THE UNNATURAL LIKENESS OF DEFERENCE: THE SUPREME COURT OF CANADA AND THE DEMOCRATIC PROCESS

by

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Abstract

This dissertation examines the behaviour of the Supreme Court of Canada in cases involving electoral/referendum laws and the alleged violation of freedom of expression and/or the right to vote. In 2007, it declared that the judiciary should adopt ‘a natural attitude of deference’ towards Parliament’s decisions about the democratic process when determining, under section one of the *Canadian Charter of Rights and Freedoms*, whether the infringement is reasonable and justified. This declaration reflected institutional concerns about judicial competence to review legislative choices in this area of public policy and the democratic legitimacy of it doing so. It was made even though the Court had found laws unconstitutional in a majority of the cases that it had heard to date. Deference is often simply equated with government ‘wins’ in court. Such an equation ignores the effect that the decision has on judicial reasoning. It sets the standard of review the court uses when applying the *Oakes* test, the framework within which the section 1 analysis occurs. It also establishes the standard of proof that the Crown must meet to demonstrate that an infringement is justified. The outcome of constitutional disputes can turn on the decision about deference, pointing to a need for structure and coherence in the judiciary’s approach. A review of the Court’s jurisprudence shows that this need has not been met. In spite of its importance to constitutional adjudication, the analytical process by which the decision is made has garnered little attention from those who study the *Charter*. This dissertation seeks to fill this gap by examining deference theory and the use of deference in disputes involving the democratic process and by proposing an approach for specific use in these cases. The approach links the decision to the nature of the legislation, the nature of the right and the nature of the parliamentary discourse that preceded the enactment or amendment of the impugned law. Before setting the standards of review and proof used during the *Oakes* test, courts should determine whether: they have the necessary competence and legitimacy to act; the right warrants stringent constitutional protection; and parliamentarians engaged in serious deliberations that included the *Charter* and the reasonableness of any infringements.
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Chapter 1

Introduction

This dissertation examines the use of deference by the Supreme Court of Canada in disputes involving electoral and referendum laws and the alleged violation of rights and freedoms protected by the *Canadian Charter of Rights and Freedoms*. Deference is a concept whose meaning and whose consequences are not fully appreciated and understood. Courts are often described as according deference when they uphold a law and withholding it when they strike one down. Such a description ignores and obscures the effects that the concept has on the manner in which the Court undertakes the review of government actions and decisions. The decision about deference affects the standard of review the judiciary uses and the standard of proof borne by the government as it defends an impugned piece of legislation.

The Supreme Court has evoked concerns about institutional competence and democracy legitimacy to justify the need for deference in *Charter* adjudication. These concerns incorporate and reflect the division of responsibilities and powers among the three branches of government. All three, under our constitutional construct, are presumed to have a different function. The legislature makes laws, the executive administers and implements them, and the judiciary interprets and applies them.\(^1\) Each of the branches is supposed to exercise restraint when acting, keeping within the bounds of their

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\(^1\) *Fraser v. Canada (Treasury Board)*, [1985] 2 S.C.R. 455, 469-470.
jurisdictions and refraining from meddling in those of the other two. The principle of judicial review challenges this presumption of disparate functions. The courts, in evaluating the constitutionality of the actions and decisions of the two other branches, play a role in the formulation of public policy and its administration and implementation. The importance of the decision about deference cannot be overstated. This decision signals where the judiciary has drawn the boundaries between its jurisdiction and those of the two other branches of government. It indicates where its sphere of power and responsibility ends and where those of the legislative and executive branches begin. The problem, which is revealed when its record is examined, is that the Supreme Court has been inconsistent in its decisions about deference in cases involving the democratic process. It draws the boundaries in pencil, permitting them to be moved in subsequent disputes.

The Supreme Court of Canada, in the aftermath of the constitutional entrenchment of the Charter in 1982, has played an increasingly central role in the governing of this country. It has evolved from a judicial body whose purpose was to resolve disputes about law and federalism into a policy-maker and a policy-administrator. This transformation has triggered ongoing debates about the role of unelected, unaccountable and unrepresentative courts in the legislative process; the normative bases for judicial review; and the nature of the relationship among the three branches of government. The Court’s

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3 Please see among others: Peter H. Russell, F.L. Morton and Rainer Knopff, Federalism and the Charter: Leading Constitutional Decisions, (Ottawa: Carleton University Press, 1989); Michael Mandel, The
rulings, regardless of whether they uphold or nullify the actions and decisions of the other branches, have profound effects on Canadian society, government and democracy. They have consequences and implications that reach far beyond the immediate parties to a case. They have caused governments to significantly change the manner in which policy is formulated to ensure that its compatibility with the Charter. They have influenced how social problems are understood by Canadians and legislatively resolved by our elected representatives.

Adjudication under the Charter involves a two-step process. The individual, making a claim, must persuade a court that a constitutionally-guaranteed right or freedom has been infringed. If no infringement is proven, the impugned law is upheld as constitutional. If an infringement is established, the government must demonstrate that it is, under section one of the Charter, reasonable and justified. The Oakes test, created in 1986, provides the framework within which this demonstration occurs. Comprised of four


components, it requires the Crown to show that: (i) the objective of the impugned legislation is pressing and substantial; (ii) a rational connection exists between the objective and legislative measures; (iii) the right or freedom is minimally impaired by the legislative measures; and (iv) the salutary effects of the legislative measures outweigh their deleterious ones. If the Crown fails to meet the requirements of any of the four components, the law is found to be unconstitutional.

While the structure of the section one analysis is now a fixed feature in all Charter cases, the intensity with which the Oakes test is applied is not uniform. It fluctuates because the judiciary has discretionary powers about how high or low to set the bar. If the bar is set high, the Crown has greater difficulty demonstrating that an infringement is reasonable. If it is set low, it is less difficult for it to meet the requirements of the section one analysis. This discretionary power has its roots in the adoption by the Supreme Court of the civil standard of proof of a balance of probabilities for Charter adjudication. The government must demonstrate that an infringement is probably more reasonable than unreasonable. The degree of probability in each case is dependent upon its unique set of facts.

The integration of deference in Charter adjudication broadened the breadth of the judicial discretionary power about how to apply the Oakes test. The concept was not a feature of the test in its original formulation. Its adoption resulted from the difficulties that the Supreme Court experienced in reconciling the judicial necessity for evidence with the political realities of formulating policy choices in the absence of certainty about
the nature of the social problems and the effectiveness of legislative remedies. Deference encapsulates concerns about the competence of the judiciary to review the actions and decisions of the executive and the legislature, and the democratic legitimacy of it doing so. It manifests a judicial belief that some matters are beyond the pale of the courts and are better left to the two other branches of government to resolve.

When a high degree of deference is granted, the standard of review used to scrutinize the constitutionality of government decisions and actions is relaxed. The standard of proof that the Crown must meet in order to demonstrate that an infringement is reasonable is altered and the type of evidence upon which it can rely is expanded to include arguments based on common sense, logic and reason. When a low degree of deference is given, the stringency of judicial scrutiny is tightened. The evidentiary burden borne by the Crown is made heavier by limiting the sort of the proof and arguments that can be used to justify the infringement of a constitutionally-guaranteed right or freedom.

The Supreme Court declares in its most recent democratic process ruling that the judiciary “ought to take a natural attitude of deference toward Parliament…” in this area of public policy.5 This dissertation argues that there is little empirical basis for the Court’s claim. It has nullified or suspended laws in a majority of the cases that it has heard. This dissertation also argues that the Court has failed to develop and consistently apply a structured and coherent approach for determining the degree of deference that should be accorded. Over the course of the last 25 years, it has formulated and

reformulated an approach requiring judicial consideration of the context in which the government acted. Its record reveals the contextualized approach, which, in its different formulations, emphasizes the nature of the right and/or the nature of the legislation, has not given the decision structure and coherence.

This dissertation proposes an alternative contextualized approach to deference for specific use in the cases involving the democratic process. These cases involve a distinct type of constitutional law that warrants its own set of rules and guidelines. The proposed approach requires the courts to consider the nature of the legislation, the nature of the right and the nature of the parliamentary discourse that preceded the enactment or amendment of impugned legislation before setting the standards of review and proof used during the section one analysis.

There are three reasons why disputes about the democratic process were chosen for a study of the Supreme Court’s conceptualization of deference and its use. First, the Court’s declaration of “a natural attitude of deference” was made in spite of the fact that it had found statutory provisions unconstitutional in five of the eight cases that it had previously heard. On first appearances, the declaration signals that the democratic process is an area of public policy in which the resolution of disputes belongs to legislatures rather than courts. It appears to establish a line of demarcation around this specific area and designate it as a judicial ‘no-go’ zone. This creates the possibility that the declaration will, in future disputes, be transformed into a constitutional axiom that automatically precludes stringent judicial scrutiny and potentially negates the
constitutional guarantee of rights and freedoms that are of such fundamental importance to democracy that it cannot exist without them.

The second reason to use democratic process cases to study deference is that it is an area of public policy that is highly political in nature and consequence to both individual citizens and our political system. While the judiciary should be cognizant of its own limitations in reviewing legislative decisions about elections and referendums, it can never lose sight of the fact that the rights and freedoms affected by these decisions are those used by ordinary citizens to participate in the political process and to ensure that their interests are represented in the legislature and in government. As such they warrant due and careful consideration by all branches of government involved in the design and/or oversight of our political institutions and processes. They are also deserving of the most strenuous of constitutional protection.

The third reason to use these cases is their subject matter. They are “unique” and require “special treatment” because the government bears a positive duty to design democratic processes and, in particular, to hold regular elections. It must create the structures within which individual citizens can exercise their democratic rights and freedoms. These creations are characterized by distinctive features. Elections and referendums have a specific life span of limited duration. Their end is signalled by an exercise in collective or communal decision-making about government and governance.

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6 *Thomson Newspapers* paragraph 28.
They produce decisions that are, in all of the cases examined in this dissertation, binding and definitive. They cannot, in essence, be ‘undone’.

These cases are about democracy and the institutions, practices, processes, and rules that define it. They expressly and explicitly evoke questions about the appropriateness both of judicial intervention and judicial abstinence. Frederick Schauer observes that if “the people cannot in a democratic fashion make decisions about what their democracy will look like, then the notion of democracy is hollow.”8 Beverly McLachlin, shortly after she was named to the Supreme Court of Canada, expresses reservations about the judicial review of democratic process legislation. She cautions that “[n]ever have the courts been forced so close to the essential core of the political institutions of our country...”9 because they involve “fundamental value choices.”10 These decisions, as a consequence, may warrant judicial deference. John Hart Ely argues, however, that decisions about the electoral process – and by extension the referendum process – are ones which require judicial vigilance. He warns that political self-interest rather than the health and well-being of our democracy motivate legislators in the choices that they make.11 The problem, as Rawls explains, is that “[p]olitical power rapidly accumulates and becomes unequal: and making use of the coercive apparatus of the state

and its law, those who gain the advantage can often assure themselves of a favored position.”\textsuperscript{12} Christopher D. Bredt and Laura Pottie argue that, as a consequence, there is a need for “a high dose of judicial scepticism….”\textsuperscript{13}

The Supreme Court has heard nine cases involving election and referendum laws that allegedly violate freedom of expression and the right to vote.\textsuperscript{14} They each address questions about how we organize ourselves politically and how we, as a self-governing people, participate in the political process, give consent to be governed and are represented. They each require the Court to examine choices that have been enacted, using the principle of majoritarianism, by elected officials who are democratically representative of and accountable to the citizens of this country or specific province.

