, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355. The next logical step would be pressure from disgruntled voters for some say in the appointments process, as in U.S.-style Senate confirmation hearings. This may become a popular issue as our experience with the *Charter* increases.

[70] *Supra*, note 13 at 1355.

and rank the infringement according to its understanding of the values and interests protected by the right. Somehow, it must determine that debate in the House of Commons has more to do with the values and interests protected by "freedom of expression" than a newspaper article reporting the details of a matrimonial dispute.

Once again, if this process is to be anything other than completely arbitrary, the Court must develop and enunciate considerations that are general in their application — in other words, doctrine. This doctrine is no longer section 1 doctrine, but rather doctrine under the right or freedom in question. From the whirlpool of doctrine surrounding the words "reasonable limits" in section 1, eddies spin off under each of the substantive rights and freedoms. This doctrine, which has already begun to form under provisions such as sections 2(b) and 15, seeks to establish a hierarchy of infringements, so that the Court may know to strike down legislation in one circumstance, and uphold it in another.[71]

Some examples of recent cases under subsection 2(b), freedom of expression, will illustrate the point. In *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*,[72] the provisions of the *Criminal Code*[73] making it an offence to communicate for the purposes of prostitution were upheld against challenge under subsection 2(b) of the *Charter*. The Court had little difficulty in finding an infringement, but used section 1 to find that the infringement was justified. Key to this holding was the characterization of communication for the purposes of prostitution as "economic", and therefore less deserving of *Charter* protection than other expression.[74] *Rocket* goes one step further, observing that since the motive of the speaker (dentists who wished to advertise) is primarily economic, it did not fit within those values previously identified by the Court as being central to the freedom of expression guarantee.[75]

---

[71] This helps to explain much of the recent interest of the Court in "internal limits" to rights and freedoms. While the Court is loathe to hold categorically that claims that might be seen as falling within the purview of a right in fact do not, for fear of limiting their future discretion, there has certainly been a great deal of argument over what internal limits there might be to the more broadly defined rights. *See, e.g.*, the discussion of whether threats of violence are protected by freedom of expression in *Keegstra*, *supra*, note 8 or on whether any restriction on expression using government property violates freedom of expression in *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139, 120 N.R. 241.

[72] [1990] 1 S.C.R. 1123, 109 N.R. 81 [hereinafter *Re ss. 193 and 195.1(1)(c)* cited to N.R.].

[73] R.S.C. 1985, c. C-46.

[74] *See* Dickson C.J.C. in *Re ss. 193 and 195.1(1)(c)*, *supra*, note 71:

> Yet, the expressive activity, as with any infringed *Charter* right, should also be analysed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. 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.

See also Rocket, *supra*, note 67 at 242.

[75] *Rocket*, *supra*, note 67 at 247.

This set the stage for an extensive discussion both of the role of section 1, and of the relation between the expression in question and the values protected by subsection 2(b), in the majority judgment of Chief Justice Dickson in *Keegstra*.[76] Doctrinally, the general discussion of section 1 adds little to the comments of *Edwards Books*, *Jones*, and *Cotroni* — except perhaps to stress even more clearly that section 1 must admit of a great amount of flexibility (discretion). According to the Chief Justice, it is "dangerously misleading to conceive of s. 1 as a rigid and technical provision". Rather, "in the body of our nation's constitutional law it plays an immeasurably richer role, one of great magnitude and sophistication."[77] The Chief Justice also expressly endorses "the contextual approach" as set out by Wilson J. in *Edmonton Journal*.[78] The only general point that is new, or newly emphasized in relation to section 1 doctrine, is that the words "free and democratic society" in section 1 include the rights and freedoms elsewhere in the *Charter*. This sets the stage for a section 1 analysis later in the judgment which downgrades the importance of expression targeted by the hate propaganda law, because it is inimical to the values of equality and multiculturalism which find expression in sections 15 and 27.[79]

While there may be little that is new in relation to section 1 generally in *Keegstra*, the significance of the case for freedom of expression cases is great. According to the approach adopted by Chief Justice Dickson, a full inquiry must be made into the relationship between the expression which is infringed and "freedom of expression principles":

> In discussing the nature of the government objective, I have commented at length upon the way in which the suppression of hate propaganda furthers values basic to a free and democratic society. I have said little, however, regarding the extent to which these same values, including the freedom of expression, are furthered by *permitting* the exposition of such expressive activity. This lacuna is explicable when one realizes

---

[76] *Supra*, note 8 at 734-38 and 759-67.

[77] *Ibid.* at 735.

[78] *Ibid.* at 737.