The primary rights claim\textsuperscript{15} in four of the cases involves the alleged violation of section 2(b) of the \textit{Charter} which guarantees freedom of expression. Two of these centre on the question of whether third party spending can be restricted during political campaigns. In \textit{Libman v. Attorney General (Quebec)},\textsuperscript{16} Robert Libman wants to run a campaign that is separate from and unaffiliated with the two statutorily-created and publicly-funded national committees, the only entities permitted to incur expenditures

\textsuperscript{14} A tenth case involving the right to seek political office, constitutionally guaranteed by section three of the \textit{Charter} is not examined. Please see: \textit{Harvey v. New Brunswick (Attorney General)}, [1996] 2 S.C.R. 876.
\textsuperscript{15} Most of the disputes examined in this dissertation involve more than one claim. Claimants, at times, allege that freedom of expression, the right to vote, freedom of association, and/or their equality right have been violated by the impugned laws. The Court concentrates its analysis and reasoning on these primary claims.
during a provincial referendum. Unaffiliated third parties are, under the provincial law, only allowed to spend $600 and that sum can only be used to organize and holding public meetings. In *Harper v. Canada (Attorney General)*,\(^\text{17}\) Stephen Harper, the president of the National Citizens’ Coalition, challenges provisions of the *Canada Elections Act* that limit third party election expenses to $3,000 in individual ridings and $150,000 nationally during federal elections. He and the interest group want to spend more than the permitted amounts.

The remaining two freedom of expression cases involve publication bans. In *Thomson Newspapers Co. v. Canada (Attorney General)*,\(^\text{18}\) federal legislation prohibits the broadcast, publication or dissemination of public opinion survey results during the last three days of a federal election campaign. The news media wants to continue to publish and transmit polling data to their readers and viewers. It is argued that the press, in a democracy, must be free to convey political information to citizens so that they can make free and informed choices. In *R. v. Bryan*,\(^\text{19}\) Paul Bryan posts the election results from the ridings in Atlantic Canada on his website while polling stations remain open in other parts of the county. The transmission of results from one electoral district to another district is prohibited under the *Canada Elections Act* until voting has ended in the latter. The immediate posting of the information permits people in the west of the country to


cast their ballots knowing how others voted before them, thereby creating an information imbalance.

The five remaining cases involved the violation of section 3 of the *Charter*. In *Reference re Provincial Electoral Boundaries (Saskatchewan)*, the Supreme Court is asked whether the population densities of electoral ridings have to be the same and whether individual votes have to be of equal value. The provincial law permits deviations in individual districts of plus or minus 25 per cent from the provincial average of roughly 10,000 constituents. The differences in population density are intended to accommodate rates of population growth, geographic features, community history, minority representation, and the diversity of our cultural mosaic.

In *Sauvé v. Canada (Attorney General)* and *Sauvé v. Canada (Chief Electoral Officer)*, the Court has to decide whether prisoners ought to be permitted to vote in federal elections. Richard Sauvé, who was convicted of first degree murder and sentenced to life in prison, is disenfranchised. The first case involves a statutory provision that bans all citizens who are incarcerated on Election Day from voting. The second one involves the disenfranchisement of inmates who are serving time in federal penitentiaries.

The issue of who should be permitted to vote in a federal referendum is the subject of *Haig v. Canada*. Graham Haig is not entitled to vote in the 1992 federal referendum about the constitutional amendments contained in the Charlottetown Accord.
Having recently moved from Ontario to Quebec, he does not live in a federally-established polling division. He cannot vote in the provincial referendum, held on the same day using the same question, because he does not meet the residency requirements. Haig challenges the constitutionality of the federal statute, but not the provincial law.

The dispute in *Figueroa v. Canada (Attorney General)*\(^{24}\) revolves around the benefits to which registered political parties are entitled and to which unregistered ones are not. A party has to nominate candidates in at least 50 ridings in order to obtain or retain its status as a registered party. This status permits its candidates to issue tax receipts for donations made outside the election period, to transfer unspent campaign funds to the party and to list their party affiliation on ballot papers. Miguel Figueroa, the leader of the Communist Party of Canada, argues that the threshold is unconstitutional because it gives large, mainstream political parties unfair advantages over smaller marginal ones.

The questions raised in the nine democratic process cases are not easily answered. There are very few “institutions, practices, and rules [that] are inevitable, in the sense of being the necessary concomitants of any system worthy of being considered a democracy. Instead, for almost all of the institutions of democratic decision making there were choices, all of which are at least plausibly compatible with the basic contours of representative democracy.”\(^{25}\) How and by whom these questions are answered tells us

something about the fundamental values and principles of our democracy and constitutional construct.

Chapter Outline

Chapter two examines two debates. The first involves the question of judicial involvement in the design and oversight of democratic processes and institutions. It, in particular, studies the arguments of Ronald Dworkin, Jeremy Waldron and John Hart Ely. This study reveals a lack of consensus about the role that the courts should play in the protection of those rights and freedoms used by citizens to participate in democracy and to ensure effective representation. The second debate involves the four methodological approaches employed by political scientists when studying judicial opinions. They are the legal model, the attitudinal model, the strategic model, and the historical institutional model. While the focus of the research is the same, proponents of each of these approaches make specific assumptions about law and the judiciary. They conceptualize the relationship to politics and the political arena differently. They also adopt divergent understandings of how and why members of the bench make their decisions.

Chapter three examines deference theory in an attempt to bring the complexities of the concept to the fore. Deference, as commonly-understood, is simply equated with government success in defending legislation. The Court is viewed as deferential when laws are upheld. It is regarded as acquiescing to the will of Parliament. Such simplicity ignores the fact that the decision about deference is a matter of degrees rather absolutes. Such simplicity ignores the effect that the judicial decision about deference has on the standards of review and proof used during the section one analysis. Such simplicity
ignores the fact that the Court upholds legislation not because it agrees with it, but rather because it finds it reasonable and justifiable. Such simplicity obscures debates about what deference actually means and the rationales for its use in disputes involving civil liberties. Such simplicity finally dissuades contemplation of the manner in which the Court actually makes its decision in individual cases and the possible existence of alternative analytical processes.

There is a need to move beyond the simplicity of construing deference with judicial acquiescence and government victories. The theoretical underpinnings of the Canadian construction of the concept have not garnered sustained attention from scholars who study the Charter. This chapter exposes these underpinnings in order to better understand how and why the Court determines where to set the bar when assessing the reasonableness of an infringement. It lays out the alternative meanings of the concept, the rationales for its use in rights adjudication, and the three analytical processes – non-doctrinism, formalism, and contextualism – that have been employed by courts to make their decisions. The chapter concludes by proposing an approach to deference for cases involving the democratic process that links the judicial decision to the consideration of the nature of the legislation, the nature of the right and the nature of the parliamentary discourse that preceded the enactment or amendment of the impugned law.

The Oakes test and the grafting of deference on the minimal impairment component are examined in chapter four. The evolution of the test is traced to show how deference has affected the stringency with which the test is applied and the weighting of
the evidentiary burden borne by the Crown. The *Oakes* test has, in the years since it was first set out by Chief Justice Dickson, become synonymous with the section one analysis, serving as the framework within which the judiciary always evaluates the arguments advanced by the government to justify the infringement of a right or freedom. Its constant presence has deflected attention from the fact that the elemental parts of the framework have not remained unchanged. The minimal impairment component has become the pith and substance of the test while the remaining three have receded almost to the point of irrelevancy. This constancy has also overshadowed the fact that standards of review and proof used during its application fluctuate. This chapter shows that fluctuations are caused, in part, by the use of a civil standard of proof in *Charter* adjudication. The range in fluctuation has, however, been significantly broadened by the grafting of deference on the *Oakes* test.

Chapter five examines the Supreme Court of Canada and its judicial review in cases involving electoral/referendum legislation and the alleged violation of freedom of expression and/or the right to vote. It explores the approaches used by the Court to determine how much deference to accord and confirms that the ‘natural’ attitude of the Supreme Court toward parliamentary choices about democratic processes has not, in most cases, been one of deference. It shows that the judiciary has employed two approaches when deciding how high or low to set the standard of review for use during the section one analysis and the standard of proof borne by the government in demonstrating the reasonableness of infringements. The lack of a uniform approach is worrying because of
the shared features of these nine cases. They are all about democracy and its institutions and processes. Six of the nine cases involve provisions of the same piece of legislation. Six of the nine rely on the same document as the primary piece of evidence. Six of the nine are the subject of inquiries by the same parliamentary committee. These commonalities point to the need for a uniform approach to the question of deference.

Chapter six lays out the proposed contextualized approach to deference and then applies it to the nine democratic process disputes examined in this dissertation. The approach requires the Court to consider the nature of the legislation, the nature of the right and the nature of the parliamentary discourse when deciding how high or low to set the bar for the section one analysis. The chapter includes the analysis of the parliamentary discourses that preceded the enactment or amendment of each of the impugned pieces of legislation. Our constitutional construct presumes that the protection of rights and freedoms is a shared responsibility of all three branches of government. Courts should ascertain whether parliamentarians approached their obligation to make constitutionally-sound choices with seriousness. Evidence of these discourses is contained in *Hansard*, parliamentary reports and the transcripts of parliamentary committees.

The concluding chapter summarizes the findings of this dissertation, discusses its limitations and ponders the implications of future research.
Chapter 2

Democracy, Rights and Theoretical Perspectives

“Few concepts in political theory are more confused than that of democracy” 1

The Supreme Court, in *Bryan*, declares that courts should assume a deferential stance when examining electoral/referendum legislation. This declaration is directed specifically at their approach to the section one analysis. While it signals the acceptance of a constrained judicial role in the design and oversight of our democratic processes, it is at odds with the Court’s own record in this area of public policy. It has upheld impugned statutory provisions in only four of the nine cases, involving the laws alleged to violate freedom of expression and/or the right to vote (*Reference, Haig, Harper, and Bryan*). Its level of deference when assessing the reasonableness of these violations is even lower. It has only accepted the government’s arguments in two cases (*Harper* and *Bryan*). The inherently political nature of these disputes raises questions about the role of the judiciary in their resolution. At their core, the decisions of Parliament about the institutions and processes of our democracy reflect and represent normative choices about political philosophy and the underlying values and principles of liberal democracy. Judicial review drags the courts directly into substantive deliberations about the principle of self-government.

The purpose of this chapter is twofold. It first examines the debate among Ronald Dworkin, Jeremy Waldron and John Hart Ely about the involvement of the judiciary in the design and oversight of our democracy, its institutions and processes. They each express commitments to democracy and the principles of equality and fairness. They each recognize the importance of political participation and seek to ensure that all members in the political community participate freely and fully in the decision-making process. In spite of these commonalities, they each view the judicial review of legislative choices about elections and referendums differently. Dworkin favours it because the judicial protection of rights is a precondition of democratic legitimacy. Waldron opposes it because these choices should be made by the people or their elected representatives. Ely embraces it because of the dangers of self-dealing, self-interested legislators.

The second purpose of the chapter is to set out the four models of judicial decision making that are employed by political scientists when they examine the courts and their rulings. They are the legal model, the attitudinal model, the strategic model, and the historical institutional model. The first understands judicial reasoning to involve the application of ‘law’ and a set of rules and principles. The second views it as an expression of the ideological preferences of individual judges. The third sees it as the consequence of strategic machinations on their part. The fourth regards it as contextual and reflective of the role perceptions of members of the bench. While the focus of the research is the same, proponents of each of these approaches make different assumptions about law and the judiciary and employ disparate conceptualizations of their relationships.
to politics and the political arena. They also adopt dissimilar understandings of how and why members of the bench make their decisions. These models, originally developed and employed by scholars looking at the American judiciary and its jurisprudence, have been adopted and adapted by academics examining Canadian courts. This adoption and adaption has occurred, in part, because the study of the judiciary in Canada has been regarded as largely descriptive and lacking in theoretical moorings.²

The Role of the Judiciary in the Democratic Process

There is very little consensus about the essential features of a democracy. Ronald Dworkin remarks that it “is an idea of great abstraction if not ambiguity.”³ There a positive duty on the part of government to create frameworks within which ordinary citizens can participate in the political process and exercise their democratic rights. All would agree that elections must be held on a regular basis, but there is disagreement about what features they should possess and how they should be organized. There is also disagreement about how involved the judiciary should be in the design and oversight of democratic processes. The cases examined in this dissertation deal with such disparate issues as the size of electoral ridings, the entitlement to vote, third party participation in elections and referendums, publication bans, and the registration of political parties. The institutions and processes adopted by a political community represent substantive choices

about political values and principles. They are decisions that involve normative considerations of political philosophy and democratic theory.

**Ronald Dworkin and Equal Concern and Respect**

Ronald Dworkin argues that, rather than being at odds with democracy, judicial review actually enhances it.\(^4\) His stance is founded, in large measure, on his belief that democracy presumes the presence of a set of individual rights and freedoms which include those of equality, political participation, expression and association.\(^5\) They form part of the underlying conditions of democracy which give legitimacy to the decisions taken by government. Judicial review prevents the state from justifying the curtailment of rights and freedoms of individual citizens for the sake of the common good.\(^6\) Rights and freedoms act as “trumps”\(^7\) precluding the government from exercising power in an oppressive and/or discriminatory fashion.\(^8\) This preclusion is possible because they “can be enforced upon the demand of individual citizens through courts or other judicial institutions….”\(^9\)

There is, in Dworkin’s view, greater assurance that these underlying conditions will be protected and respected if the judiciary rather than the other branches of government is endowed with responsibility. The courts are more likely “to produce the

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\(^7\) Dworkin, *Taking Rights Seriously*, xi-xii, 199-200.


best answers to the essentially moral question of what the democratic conditions actually are and to secure stable compliance with those institutions.\textsuperscript{10} He adopts this position even while acknowledging that “political morality is inherently uncertain and controversial”\textsuperscript{11} and disagreements about rights and freedoms exist. Decisions about their meaning and scope cannot be left with the people, or their elected representatives, because they would become judges in their own cause.\textsuperscript{12} They would have the authority to decide whether or not their initial decisions were constitutionally sound.

Dworkin argues that it is preferable to give responsibility for evaluating legislative decisions to the courts because they are forums of principle whose decision-making is not swayed by policy considerations. Policy is a:

kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community … [and principle is] a standard that is to be observed, not because it will advance … an economic, political, or social situation seemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.\textsuperscript{13}

Courts "make decisions of principle rather than policy – decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted – and … [they] make these decisions by elaborating and applying the substantive theory of representation taken from the root principle that government must treat people as equals."\textsuperscript{14} The role of the courts is to ensure that majoritarian preferences, as expressed in legislative choices, do not override

\textsuperscript{10} Dworkin, Freedom's Law, 34.
\textsuperscript{12} Dworkin, A Matter of Principle, 24.
\textsuperscript{13} Dworkin, Taking Rights Seriously, 22.
constitutionally-guaranteed rights and freedoms. Their authority to review these preferences ensures that political power will not always dictate how social and communal problems involving questions of justice are debated and resolved by a society.\footnote{Dworkin, “A Forum of Principle,” 517.}

Dworkin reconciles judicial review and democracy by proposes a conceptualization of latter that is far more substantive and expansive than mere majoritarianism. A political system rooted exclusively in the principle of majority rule cannot guarantee that individual rights, particularly that of political equality, are protected and respected.\footnote{Ronald Dworkin, “The Partnership Conception of Democracy,” \textit{California Law Review} 86 (1998), 457-458.} He argues that “it would be a mistake to suppose that the only genuine democracy is one that has been created only in accordance with, or is sustained only by, the will and blessing of the people as a whole.”\footnote{Dworkin, “The Partnership Conception of Democracy,” 458.} The democratic pedigree of a political community cannot, in other words, be measured solely on the criterion of whether decisions are all taken by the people or their elected representatives. The importance of protecting and respecting rights and the underlying conditions of democracy, in Dworkin’s view, mitigates the fact that judicial review dispossesses elected and accountable legislators of decision-making powers.

Dworkin maintains that in a democracy each individual must be recognized as being of equal importance. Each must have an equal opportunity to participate and to influence the choices that are made by the political community. Each must be treated with equal concern and respect. Each must be regarded as a full and equal member of the political community. In the absence of substantive egalitarianism of this sort, the underlying conditions of democracy are compromised. Citizens are not equal participants in the democratic process and the government is tyrannical.

Dworkin’s conceptualization of democracy as a partnership reflects the importance he places on the individual’s right of participation in the political sphere. He asserts, however, that the democratic nature and legitimacy of a political community cannot be measured using this criterion alone. The principle of equality requires that the “government … act to make the lives of citizens better, and … act with equal concern for the life of each member.” Combining both notions of process and outcome, he argues that a society must be judged “by its capacity to improve the conditions of genuine

political participation"\textsuperscript{28} and its ability “to make accurate judgments about which
decision is best, or at least in the group of better decisions.”\textsuperscript{29}

Critics express reservations about Dworkin’s differentiation between principle
and policy. Cass Sunstein argues that legislators are also guided by principle when
formulating policy. The courts should not, in his view, be characterized as the singular
principled institution of a democracy.\textsuperscript{30} Joseph Raz, Kent Greenawalt and Bradley Miller
dispute the ease with which Dworkin believes the distinction between principle and
policy can be drawn.\textsuperscript{31} Aileen Kavanagh argues that the theory exaggerates “the
differences between the subject matter and decision-making processes appropriate to the
judicial bodies on the one hand, and the elected branches on the other. In so doing, it
distort[s] the extent to which both principle and policy have a role to play in both
spheres.”\textsuperscript{32}

Allan Hutchinson is critical of Dworkin’s theory because it strips the people and
their elected representatives of the authority and responsibility to resolve constitutional
disputes about rights and freedoms. He argues that it elevates judges “to the rank of moral

\textsuperscript{28} Dworkin, “The Partnership Conception of Democracy,” 458.
\textsuperscript{29} Dworkin, “What is Equality? Part 4,” 23.
\textsuperscript{31} Joseph Raz, “Professor Dworkin’s Theory of Rights,” \textit{Political Studies} 26 (1983),128; Kent Greenawalt,
“Policy, Rights and Judicial Decision,” in Marshall Cohen editor, \textit{Ronald Dworkin and Contemporary
Jurisprudence}, (Totawa: Rowman & Allanheld, 1984), 90; Bradley W. Miller, “Justification and Rights
Limitations,” in Grant Huscroft, ed., \textit{Expounding the Constitution: Essays in Constitutional Theory}, (New
\textsuperscript{32} Aileen Kavanagh, “Deference or Defiance? The Limits of the Judicial Role in Constitutional
Adjudication” in Grant Huscroft, editor, \textit{Expounding the Constitution: Essays in Constitutional Theory}.
prophets and philosopher monarchs. For citizens, politics has become a spectator sport.”

This concern is echoed by Silas Wasserstrom who expresses worries about the effect that judicial review has on the political institutions and discourse of a community. He fears that politics becomes “rather rarefied and effete, and … involve very few ordinary citizens as active participants.” Frank Michelman argues that Dworkin underestimates the importance of self-government and participation and political accountability to the individual citizen.

Lawrence Sager asserts that Dworkin does not give sufficient weight to the fact that there is disagreement about how rights should be properly protected and shown respect. When the courts fail in their attempts to protect and respect them, democracy is diminished because the decision-making process is not rooted in majoritarianism. This sentiment is echoed by Waldron who argues that judicial review leads to the courts usurping decisions that, in a democracy, should be made by the people or their elected representatives. He asserts that Dworkin demonstrates a troubling indifference to the importance of the process by which decisions about democracy are made.

Waldron also expresses reservations about the level of commitment displayed by Dworkin towards political participation. These reservations are rooted, in large measure,

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in the different understanding of equality that each employs. While the latter recognizes the value of participation, he, in the view of the former, does not give it sufficient consideration. In particular, Waldron argues, Dworkin defines it in terms of its consequences rather than its inherent value to the individual. He “radically underestimates the notion of a right to participate, the imperative that one be treated as an equal so far as a society’s decisionmaking is concerned…” 39

John Hart Ely expresses concerns about the breadth of judicial review that Dworkin endorses. His objections are rooted in his belief that what a judge, who engages in the review of legislative, is “really … discovering … are his own values.” 40 This exercise in self-discovery occurs because there is no consensus in liberal democratic societies about “a discoverable and objectively valid set of moral principles … that could plausibly serve to overturn the decisions of our elected representatives.” 41

Waldron and the ‘Right of Rights’

Jeremy Waldron regards judicial review as undemocratic. 42 His opposition to it evidences his commitments to the importance of rights in a liberal democracy, 43 to decision-making

42 His assessment of the legitimacy of the practice rests upon a distinction between a strong and weak judicial review. Please see: Waldron, “The Core of the Case Against Judicial Review,” 1354-55. Waldron explains that strong judicial review gives courts “the authority to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage). Moreover, courts in this system have the authority to establish as a matter of law that a given statute or legislative provision will not be applied, so that as a result of stare decisis and issue preclusion a law that they have refused to apply becomes in effect a dead letter. A form of even stronger judicial review would empower the courts to actually strike a piece of legislation out of the statute-book altogether.” A
processes that are based on the principle of participatory majoritarianism, and to the principle of equality. These commitments represent his response to the fact that in political communities there are always disagreements about foundational principles and values, including the nature and substance of rights and freedoms. Describing these disagreements as “the circumstances of politics,” Waldron argues that judicial review denies citizens the “right to democratic participation” and prevents them from taking part in their resolution. He asserts that the right of participation, which he describes as the “right of rights”, requires ordinary citizens be involved, as equals, in public decision-making.