[79] *Ibid.* at 736-37 where the general point is made and applied specifically to the expression at stake at 759-67. It remains to be seen whether the Court will subsequently interpret this as expressing the principle that the better the motive of government, the less exacting will be the s. 1 scrutiny. Considering the lack of emphasis in the cases on the "importance of the objective" branch of the *Oakes* test, with virtually any plausible objective being accepted as meeting the standard, it would seem unlikely. In any event, it is a principle which applies more readily to freedom of expression (i.e., expression which is seen as inimical to *Charter* values can be more readily limited) than to other *Charter* rights. Similar considerations might have been applied in *Morgentaler* — holding that it was more permissible to infringe women's s. 7 rights for the purpose of protecting the lives of foetuses — by a court of a different ideological bent. Other non-expression examples are difficult to think of. The other obvious provision to which this reasoning might apply, s. 15, already contains in s. 15(2) the principle that the equality rights of some can be infringed for the purpose of furthering the equality of disadvantaged groups.

> that the interpretation of s. 2(b) under *Irwin Toy*, *supra*, 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 s. 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 s. 1 analysis of a limit upon s. 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 s. 2(b).[80]

In other words, in all cases the Court is to enquire into the merits of the expression being curtailed, and tailor its standard of scrutiny accordingly. Expression which is found to be central to the search for truth, individual self-fulfillment, or (especially) the democratic process will be most difficult to limit, while expression which is found to be peripheral to these concerns will be correspondingly easier to limit.

It remains to be seen whether this rather vague approach will become more determinate as precedents accumulate. Not surprisingly, it figured prominently in *Butler*,[81] where the Court discussed whether obscene materials as defined by the *Criminal Code* bore any relation to "individual self-fulfillment".[82] Obviously, at the level of generality at which they now stand, such statements of doctrine are themselves highly manipulable,[83] and do little to guide the courts beyond their own instincts and prejudices. To the extent that they do provide useful guidance, it seems likely that it will be through their being interpreted as rough-and-ready classifications; for example a distinction between speech for economic motives and other speech,[84] or between speech inimical to *Charter* values and other speech.[85]

Similar trends are apparent under other provisions of the *Charter*, though they are perhaps not yet as clear or pronounced. In *R.* v. *Wholesale Travel Group Inc.*,[86] various opinions were expressed on whether a provision of the *Competition Act*[87] creating an offence of false or misleading advertising, but allowing the accused to establish due diligence, unconstitutionally violated subsection 11(d). Two members of the Court (L'Heureux-Dubé and Cory JJ.) explicitly cited "the contextual approach"

---

[80] *Ibid.* at 759-60 (emphasis in original).

[81] *Supra*, note 9.

[82] *Ibid.* at 161-62. The answer, according to Sopinka J., is no.

[83] The Attorney General for Ontario, for example, argued that the only "individual self-fulfillment" involved as far as obscene materials were concerned was base physical arousal. By contrast, civil liberties groups characterized pornography as forcing us into inherently political discourse by challenging conventional notions of sexuality (*ibid.* at 50). There is some plausibility to both claims.

[84] *Rocket*, *supra*, note 67 at 247; cited for this point in *Butler*, *supra*, note 9 at 162.

[85] *Keegstra*, *supra*, note 8; *Butler*, *supra*, note 9.

[86] [1991] 3 S.C.R. 154, 67 C.C.C. (3d) 193.

[87] R.S.C. 1985, c. C-34.

and *Thomson Newspapers Ltd* v. *Canada (Director of Investigation and Research Restriction Trade Practices Comm'n)*[88] for the proposition that the legal rights provisions of the *Charter* may have a different meaning as applied to "regulatory" as opposed to "true criminal" offences, thereby finding no infringement. La Forest J. agreed with this principle, but disagreed with its application. Three other justices (Gonthier, Stevenson and Iacobucci JJ.) "abstained from commenting" on the dichotomy between true crimes and regulatory offences, but noted the importance of public welfare offences to Canadian society in upholding the provision under section 1. Before too long, it seems safe to predict that the regulatory or public welfare versus true criminal offence distinction will be a standard part of the "contextual approach" repertoire.

Similarly, there is some indication that the Court's doctrine under section 15 is assuming some of the function of the section 1 test. Of all substantive *Charter* provisions section 15 is most likely to encounter the problem of judicial review, because of its potentially limitless expandability. Indeed, those scholars who have attempted to fashion a general theory of judicial review have focused on the equality principle as being the key to justifying judicial intervention in the democratic process.[89] If any law that distinguishes between persons can be regarded as creating an inequality, and even those laws that do not distinguish between persons can sometimes be regarded as unequal because circumstances call for a distinction, then any law at all can be subject to review.