Judicial review, Watson alleges, strips right-bearing individuals of the authority to determine the meaning and substance of principles and values. It contradicts the principle of participatory majoritarianism because it places the responsibility for resolving disputes with the judiciary which is unelected, unrepresentative and unaccountable for its actions. It negates the principle of equality by privileging the decisions of judges at the expense of ordinary citizens or their elected representatives.

weak form of judicial review authorizes the courts to “scrutinize legislation for its conformity to individual rights but they may not decline to apply it (or moderate its application) simply because rights would otherwise be violated.”

45 Waldron, Law and Disagreement, 213.
46 Waldron, Law and Disagreement, 101-103.
47 Waldron, Law and Disagreement, 213.
48 Waldron, Law and Disagreement, 232.
The importance of rights and freedoms in a liberal democracy speaks to recognition of the inherent dignity and worth of individual citizens.\textsuperscript{49} Judicial review undermines this recognition. Waldron explains that a political community’s commitment to rights signals a belief “that key interests of individuals … deserve special protection, and that they should not be sacrificed for the sake of greater efficiency or prosperity or for any aggregate of lesser interests under the heading of the public good.”\textsuperscript{50} He regards the right of participation, in particular, to be of such seminal importance that it should never be balanced against any other constitutional values and principles when making legislative decisions.\textsuperscript{51} The imposition of any restrictions on its exercise represents, in Waldron’s view, an assault on the dignity of the individual. His stance, as a consequence, precludes instrumentalist laws whose purpose is to improve the equality of opportunity of specific groups and individuals or the substantive fairness of the political process. The merit of the objective being pursued by the government does not diminish the harm done to individuals and their right to partake in public decision-making because “[t]here is a certain dignity in participation and element of insult and dishonour in exclusion that transcends issues of outcome.”\textsuperscript{52} Permitting people to participate, he argues, represents societal recognition of their equal membership in the political community.

Waldron also argues that the judicial review is predicated upon a negative view of the ability of the citizenry and the democratic and representative processes of the political

\textsuperscript{49}Waldron, “A Right-Based Critique,” 18; Waldron, \textit{Law and Disagreement}, 249-252.
\textsuperscript{50}Waldron, “A Right-Based Critique,” 30.
\textsuperscript{51}Waldron, “A Right-Based Critique,” 38.
\textsuperscript{52}Waldron, “A Right-Based Critique,” 38.
community to respect and to protect civil liberties. It encapsulates an inherent distrust of their willingness to behave in a moral and responsible fashion.\textsuperscript{53} The distrust cannot, Waldron asserts, be reconciled with the liberal conception of individuals as rational and capable of acting for the common good.\textsuperscript{54} Judicial review is at odds with “the aura of respect for their autonomy and responsibility that is conveyed by the substance of the rights which are … entrenched.”\textsuperscript{55} The people and/or their elected representatives are capable of making sound public policy choices that reflect and respect the rights and freedoms.\textsuperscript{56} They are able to deliberate and resolve disagreements about their nature and scope and about how to balance them. Waldron argues that a political community that truly recognizes individuals as right-bearing and moral should not see a need for courts to review and overrule decisions that are rooted in the principle of participatory majoritarianism.\textsuperscript{57}

A political community and its institutions should, in other words, be structured in ways that demonstrate trust in the deliberations and decisions of the people. Democracy, Waldron argues, is based on:

the idea that rulers are chosen by the people whom they rule, the people determine the basis under which they are governed, and the people choose the goals of public policy, the principles of their association, and the broad content of their laws. The people do all this by acting, voting, and

\textsuperscript{54} Waldron, “A Right-Based Critique,” 27.
\textsuperscript{55} Waldron, \textit{Law and Disagreement}, 222.
\textsuperscript{56} Waldron, \textit{Law and Disagreement}, 417.
\textsuperscript{57} Waldron, \textit{Law and Disagreement}, 296-301.
deliberating as equals, through elections and through their relations with representatives.\textsuperscript{58}

He maintains that processes, grounded in the principle of participatory majoritarianism, are the only available mechanisms that do not “bias the matter up-front one way or another….\textsuperscript{59} They respect “the voices and opinions of the persons – in their millions – whose rights are at stake in these disagreements and treat them as equals in the process.”\textsuperscript{60} This respect requires us to “leave [it to] the members of the society to work out their differences and change their minds in collective decision making….\textsuperscript{61}”

Waldron claims that “if a process [of decision-making] is non-democratic, it inherently and necessarily does an injustice, in its operation, to the participatory aspirations of the ordinary citizen. And it does this injustice, tyrannises in this way, whether it comes up with the correct result or not.”\textsuperscript{62} Endowing the courts with the responsibility for reviewing and overruling the decisions made by the people or their elected representatives indicates an abandonment of the notion of self-government which is at the heart of democratic theory. Judicial review represents the “disempowerment of ordinary citizens on matters of the highest moral and political importance.”\textsuperscript{63} Waldron argues that “an additional layer of final review by courts adds little to the [decision-

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\item[\textsuperscript{59}] Waldron, “The Core of the Case Against Judicial Review,” 1388.
\item[\textsuperscript{60}] Waldron, “The Core of the Case Against Judicial Review,” 1406.
\item[\textsuperscript{62}] Waldron, “A Right-Based Critique,” 50.
\item[\textsuperscript{63}] Waldron, “A Right-Based Critique,” 30.
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making] process except a rather insulting form of disenfranchisement and a legalistic obfuscation of the moral issues at stake in our disagreements about rights.” He asserts that, at the very most, the role of the judiciary should be limited “to alert[ing] the public that this [or that matter] is not a trivial … but a hugely important one.”

The principle of equality means, Waldron claims, that it is “imperative that one be treated as an equal so far as a society’s decisionmaking is concerned, the sense of principle [of equality] that is at stake when someone asks indignantly, ‘How dare they exclude my say – disenfranchise me – from this decision, which affects me and to which I am subject?’” Democracy requires “a commitment to give equal weight to each person’s view in the process by which one view is selected as the group’s.” While privileging the principle, Waldron’s conception of it resembles formal rather than substantive equality. Because of our disagreements about the meaning and scope of rights and the underlying values and principles, he maintains that it is necessary to employ an “‘implausibly narrow understanding’ of equal respect; and [as a result] … majority-

64 Waldron, “The Core of the Case Against Judicial Review,” 1406; Please also see: Mark Tushnet, Taking the Constitution away from the Courts, (Princeton: Princeton University Press, 1999), 157. Tushnet makes a similar argument, claiming that rather than relying on judges to interpret the constitution, “we all ought to participate in creating constitutional law through our actions in politics.”; Michael Walzer, “Philosophy and Democracy,” Political Theory 9 (1981). Walzer describes judicial review, at 385, as “authoritative correction”.


66 Waldron, “The Core of the Case Against Judicial Review,” 1375. [emphasis in the original text].

67 Waldron, Law and Disagreement, 114.
decision is the only decision-procedure consistent with equal respect in the necessarily impoverished sense.”

Lawrence Sager is critical of Waldron’s assumption that their status as right-bearing renders the people capable of making judgments about the nature and scope of rights and freedoms and the meanings of constitutional principles and values. He fears, in particular, that “self-interest may … cloud [their] judgements about the rights that others have.” John Rawls expresses reservations about the popular will, characterizing it as “imperfect procedural justice.” Aileen Kavanagh accepts that the capacity exists but queries whether the people or their elected representatives will always act in a moral fashion or make sound choices. She observes that “[p]opular preference does not transform a morally wrong state of affairs into one that is morally right.” She maintains that the institutions and processes of a democratic society must designed taking the possibility of bad choices into consideration.

Joseph Raz questions Waldron’s privileging of the right of rights to the exclusion of any consideration of the consequences of decisions taken using the principle of participatory majoritarianism. Raz argues that the legitimacy and authority of liberal democratic government are grounded, in part, in it making sound decisions that are in the common good or the best interest of the people. A political community must, as a

68 Waldron, Law and Disagreement, 116.
72 Kavanagh, “Participation and Judicial Review,” 460-461.
consequence, rely on an “instrumentalist condition of good government” when designing its political institutions and processes. They must be structured in ways that encourage and lead to sound decisions with few adverse consequences. Rawls makes a similar claim, when he observes that “the fundamental criterion … [of political choice is] the justice of its likely results...” Kavanagh argues that even in the absence of consensus about the meaning of values and principles, there must be a standard of morality to evaluate the choices that are made by a political community. The substance of decisions cannot be ignored simply because the process by which they are made is democratic in nature. Dworkin also argues that consideration must be given to their justice.

Alan Gewirth bases his concerns on the fact that political participation is a teleological activity. It is, for many political actors, a means to an end. People may well involve themselves in the political process as an expression of their inherent self-worth and dignity. Their inclusion may signal recognition by the community of their standing as equal members. People, however, also participate in hopes of influencing the choices that are made by government and benefiting from them. The teleological nature of the exercise suggests the need for its instrumental nature to be taken into consideration when

76 Kavanagh, “Participation and Judicial Review,” 465.
77 Kavanagh, “Participation and Judicial Review,” 462.
78 Dworkin, *Freedom’s Law*, 34.
assessing the soundness of decisions taken by the people or their elected representatives. Relying exclusively on the principle of participation prevents such consideration from occurring.

Christopher Eisgruber casts doubts on the wisdom of embracing the principle of participatory majoritarianism wholeheartedly. He disputes Waldron’s claim that majority rule is a neutral process that can be objectively employed by a political community, observing that it “is itself a distinct conception of that ideal [of equal respect]. As such it competes with other interpretations of ‘equal respect’. Thus, endorsing majority rule would not avoid privileging one position over others; on the contrary, doing so would privilege a particular conception that has the unattractive distinction of being rejected by almost everybody.”

Eisgruber further argues that “there is no inherent connection between majoritarianism and democracy. The question whether majoritarianism advances democracy, including the democratic resolution of moral controversy, is entirely a matter of pragmatic institutional strategy.” He is particularly critical of Waldron’s tendency to emphasize the size of the group making decisions as evidence of its democratic pedigree. He maintains that numbers alone are not the issue because they “cannot tell us whether the government has resolved an issue democratically…. What is, instead, important are

the reasons why people - whether judges, legislators, or voters - make the choices that they do.

Charles Beitz also questions the value of majoritarian decision-making procedures and formal equality. He argues that the assumption that such procedures show, by their very nature, respect for equality is flawed. He explains that it “reflect[s] an implausibly narrow understand of the more basic principle [of equality] from which substantive concerns regarding the content of political outcomes … have been excluded….”83 In his view, respect cannot be ascertained by merely examining the procedures through which decisions are taken.

Owen Fiss and Cass Sunstein reject Waldron’s conception of equality, favouring instead a more substantive form. They argue that the government has to act in order to ensure that all points of view are included in the political debate.84 Dworkin maintains that while people must be “equal in their vote and their freedom to hear the candidates they wish to hear, they … [must also be] equal in their own ability to command the attention of others for their own candidates, interests, and convictions.”85 The legislative objective of “reducing inequality to protect the integrity of political debate”86 is, in his view, a laudable one which justifies curtailing the right to participate.

85 Dworkin, “The Curse of American Politics”.
John Hart Ely proposes the political process theory of constitutional interpretation as a means of narrowly constraining opportunities for judicial intervention.87 This constraint is predicated upon a distinction between substance and process in the formulation of public policy. Ely seeks to ensure that the division of powers between the legislative branch of government and judiciary is respected. He argues that his theory strikes a balance between representative democracy, based on the principle of majoritarianism, and judicial review, grounded in the notion of constitutional safeguards against majority rule, by narrowing the scope of judicial review.

Ely maintains “that only some things should be reviewed, and some things not at all, but those ... that do merit review should be reviewed with a vengeance.”88 The legislative branch, elected and accountable to the people, is responsible for making normative decisions about social problems and how best to resolve them. The judiciary, unelected and unaccountable, should limit its review of government decisions to questions of procedure, leaving unexplored those of the substance. He argues that judicial review should concern “itself only with questions of participation, and not with the

87 While the theory gains renown in academic circles through the work of Ely, it finds its genesis in a judicial opinion written by Justice Stone of the United States Supreme Court in United States v. Carolene Products Co., 304 U.S. 114 (1938). Justice Stone identifies three circumstances in which judicial intervention is justified. These include, at page 152, when legislation: “appears on its face to be within a specific prohibition of the Constitution”; “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”; or involves prejudice “against discrete and insular minorities...which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”

substantive merits of the political choice under attack.” The examination of laws should be undertaken with the objective of ascertaining whether they structurally impede changes from occurring through the ordinary political process or fail to consider and represent the needs and interests of all members of society, including those of politically powerless minorities. The court, in assessing the validity of laws, should be guided by democracy itself. Patrick Monahan, who proposes a variation of Ely’s theory for use in Canada in the late 1980s, explains that:

[d]emocracy regards consent as the only legitimate basis for the exercise of state power. Either the people themselves or their accountable representatives should have the responsibility for making political choices. This procedural theory regards judicial review as the mechanism to protect existing opportunities for democratic debate and to open new avenues for such debate.

By protecting procedural fairness, the courts can ensure that elected representatives will enact substantively fair laws.

Ely roots his theoretical approach in the American constitution itself which constitutes “the basic democratic theory of our government” and establishes the procedures in which citizens can participate and be represented and through which they can determine the values and principles that ought to guide and shape public policy. He

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89 Ely, Democracy and Distrust, 181.
90 Ely, Democracy and Distrust, 79, 82.
91 Monahan, “Judicial Review and Democracy,” 89.
92 Monahan, “Judicial Review and Democracy,” 78; Please also see: Alexander Bickel The Least Dangerous Branch: the Supreme Court at the bar of politics, (Indianapolis: Bobbs-Merill, 1962). Bickel, at 233, makes a similar distinction, observing that “procedural decisions for the most part point to infirmities that are curable. They deal with the ‘how’ of governmental action, whereas substantive decisions go ends, dealing with ‘what’.”
argues that the document must be understood as setting out the “process of government, [and] not a governing ideology” because it does not mandate specific political goals or identify specific values and principles. He maintains that all of its original provisions and any subsequent amendments are essentially procedural in nature. While some, such as freedom of speech or the right to assembly, may appear normative, they are instrumental to the proper functioning of a political process that professes to be a democracy.

In undertaking judicial review, courts must prevent or correct malfunctions in the political process in order to ensure that substantive choices, falling within the purview of legislators, reflect and respect the interests and rights of all members of society. The preventative and corrective responsibility belongs to the judiciary because our elected representatives cannot be trusted to make decisions that protect the well-being of our democracy. Self-interest prevents them from making sound choices. Ely argues that elected representatives will be tempted to make decisions about the democratic process that result in:

(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby

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95 Ely, Democracy and Distrust, 90, 92.
97 Ely, Democracy and Distrust, 105.
98 Ely, Democracy and Distrust, 103.
99 Ely, Democracy and Distrust, 117.
denying that minority the protection afforded other groups by a representative system.\textsuperscript{100}

This possibility of malfunction necessitates and legitimates judicial intervention. Necessity and legitimacy are rooted in the status of judges as outside the political process. Their separateness:

\begin{quote}
\textquotesingle\textquotesingle\ does not give them some special pipeline to the genuine values of the ... people: in fact it goes far to ensure that they won\textquoteright;t have one. It does, however, put them in a position objectively to assess claims ... that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.\textsuperscript{101}
\end{quote}

Impartiality and an absence of self-interest mean, Ely argues, that the courts are better able to identify and guard against or remedy procedural malfunctions.

In spite of fierce criticism and the fact that he himself devotes little consideration to question of how the theory can actually be applied to the design and administration of the democratic process,\textsuperscript{102} Ely\textquoteright;s theory has come to dominate the study of election laws in the United States\textsuperscript{103} The theory has been re-conceptualized by a number of scholars, each employing a specific normative ideal – be it participation, competition, equality, or core rights\textsuperscript{104} – as the standard against which the constitutionality of statutory provisions

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  \item \textsuperscript{100} Ely, \textit{Democracy and Distrust}, 103.
  \item \textsuperscript{101} Ely, \textit{Democracy and Distrust}, 103.
  \item \textsuperscript{102} Michael Dorf and Samuel Issacharoff, \textquoteleft\textquoteleft Can Process Theory Constrain Courts\textquoteleft\textquoteright\textquoteright, \textit{University of Colorado Law Review} 72 (2001), 928.
  \item \textsuperscript{103} Guy-Uriel E. Charles, \textquoteleft\textquoteleft Law, Politics, and Judicial Review: A Comment on Hasen\textquoteright\textquoteright, \textit{Journal of Legislation} 31(1) (2004), 19.
\end{itemize}
is assessed and as the basis upon which the legitimacy and necessity of judicial intervention rests.

Included among scholars who have re-conceptualized the theory is the Canadian Patrick Monahan who argues that it “actually offers a far more convincing account of the purposes underlying the Canadian Charter. … [because it] is mostly concerned with the proper functioning of democratic politics as opposed to the substantive outcomes of the process.”\textsuperscript{105} He asserts that courts, in a political system which combines judicial review and parliamentary sovereignty, should focus their attention on the manner in which decisions are taken rather than substance of the decisions themselves.\textsuperscript{106} Their priority should be to “police the process of democracy”,\textsuperscript{107} protecting and creating opportunities for equal access and participation.

Guarding the integrity of the political process is possible if, Monahan asserts, courts are guided in their interpretation of rights and freedoms by the substantive values of democracy and community.\textsuperscript{108} He describes the former as “a broadening of the opportunities for, and the scope of, collective deliberation and debate in a political community; it means identifying and reducing the barriers to effective and equal participation in the process by all citizens; it means ensuring that there are no arbitrary and permanent boundaries around the scope of political debate.”\textsuperscript{109} He views the latter,

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which downplays individualism and emphasizes group membership, as one of the “distinguishing features of the Canadian political tradition.”\textsuperscript{110}

Colin Feasby, another Canadian, posits a “process theory lite” approach to judicial review of democratic process laws by the Supreme Court of Canada.\textsuperscript{111} He argues that the Court, in its two last rulings, ignores “a fundamental conflict of interests, in that the government is both regulating the political process and is the product of that process.”\textsuperscript{112} In doing so, it weakens its ability to remedy legislative abuses and may, in fact, have facilitated future ones. Feasby maintains that courts should be guided by the notion of procedural fairness which rests on the normative principles of majoritarianism, egalitarianism, legitimacy, accountability and free debate.\textsuperscript{113} His approach requires the judiciary, during its section 1 analysis, to accord deference only to Parliament’s objectives.\textsuperscript{114}

Scholars have identified three key flaws in political process theory. The first criticism relates to the characterization of the constitution as wholly procedural in nature. Mark Tushnet regards this claim as simply untenable, asserting that the written text is

\textsuperscript{110}Monahan, Judicial Review and Democracy,” 141.
\textsuperscript{112}Feasby, “Constitutional Questions about Canada’s New Political Finance Regime,” 542.
\textsuperscript{113}Feasby, “Constitutional Questions about Canada’s New Political Finance Regime,” 539-41.
\textsuperscript{114}Feasby, “Constitutional Questions about Canada’s New Political Finance Regime,” 544. Feasby’s proposal, as will be discussed in chapter four of this dissertation, reflects the Court’s ‘normal’ approach to section 1 analysis. It generally accepts all legislative objectives as pressing and substantial. The reasonableness of infringements almost always turns on proportionality in general.
inherently normative.\textsuperscript{115} Pamela Kaplan describes such a characterization as requiring a “tortured reading of the document and its history.”\textsuperscript{116} Lawrence Tribe marvels at how anyone could argue that “the Constitution is or should be predominantly concerned with process and not substance.”\textsuperscript{117} Many of its most crucial commitments, he observes, have a “stubbornly substantive character” and “defin[e] the values that we as a society, acting politically, must respect.”\textsuperscript{118} Even if the individual provisions and amendments could be regarded as procedural in nature, they cannot be understood or applied “in the absence of a developed theory of fundamental rights that are secured to persons against the state – a theory whose derivation demands precisely the kinds of controversial substantive choices that the process proponents are so anxious to leave to the electorate and its representatives.”\textsuperscript{119}

The second criticism relates to the process/substance dichotomy at the core of the theory and its unsustainability. Political processes are themselves inherently substantive.\textsuperscript{120} In designing and administering them, legislators must make normative choices that reflect and respect democratic values and principles. Judges cannot review electoral/referendum laws without relying on the self-same values and principles.