In U.S. constitutional law, a categorical approach is adopted for equality rights. Some classifications, for example those that are based on race, are subject to "strict scrutiny" by the courts, which nearly always results in them being struck down.[90] Others, such as classifications based on gender, are subject to "intermediate" or "heightened" scrutiny. But even distinctions which are not based on grounds which have historically been tainted by discriminatory treatment are subject to "minimum rationality" review, so that "the classifications drawn in a statute are reasonable in light of its purpose."[91]

As of yet, our Court has declined to adopt a categorical approach. It has also rejected the notion that any distinction or classification may be subject to review,[92] holding instead that only distinctions based on enumerated or analogous grounds infringe section 15. However, there are hints of a division opening up under the section, either between members of the Court or between types of cases. In *Andrews*, McIntyre J. held that in order to find an infringement of section 15 the Court had

---

[88] [1990] 1 S.C.R. 425, 106 N.R. 161.

[89] *See, e.g.*, J.H. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Cambridge: Harvard University Press, 1980).

[90] The one notable exception being *Toyosaburo Korematsu* v. *United States*, 323 U.S. 214 (1944) which upheld a wartime military exclusion of Americans of Japanese origin from certain West Coast areas.

[91] *McLaughlin* v. *Florida*, 379 U.S. 184 (1964) at 191.

[92] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 181-82, 56 D.L.R. (4th) 1 at 23 [hereinafter *Andrews* cited to D.L.R.].

to find not only a distinction, but one which was "discriminatory". Discrimination, however, was defined simply as:

> a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[93]

This definition was expanded upon by Wilson J. in *Turpin*.[94] Her Ladyship stressed not only the need to find a burden within the impugned legislation, but also to look at "the larger social, political and legal context":

> [I]t is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.[95]

This might have been understood as setting a different standard for "analogous grounds" as opposed to "enumerated grounds" cases,[96] but in *R.* v. *Hess*; *R.* v. *Nguyen*[97] Wilson J., for a majority of the Court, applied this reasoning to find that there was no infringement of equality rights in a provision of the *Criminal Code* making it a crime for a man to have sexual intercourse with a girl under fourteen (but not for a woman to have sexual intercourse with a boy under fourteen).[98] The reasoning followed is at times strikingly reminiscent of section 1 analyses in other cases.[99] The dissenting justices, meanwhile, would have found an infringement based purely on the burden imposed on men and not women by the provision.[100] And in *McKinney*,[101] a plurality of the Court would have found discrimination based simply on the burden placed on university professors over sixty-five by a mandatory retirement policy.

---

[93] *Ibid.* at 18.

[94] *Supra*, note 60 at 335-36.

[95] *Ibid.* at 336.

[96] In her dissenting judgment in *McKinney*, *supra*, note 6 at 120, Wilson J. came close to this in noting that while a distinction based on an enumerated ground would not automatically infringe s. 15, "once a distinction on one of the enumerated grounds has been drawn, one would be hard pressed to show that the distinction was not in fact discriminatory".

[97] [1990] 2 S.C.R. 906, 50 C.R.R. 71 [hereinafter *Hess* cited to C.R.R.].

[98] *Ibid.* at 87-90.

[99] *See, e.g.*, the reference to "distinctions....that go to the heart of society's morality and involve considerations of policy", and that are therefore "best left to the Legislature", *ibid.* at 90.

[100] *Ibid.* at 101, *per* McLachlin J.

[101] *Supra*, note 6 at 34-35, *per* La Forest J.

Clearly, the question of whether "disadvantage apart from and independent of the particular legal distinction being challenged" exists will have significance in section 15 cases, though it is unclear what that significance will be. It may lead to a narrowing of section 15's definition, or (perhaps more likely) it may lead to a stricter standard of scrutiny. But in either case, it is evident that the Court is searching for doctrinal considerations under section 15 to answer the fundamental question that has remained unanswered under section 1 — what circumstances justify judicial intervention on behalf of *Charter* claimants?

As these recent cases show, the shift in doctrinal emphasis to either internal limits or a hierarchy of values under the substantive provisions is directly related to the failure of section 1 doctrine to provide an intelligible standard. Furthermore, this trend can be expected to continue. Despite occasional protestations to the contrary,[102] the Court appears to be lapsing into a *de facto* recognition of the "categories" of infringement (or non-infringement) that are characteristic of U.S. constitutional law. In other words, as jurisprudence under the *Charter* accumulates, the courts will be driven less to the statements of principle under the *Oakes* test, and more to a comparison of the facts of the case at bar with previous cases. Economic or commercial expression will find one level of protection, speech which is seen as contradicting the values of the *Charter* another, and purely "political" expression still another.[103] In considering legal rights, "criminal" legislation will encounter greater scrutiny than "regulatory" legislation.[104] And in considering equality claims, members of historically disadvantaged groups will arguably receive greater protection than members of historically favoured groups.[105] From the overarching principles of *Oakes*, the Court is descending to deductive, analogical reasoning for guidance in solving the problem of judicial review. As far as section 1 is concerned, doctrine has truly had its day.