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\textsuperscript{118}Tribe, “The Puzzling Persistence of Process-Based Constitutional Theories,” 1065.
\textsuperscript{119}Tribe, “The Puzzling Persistence of Process-Based Constitutional Theories,” 1064 and 1067.
\end{footnotes}
Dworkin queries how it would be possible for judges to “avoid making the kinds of decisions of political morality that Ely is most anxious they avoid....”¹²¹ He argues that “[i]f the Court cannot make the judgments about process Ely recommends without making the judgments about substance he condemns, then his own arguments will subvert his own theory.”¹²² Dworkin also characterizes the political process theory as a “flight from substance [that] must end in substance.”¹²³

The third criticism is that concepts like ‘democracy’ cannot function as guiding principle for constitutional interpretation. It is, Dworkin argues, insufficiently precise to anchor the practice of judicial review.¹²⁴ There are fundamental disagreements about democracy itself and how it ought to be conceptualized. There is little agreement about its essential procedural mechanisms. In the absence of consensus, it is impossible to determine the standard against which the ‘democratic’ nature of procedures can be measured. Ely leaves the concept of ‘democracy’ largely undefined. He does, however, explicitly argue that it entails more than mere majority rule. It encapsulates the political ideal, which is itself implicitly normative, that all members of society, including minorities, are represented by elected representatives.¹²⁵ The use of democracy as a guiding principle might make sense if it were possible for the judiciary, in an objective

¹²³ Dworkin, “The Forum of Principle,” 516; This particular problem is one of which Ely appears to be cognizant. He observes, at 103, that “no one could suppose the evaluation [of an alleged procedural malfunction] won’t be full of judgment calls....”
and non-substantive manner, to discern, understand and interpret the various conceptualizations of the concept in order to identify which one is more participation-oriented and representation-reinforcing than the others. Dworkin questions, however, whether such a comparative determination is possible and, if it is possible, what factors ought to be used.\textsuperscript{126}

\textit{The Supreme Court of Canada and the Debate}

Frederick Schauer observes that few “institutions, practices, and rules are inevitable, in the sense of being the necessary concomitants of any system worthy of being considered a democracy.”\textsuperscript{127} One can discern in the judicial opinions of the Justices traces of the debate in which Dworkin, Waldron and Ely are engaged and indecision about which theoretical perspective to embrace. Ultimately, while each of the three offers insight into the difficulties faced by the courts when reviewing democratic process legislation, none fits naturally within the parameters of \textit{Charter} adjudication. Our constitutional construct is an example of commonwealth constitutionalism\textsuperscript{128} which presumes that the protection of rights and freedoms is a shared responsibility of the legislative and judicial branches of government. Such sharing is at odds with each of the three approaches. Dworkin’s theory views the courts as responsible for the interpretation and protection of right and freedoms. It cannot incorporate the Court’s self-expressed concerns about its relative

ability to review legislative decisions and the legitimacy of it doing so. Waldron’s theory is predicated upon the paramountcy of the legislative and executive branches in protecting the ‘right of rights’. It rejects, as undemocratic, any judicial nullification of legislative decisions that infringe democratic rights and freedoms. Ely’s theory is based on a distrust of both the legislative assembly and the courts. Members of the former are regarded as being unable to set aside self-interest when making political choices that affect the well-being of our democracy. Those of the latter are viewed as lacking the ability and legitimacy to adequately examine and assess the substance of these normative choices.

The Supreme Court, in the cases examined in this dissertation, is confronted with questions about the design and oversight of our democracy. It is asked to decide whether legislative decisions impose unreasonable constraints on freedom of expression and/or the right to vote. As the examination of the jurisprudence of the Supreme Court of Canada undertaken in chapter five of this dissertation reveals that it has struggled when making these decisions. Its struggles reflect, in large part, its uncertainty about the appropriate scope and nature of the judicial role in the design and oversight of democratic processes. In setting the parameters of its powers and responsibilities, the Court must never lose sight of the fact that the rights and freedoms at the centre of these disputes are the means through which ordinary citizens participate in our democracy and seek to ensure that their needs and interests are represented in government. They are also of such
fundamental importance to democracy that it cannot exist without them. As a consequence, judicial decisions about deference must be structured and coherent.

**The Models of Judicial Decision-Making**

There are four models of judicial decision-making employed by political scientists, who study the judiciary. They are the legal model, the attitudinal model, the strategic model, and the historical institutional model. The legal model privileges the ‘law’ and legal norms, principles, rules and values, in particular that of *stare decisis*. The attitudinal model prioritizes the ideological perspectives of the members of the bench. The strategic model emphasizes the calculations and machinations of judges. The historical institutional model highlights their self-awareness and role perceptions as well as the norms, values and ideas that infuse the political community. Each rests on a specific set of assumptions about law and politics. Each employs a unique conceptualization of the judiciary and its roles in government and in society at large. Each adopts a particular understanding of the behaviour of judges and what motivates them in the choices that they make. As a result, proponents of each model would perceive deference and its use in democratic process disputes differently.

**The Legal Model**

The legal model, in its original formulation, conceptualized judicial decision-making as mechanical and apolitical in nature and substance. It employs a formalist understanding of the law. Formalism characterizes judges as deciding “objectively and impersonally … cases by logically deducing the correct resolution from a definite and consistent body of
rules.” They engage in a mechanical exercise in reasoning that is governed by a set of determinate legal rules, principles and practices. The set constrains judicial decisions, ensuring that the principle of *stare decisis* is followed and that the interpretation of statutory and constitutional texts is impartial. Harry Kalven explains that “the fundamental premise in the idea of impartial judges and rules of law is that certain kinds of decision-making … by judges, can … be made to show less variance and less correlation to personal factors than other kinds of decision-making.” It is predicated upon a belief that there is a clear demarcation between law and politics. The model assumed that “legal analysis … can and should be free from contaminating political and ideological elements.”

It maintains that judges can objectively and impartially apply the ‘law’ to a set of facts. Legal norms, practices, principles and rules guide and constrain their use of deduction, logic and reason in order to resolve disputes ‘correctly’. The objective and impartial application of the law precludes individual judges from acting arbitrarily, politically, or ideologically, thereby ensuring that judicial decision-making is consistent and predictable. Edward Levi explains that the model conceptualizes judicial decision-making as resembling “reasoning by example. It is reasoning from case to case. It is a …

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133 Schauer, “Formalism”.
process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation.”

The model, in its original formulation, is the subject of attack by academics who dispute the mechanical and apolitical nature of the conceptualization of judicial decision-making. Judges, in their view, create law rather than merely applying it in a perfunctory manner. These creations, which reflect and represent the backgrounds and ideological perspectives of the members of the bench, are political in origin, substance and consequence.

The contemporary legal model abandons formalism, recognizing that it offers a “naïve’ vision of a legal system….” Judicial decision-making cannot be reduced to resemble a scientific or mathematical equation which, when applied objectively and impartially applied by judges, yields the one singular correct answer. The contemporary model concedes that judicial decision-making cannot be reduced to an apolitical mechanical syllogistic exercise. Its proponents recognize that judges, particularly at the upper echelons of the judicial system, have a degree of discretion that obviates a conceptualization of decision-making as purely impartial and objective. The exercise of this discretion is influenced and informed by things other than law. Judicial decisions are,

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as a consequence, political in nature or, at the very least, part of the political process. Proponents of the model argue, however, that the ‘law’ remains the dominant factor in the choices made by judges. The contemporary model maintains that legal norms, practices, principles and rules – in particular those of precedent and statutory interpretation – do not dictate or predetermine a particular outcome. They instead inform, influence and constrain judges in the choices that they make.

Steven Burton employs the concept of “good faith” to argue that judges “are bound in law to uphold the conventional law, even when they have discretion, by acting only on reasons warranted by that law as grounds for judicial decisions.” Lawrence Baum maintains that legal norms, practices, principles and rules “channels judges’ thinking….” Frank Cross describes them as exercising a “disciplining function” on judges. David Shapiro refers to their “vital function in constraining the judiciary’s exercise of power.” Dworkin explains that they impose obligations and the use of judgment on members of the bench which prevent them from acting solely on their own personal preferences or ideological perspectives.

139 Steven Burton, Judging in Good Faith, (Cambridge: Cambridge University Press, 1992), xii.
141 Cross, “Political Science and the New Legal Realism,” 262.
143 Dworkin, Taking Rights Seriously, 31-33; Dworkin, Law’s Empire.
Gerald Rosenberg argues that any differences among the conclusions drawn by judges reflect “honest attempts to apply consistent interpretative philosophy to the facts” rather than evidence that the law has no constraining effect. Gillman asserts that differences in opinion in the meaning of legal norms, practices, principles and rules are: properly seen as disagreements that fall equally with the practice (as with a decision to dissent from a precedent-setting case) rather than as behaviors that expose the fraudulent nature of the practice. Thus, so long as judges draw on beliefs about public values, because they believe the law recognizes this as an inevitable part of interpretation (in some circumstances), but also (for example) refuse to base decisions on partisan favoritism, because that kind of political consideration is considered out of bounds, then the influence of legality is at work.

He maintains that the importance of these norms, practices, principles and rules is evident in decisions that “represent a judge’s sincere belief that their decision represents their best understanding of what the law requires.”

Critics raise a number of concerns about the model. Jeffrey Segal and Harold Spaeth argue that it does not accurately predict the behaviour of judges and, as a consequence, “necessarily explains nothing.” They further characterize the model as “mythologic” and “meaningless.” Rather than clarifying how judicial decisions are made, the model involves “normative rationalization” and obscures “the reality of choice

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146 Gillman, “What’s Law Got to Do with It?”, 486.
[being] based on the individual justices’ personal policy preferences.”149 Spaeth describes legal reasoning as little more “than creative writing, necromancy, or finger painting.”150

Doubts are also expressed about the assumption made by the contemporary legal model that norms, principles, practices and rules have a limiting effect on judicial decision-making. Spaeth argues that “the constraints under which the Justices decide their cases do not inhibit them from expressing their preferences in so far as voting on the cases before them is concerned.”151 Jerome Balkin maintains that “the materials of the law … contain justifications supporting every variety of liberal and conservative positions.”152 Legal rules and principles, according to Mark Tushnet, have such great flexibility that they can be used by judges to justify almost any decision.153 Allan Hutchinson and Patrick Monahan argue that they “can be manipulated to justify an almost infinite spectrum of possible outcomes.”154

Segal and Spaeth, proponents of the attitudinal model which privileges quantitative analysis, assert that there is “no decision that would inconsistent” with the model, making its claims non-falsifiable155 and impossible to demonstrate empirically.156

149 Segal and Spaeth, The Supreme Court and the Attitudinal Model, 363.
150 Harold J. Spaeth, Supreme Court Policy Making: Explanation and Prediction, (San Francisco: W.H. Freeman, 1979), 64.
151 Spaeth, Supreme Court Policy Making, 109.
155 Segal and Spaeth, “The Authors Respond,” Law and Courts 4 (1994), 12 [emphasis in the original text]; Mark Richards and Herbert Kritzer have undertaken research projects to refute this claim. Please see:
They observe that all members of the bench, whether authoring majority, minority or concurring opinions, make reference to precedents and to other legal norms, practices, principles and rules. Their research leads them to conclude that members of the Supreme Court of the United States rarely follow precedents with which they have previously disagreed.\textsuperscript{157} Their conclusion is echoed by Frank Easterbrook who alleges that judges “cast their votes just as if prior cases did not exist….\textsuperscript{158}” Joel Grossman argues that “the mere fact that a court cites precedent provides no evidence that precedent actually determines the outcome of the case.”\textsuperscript{159} Michael Gerhardt claims that “[p]recedents are commonly regarded as a traditional source of constitutional decisionmaking despite the absence of any clear evidence that they ever forced the Court into making a decision contrary to what it would rather have decided.”\textsuperscript{160} It is, therefore, impossible to systematically measure the effect that \textit{stare decisis} has on judicial decision-making. Segal and Spaeth argue that if one cannot “predict \textit{a priori} how precedent might influence a


\textsuperscript{157} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model}, 33. Please see: Gillman, “What’s Law Got to Do with It?”. Gillman in response to this criticism argues, at 482, that “doing such tests has the effects of changing the concept of legal influence so that it no longer represents what they believe.”

\textsuperscript{158} Harold J. Spaeth and Jeffrey A. Segal, \textit{Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court}, (New York: Cambridge University Press, 1999); This finding is not surprising to proponents of the legal model because the Justices of the Supreme Court are not bound by precedent cases in which they dissented. In addition, adherence to precedent is only one factor among many others that informs, influences and guides judicial decision making. Finally, proponents of the legal model counter that the emphasis on the individual by attitudinalists overlooks the respect given to \textit{stare decisis} by the Court as an institution. Please see: Keith E. Whittington, “Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics,” \textit{Law and Social Inquiry} 25 (2000), 607.


decision, than precedent is completely meaningless as an explanation of the Court’s
decisions.”¹⁶¹

The Attitudinal Model

The attitudinal model disputes the claim that the ‘law’ is the dominant factor in the
choices made by members of the bench. It rejects the conceptualization of the decision-
making process as objective and apolitical, asserting that “law is politics through and
through and that judges exercise broad discretionary authority.”¹⁶² The model maintains
that judicial choices are not guided and constrained by legal norms, practices, principles
and rules. Their ambiguity, flexibility and vagueness mean that judges are not precluded
from making decisions that reflect and represent personal policy preferences.¹⁶³ Segal and
Spaeth argue, for example, that “precedent rarely influences … Supreme Court
justices”¹⁶⁴ and serves as little more than a “smoke screen to mask political alliances and
ideologies.”¹⁶⁵ Proponents of the attitudinal model characterize judicial opinions, which
are replete with the rituals of reasoning and references to precedent and the rules of
textual interpretations, exercises in “rationaliz[ing] the Court’s decisions and …
cloak[ing] the reality of the Court’s decision-making process.”¹⁶⁶

¹⁶¹ Segal and Spaeth, The Supreme Court and the Attitudinal Model, xv.
    see also C. Herman Pritchett, The Roosevelt Court: At Study in Judicial Politics and Values, 1937-1947,
¹⁶³ Jeffrey A. Segal and Harold J. Spaeth, “The Influence of Stare Decisis on the Votes of United States
¹⁶⁴ Spaeth and Segal, Majority Rule or Minority Will, 287.
¹⁶⁵ Anthony Champagne and Stuart S. Nagel, “The Advocates of Restraint: Holmes, Brandeis, Stone, and
    Frankfurter” in Stephen C. Halpern and Charles M. Lamb, editors, Supreme Court Activism and Restraint,
¹⁶⁶ Segal and Speath, The Supreme Court and the Attitudinal Model Revisited, 53.
The model regards legal norms, practices, principles and rules are completely irrelevant because ideology predetermines and dictates how individual judges, particularly at the higher echelons of the judicial system, will rule in any given case. Proponents of the model place judges along the political spectrum in order to measure whether they are either ‘liberal’ or ‘conservative’. This measurement is then used as the basis for predicting how they will behave in particular cases. Conservative members of the bench make conservative rulings while their liberal colleagues make liberal ones.

Segal and Spaeth argue that “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.” This freedom from constraint results from judicial tenure, control of the docket, and political independence. Judges are, as a consequence, free “to base their decisions solely upon personal policy preferences.” It also means, contrary to the assumption of the strategic model, that they can disregard the preferences of other actors, including those of the legislative and executive branches of government. Proponents of attitudinalism maintain that there is “virtually nothing else [besides ideology that] directly affects the aggregate decisions of justices.”

167 Cross, “Political Science and the New Legal Realism,” 252.
168 Segal and Spaeth, The Supreme Court and the Attitudinal Model, 65; Please also see Baum, The Supreme Court, 160.
The attitudinal model treats the ideology of judges as quantifiable. By measuring it, members of the bench can be placed on the political spectrum and characterized as ‘liberal’ or ‘conservative’. The variables used to measure ideology of individual judges have included party affiliation, personal background,\textsuperscript{172} the political party of the nominating president or prime minister\textsuperscript{173} and editorials published at the time candidates are nominated to the Supreme Court.\textsuperscript{174} Researchers have also made use of the previous rulings by judges.\textsuperscript{175}

The measurement of ideology is then employed to predict how individual members of the bench will rule in given sets of cases. Proponents of the model seek to establish, at the very least, a correlation between ideology and judicial choices. Establishing this requires them to develop “testable hypotheses, so that beliefs about law’s influence can be verified by a kind of scientific knowledge that [they] consider more authoritative…”\textsuperscript{176} Segal and Albert Cover establish a correlation of 80 per cent between the attitudes of individual justices and their voting tendencies in cases involving civil liberties.\textsuperscript{177} Segal and Spaeth are able to accurately predict how judges would rule in

\textsuperscript{172} Gillman, “What’s Law Got to Do with It?” 470.
\textsuperscript{174} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model Revisited}.
\textsuperscript{175} Reliance of them creates, Lee Epstein and Carol Mershon argue, a tautology. Rulings are used establish attitudes which are then used to explain rulings. Please see: Lee Epstein and Carol Mershon, “Measuring Political Preferences,” \textit{American Journal of Political Science} 40 (1996).
\textsuperscript{176} Gillman, “What’s Law Got to Do with It?”482.
\textsuperscript{177} Segal and Cover, “Ideological Values and the Votes of U.S. Supreme Court Justices.”
more than 70 per cent of cases.\textsuperscript{178} There is, in their view, empirical quantitative evidence to back up claims that judges base their decisions on ideology.

Critics of the attitudinal model argue that it provides a highly reductionist and instrumentalist picture of judicial decision-making. Prediction rather than comprehensive examination is the objective and that necessitates a narrowing of focus to study only one factor.\textsuperscript{179} The picture it presents of judicial decision-making is, in their view, troubling because our judicial system is characterized by “arbitrary or personal judicial lawmaking … [and by] the rule of men, not of law.”\textsuperscript{180} It reduces judges to ideologically-driven trackers of policy preferences who exercise power to achieve specific ends, and disregard any other considerations. Its narrowness ignores the possibility that factors other than ideology inform, influence and constrain judicial decision-making.\textsuperscript{181} Richard Posner offers a list of others which includes:

personal dislike of a lawyer or litigant, gratitude to the appointing authorities, desire for advancement, irritation with or even a desire to undermine a judicial colleague or subordinate, willingness to trade votes, desire to be on good terms with colleagues, not wanting to disagree with people one likes or respects, fear for personal safety, fear of ridicule, reluctance to offend one’s spouse or close friends, and racial and class solidarity.”\textsuperscript{182}

\textsuperscript{178} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model}, 229. They argue, at 227, that the rate is, in fact, skewed downward by their inability to measure, with absolute certainty, the ideologies of some members of the Supreme Court of the United States; Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model Revisited}, 325-26. Their rate of success leads them, at 325-26, to assert that that “the overall validity of the attitudinal model” has been demonstrated.

\textsuperscript{179} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model}, 32.

\textsuperscript{180} Cross, “Political Science and the New Legal Realism,”263.

\textsuperscript{181} Cross, “Political Science and the New Legal Realism,”291.

Cross suggests that individuals may also be motivated by a sense of duty arising from the oath which they swore when they became justices.\textsuperscript{183} Keith Whittington argues that:

\begin{quote}
 [b]y taking judicial preferences as given, the attitudinalists place in the background much of what formed the status quo more generally. The systematic intellectual and material processes that restrict the range of possible judicial outcomes are ignored. .. [I]t tells us little about how such cases arose, how those issues had been framed, and why the judges approach their tasks in these ways.\textsuperscript{184}
\end{quote}

Cross asserts that while the model does have a high degree of accuracy in making predictions, the rate of failure is still noteworthy. He refers specifically to research undertaken by Segal and Spaeth whose success rate, when examining only judicial rulings about the actions of government agencies, is roughly 30 per cent. He also observes that in some areas of public policy they find that ideology plays no significant role at all.\textsuperscript{185} This leads him to query whether these areas are one “in which the legal model works in explaining judicial behavior.”\textsuperscript{186}

Critics argue that the accuracy of prediction obtained by attitudinalists is achieved at the expense of ignoring details that cannot be quantified for the purposes of scientific measurement. Paul Peirson and Theda Skocpol maintain that the model discards seminal information that is necessary to understanding the decision-making process but that

\begin{footnotes}
\footnote{Cross, “Political Science and the New Legal Realism,” 251.}
\footnote{Whittington, “Once More Unto the Breach,” 622.}
\footnote{Cross, “Political Science and the New Legal Realism,” 303-04, referring to Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model}, 259.}
\footnote{Cross, “Political Science and the New Legal Realism,” 287.}
\end{footnotes}
cannot be measured empirically. There is also criticism of the manner in which factors are quantified. In spite of its claims of objectivity and empiricism, the model rests on substantive interpretations. The conceptualization of ideology, its measurement and the identification of correlations between it and judges’ decisions cannot be undertaken in a completely value-neutral manner. Patricia Wald points to the fact that many disputes are hard to categorize along ideological lines. It is, therefore, difficult to empirically describe possible outcomes as either ‘liberal’ or ‘conservative’.

Cross suggests that attitudinalists may also be selective in their case selection, focusing on controversial ones involving civil liberties and the death penalty while ignoring more mundane ones. Sara Benesh concentrates on the fact that some rulings by the Supreme Court are unanimous. Such outcomes would seem to be improbable, if not impossible, if ideology were the sole determinative factor in decision making. Jon Newman also remarks on the absence or infrequency of dissenting opinions. J. Woodford Howard emphasizes the fluidity of some judges. They change their minds

188 Gillman, “What’s Law Got to Do with It?” 491-492, 496.
190 Cross, “Political Science and the New Legal Realism,” 285.
between their first encounter with a case and their ultimate decision. These changes “in response to the multiplicity of intra-court influences” and group interaction are, Howard argues, inexplicable within the parameters of the attitudinal model. Research also suggests that ideological perspectives, as determined by editorials at the time of nomination, are not constant and appear to change after an individual is appointed to the bench. At the very least, this shift in perspective raises questions about the wisdom of relying on editorials to identify the ideologies of nominees.