V. Conclusion

What, then, is the significance of this doctrinal shift, away from the general nature of section 1 and towards the recognition of categories and specific factors under the various substantive provisions? While much has been made of the inadequacies of the categories and multiple tests as they have developed in U.S. law, there is much to be said for this kind of approach. To the extent that it descends from the utterly intractable conflict of *Oakes*, it may hold out some hope of relative determinacy in resolving *Charter* claims. Certainly, the experience in the U.S. has been that categories are easily manipulable and often irrational, but at least they give the courts — and counsel who appear before them — a starting point in organizing all the possible relevant

---

[102] *See, e.g., Rocket, supra*, note 67 at 242; *Keegstra, supra*, note 8 at 767.
[103] *See* notes 72 to 85 and accompanying text.
[104] *See* notes 86 to 88 and accompanying text.

considerations on the question of whether in the particular case, the will of the majority of legislators should give way.

That is not to say that the emerging doctrine under the substantive provisions of the *Charter* with respect to standards of scrutiny in any way solves the problem of judicial review. As noted above, to the extent that such doctrine helps, it does so only by relinquishing its claim to being universal in its application. Whereas the *Oakes* test was an attempt to state, as a matter of logic, the considerations that will be present in every section 1 case, the "categories" that are emerging under subsection 2(b) and other provisions by their nature isolate only a subset of the cases that might arise. More to the point, they do so by making inherently value-based judgments about the relative importance of the interests at stake. To say that "economic" expression is less deserving of protection than "political" expression is to imply a view of the world which may or may not be universally or even widely held.[106]

Indeed, to the extent that the emerging doctrine under the substantive provisions is general in its application, it is likely to undergo the same process of decay that has marked doctrine under section 1. Section 15 seems a particularly likely candidate. A search for independent disadvantage in all cases of discrimination, for example, is virtually tantamount to restating the problem of judicial review under section 15. Inevitably, the Court will be drawn into questions of what degree of disadvantage, if any, must be shown, and who or what constitutes a discrete and insular minority. Inconsistencies will emerge, and the new doctrine will prove to be just as unstable as the old. In the end, section 15 too may have to break down into a series of rough-and-ready categories or remain opaque.

The advantage of having the courts develop categorization schemes to address the problem of judicial review is not that they are necessarily more determinative. Nor is it that they will yield better results. But they will help expose to comment and analysis the values of the judiciary. The distinction between the standard of review offered for race-based and gender-based classifications under the Fourteenth Amendment, for example,[107] speaks volumes about the value system developed by the U.S. Supreme Court in recent decades. This in turn encourages democratic debate about the role of the judiciary, and the extent to which we as citizens and voters wish such decisions to be made by unelected

---

[105] *See* notes 89 to 101 and accompanying text.

[106] Although the distinction appears at first blush to be uncontroversial, there may well be instances in which it is not. In one sense, *Lavigne* v. *OPSEU*, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545 turned on whether a meaningful distinction could or should be made between using the coercive power of the state to compel contribution towards the "political" and the "economic" activities of trade unions. Many on the left would feel that "political" discourse primarily revolves around economic interests, and that "economic" discourse is at root political.

[107] Purportedly "strict scrutiny" as opposed to "intermediate scrutiny", although in practice the line between the two has at times become blurred. *See* AMERICAN CONSTITUTIONAL LAW, *supra*, note 34 at 1561-62.

judges. It may even spur pressure to amend or override the *Charter*,[108] forcing us to examine afresh the values we have chosen to enshrine in our Constitution. All of this is a democratically-healthy reassumption of the "work" of democracy by those who are ultimately responsible for it.

One cannot in the end fault the judiciary much for their efforts under section 1. Given an impossible task, they have put considerable effort into performing it, and when all is said and done they have not been slow in recognizing that their initial ambitions had to be scaled down. After all, the task of balancing the will of the majority with the need to protect minorities was only assigned to the judiciary in the first place because of a widespread perception that the legislative branch could not be trusted with it. The recognition that the problem of judicial review will not be solved by doctrine is in the end simply a recognition that the exercise of power must always be arbitrary, whether by legislatures, courts, or any other institution.[109] It is a lesson, once learned, that we must strive to remember through the coming decades of *Charter* jurisprudence.

---

[108] For example in Quebec after the *Ford* decision, *supra*, note 7.

[109] One response to the recently fashionable disenchantment with the *Charter* has been to believe that the wrong rights are being safeguarded by the wrong institution. *See, e.g.*, the proposals in the Special Joint Committee of the Senate and the House of Commons, *A Renewed Canada* (Ottawa: Queen's Printers, 1992) (Co-chairs: The Hon. G.-A. Beaudoin & D. Dobbie) (the Beaudoin-Dobbie Report) that social rights be enforced by the legislatures as monitored by a new specialized tribunal fashioned for that purpose. Should such a creature ever come to pass, one suspects that a similar process of disillusionment will be inevitable.