Robert Dahl expresses reservations about the model’s focus on the individual and their ideological perspectives. Such a focus pushes the institution of the court to one side, ignoring its presence in the decision-making process. It also downplays the fact that the choices of judges, sitting on multi-member panels, cannot be understood singularly. He explains that the “analysis of individual preferences cannot fully explain collective decisions, for in addition we need to understand the mechanisms by which individual decisions are aggregated and combined into collective decisions.” Lawrence Baum takes issue with the manner in which ‘attitude’ is conceptualized by proponents of the model, regarding it as an over-simplification. They understand it to have a direct and


194 Saul Brenner, “Fluidity on the United States Supreme Court: A Re-examination,” American Journal of Political Science 25(1980). He measures rates of fluidity on the American Supreme Court, finding that there were shifts in 12 per cent of cases.


singular causal effect on behaviour. Decision-making, he argues, involves “an intricate set of cognitive processes. If justices act sincerely on their policy preferences, they must organize those preferences into a coherent system and analyze the context of cases to see how the available alternatives fit into the system of preferences.”198 The organization of these preferences, involving normative choices, is not a process that can examined and measured empirically.

**The Strategic Model**

The strategic model shares, with the attitudinal model, the assumption that judges pursue results-oriented policy preferences when making rulings. Judges are, however, not driven by ideology, but, instead, behave in a calculated fashion.199 The model makes use of rational choice theory, arguing that all individuals act out of self-interest and seek to maximize their utility.200 This search for maximization obliges judges, who work within the institution of multi-membered court which is positioned in a governmental construct and in a larger political system, to make choices that may not always reflect their ideologically-driven preferences. Their strategic choices reflect and represent their understanding of institutional rules and the suspected preferences of other actors, including their colleagues on the bench and the legislative and executive branches of government.

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Judges are cognizant of the effect that context has on their ability to pursue their preferred outcomes. They are influenced and constrained, because of the interdependency of actions,\textsuperscript{201} by the institution in which they function and by the preferences of other political actors. These actors include colleagues on the bench, the legislative and executive branches of government and the general public.\textsuperscript{202} Proponents of the model employ narrow conceptualizations of institutions,\textsuperscript{203} describing them as “patterns of meaning or behavior tied to the power, authority and resources of the state”\textsuperscript{204} or as sets “of formal rules and informal norms that limit the choices available to political actors”\textsuperscript{205} as they pursue policy preferences. Whittington explains that the model treats “institutions … as a set of resources and constraints, a complex strategic environment that structures the incentives faced by individual actors. Institutions may be able to induce certain kinds of behavior, but they exist to be manipulated by individual actors as they pursue their own prior goals.”\textsuperscript{206}

The strategic model draws on rational choice theory which argues that all individuals act in order to maximize their self-interest.\textsuperscript{207} The theory regards institutions

\textsuperscript{203} Whittington, “Once More Unto the Breach,” 612.
\textsuperscript{204} Clayton and May, “A Political Regimes Approach to the Analysis of Legal Decisions,” 239.
\textsuperscript{206} Whittington, “Once More Unto the Breach,” 622-23.
\textsuperscript{207} Green and Shapiro, \textit{Pathologies of Rational Choice Theory}, 2-3.
as little more than a “given sets of rules within which the game – maximizing self-interest – is played.”

Judges, who behave purposefully, are viewed as “having fixed preferences, acting instrumentally so as to maximize the realization of those preferences, and engaging in strategic calculations as to how to achieve those goals.”

If their preferences prove unattainable, because of institutional context and/or the preferences and anticipated responses of other political actors, judges will modify their positions and pursue outcomes that provide the greatest benefit or advantage for them.

Rational theory presumes that each member of the bench will, given the specific institutional context, strive to obtain their ‘best response’.

The focus on strategy requires proponents of the model to identify the initial positions assumed by members of the bench in specific cases and to track any changes in these stances. Such exercises require the examination of the successive stages of the

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208 Clayton and May, “A Political Regimes Approach to the Analysis of Legal Decisions,” 239.
212 Green and Shapiro, Pathologies of Rational Choice Theory, 24-26.
213 Epstein and Knight, The Choices Justices Make. Studying the Supreme Court of the United States, they find that judges change their minds, engaging in negotiations and bargaining in 60 per cent of cases that they hear as they strive to build coalitions and construct majorities. This demonstrates, they argue at 80, the impact that the “complex institutional framework” has judicial decision-making. They argue that judges, at the appeals stage, rule in favour of hearing cases because they offer opportunities to develop favoured legal doctrines. They reject others that, while of interest to them, have little possibility of being resolved in a manner to their liking; Please also see: Forrest Maltzman, James F. Spriggs II and Paul J. Wahlbeck, Crafting Law on the Supreme Court: The Collegial Game, (Cambridge: Cambridge University Press, 2000), 51-2. In their study of the Burger Court, they found that while the choices of the Chief Justice were informed by factors such as expertise, workload and time constraints, he favoured colleagues, with whom he was ideologically aligned, in cases that were politically significant. He selected colleagues, with whom he did not share an ideological perspective, in cases that were less prominent or important. His decisions
decision-making process that is used by the Supreme Court. This process, most of which occurs behind closed doors, begins with the selection by the Chief Justice of the panel that hears the appeal and ends with the release of the ruling. With exception of the appeal hearing, the oral hearing, and the release of the ruling, it remains hidden from public view. This fact obliges researchers to rely on private papers, internal court documents and interviews with judges, their clerks and administrative staff to find evidence of strategic behaviour.

Maltzman, Spriggs and Wahlbeck argue that judicial opinions “are crafted in a collaborative environment among the justices, and thus justices act strategically in order to get opinions that as closely as possible mirror their policy orientations.” Justices make changes to their analysis and reasoning in order to sway their colleagues, garner greater support and avoid adverse reactions. They also act with an awareness of the policy preferences of the legislative and/or executive branches and a desire to avoid conflict with them. Cross maintains that when blocked by institutional context from obtaining their preferences, judges act to advance their “objectives indirectly through public or legislative action.” Giley and Pablo Spiller observe such behaviour suggests a

were also guided by consideration of the size of the initial majority coalition and willingness or unwillingness of colleagues on previous occasions to cooperate.

214 Maltzman, Spriggs and Wahlbeck, Crafting Law on the Supreme Court, 93.
215 Maltzman, Spriggs and Wahlbeck, Crafting Law on the Supreme Court, 84.
216 Lee Epstein, Courts and Judges (Burlington: Ashgate Publishing 2005), xvi; This need is recognized by Segal and Spaeth who observe that authors of judicial rulings “frequently have to move beyond their sincere preferences if they hope to obtain a majority opinion, especially in closely divided cases. Please see: Segal and Spaeth, The Supreme Court and the Attitudinal Model Revisited, 97.
217 Epstein and Knight, The Choices Justices Make, 149 and 83.
218 Cross, “Political Science and the New Legal Realism,” 304.
sophisticated understanding of the legislative process and the policy preferences of legislators.\(^{219}\)

Critics of the strategic model take issue with the sort of proof used to establish patterns of behaviour and strategic machinations. The secrecy surrounding how decisions are taken both individually and collectively by members of the bench necessitates reliance on qualitative evidence such as internal documents, and private papers, and interviews with judges, law clerks and administrative staff. These are used to identify the positions originally assumed by members of the bench and look for changes.\(^{220}\) The use of this sort of proof is, in the view of attitudinalists, problematic. They regard it as anecdotal and incomplete. It is, as a consequence, insufficient for the construction and defence of claims about judicial behaviour.

Segal and Spaeth argue that proponents of the strategic model have simply confirmed or, at the very least, not contradicted the findings of the attitudinal model.\(^{221}\) They also criticize the model for its limited predictive value. The incorporation of rational choice theory in the model should, in their view, permit hypotheses about strategic behaviour to be developed and used as the bases for making predictions.\(^{222}\)

Rational theory assumes that individuals will always act to maximize their own benefit or advantage which are shaped or determined by institutional context. The problem, Shapiro


\(^{220}\) Baum, The Puzzle of Judicial Behavior, 26-27; Maltzman, Spriggs and Wahlbeck, Crafting Law on the Supreme Court, 25.

\(^{221}\) Segal and Spaeth, The Supreme Court and the Attitudinal Model Revisited, 103.

\(^{222}\) Segal and Spaeth, The Supreme Court and the Attitudinal Model Revisited, 100.
and Levy argue, is that the “self-interested motivations” such as financial rewards or promotions which are generally regarded to guide individuals in determining their benefit or advantage are “sharply reduced” by the structure of the judiciary.\textsuperscript{223} This makes it difficult to determine what the ‘best responses’ of justices are. The ability of the model to develop testable hypotheses is further compromised, Segal and Spaeth assert, because of the failure of proponents to “derive or adapt equilibrium solutions… [to] demonstrate that interactions among the justices constitute a best response to a best response.”\textsuperscript{224} A point of equilibrium would be established when all justices adopts strategies that permit them to pursue their best outcome. Proponents of the model have not yet determined when, in the institutional context of the judiciary, the point is attained and the strategy of each is optimized in relation to those of the others.

Rogers Smith criticizes the constrained scope of the model, arguing that it employs “a narrow subset of possible human standards” of judicial behaviour.\textsuperscript{225} Cornell Clayton and David May, proponents of historical institutionalism, argue that the model makes “instrumentalist and reductionist assumptions about politics and law…”, diminishing institutions to a set of rules.\textsuperscript{226} Howard Gillman maintains that this


\textsuperscript{224} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model Revisited}, 102.


\textsuperscript{226} Cornell W. Clayton and David A. May, “A Political Regimes Approach to the Analysis of Legal Decisions,” 239.
diminishment leaves “unexplored a full range of other institutional effects on judicial decision-making.”

**The Historical Instrumentalist Model**

The historical institutionalist model argues that judicial decisions are reflective of and informed by the historical, institutional, political, cultural and social context in which they are made. Proponents adopt an expansive understanding of context that extends beyond the institutional rules and potential responses by other political actors to include the ideas, norms and values of the political community. The examination of judicial behaviour must, as a consequence, be undertaken with particular attention to the set of circumstances in which it takes place. The model assumes that an interdependent relationship exists among judges, institutions, law and context. The judiciary and judicial behaviour are defined, shaped and constrained by institutions and context and, in turn, define, shape and constrain them. The model argues that judicial decisions incorporate a conceptualization by judges of their proper role and that of the courts in government and in society at large. André Lecours argues that much of the study of politics in Canada bears a marked resemblance to this model. He observes that “Canadian political science may be … too close to new [historical] institutionalism to view it as something different than the current practice.”

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The historical institutional model employs a complex and fluid understanding of institutions than the strategic model. Rogers Smith explains that they are not merely rules governing decision-making nor “concrete organizations, … but [are] also cognitive structures, such as patterns of rhetorical legislation characteristic of certain traditions of political discourse or the sorts of associated values found in popular ‘belief systems.’” This expansive understanding “de-emphasize[s] the distinction between formal structures and informal norms, myths, habits of thought, or background structures and patterns of meaning.” Institutions shape judicial behaviour and, in turn, are shaped by judicial behaviour. The decisions of courts must be examined in relation to the specific cultural, legal, political, and social context in which they occur because the meaning of behaviour is not static and unchanging.

The model argues that institutions influence “the senses of purpose and principle that political actors possess” and “the self-conception of those who occupy roles defined by them in ways that can give those persons distinctively ‘institutional’ perspectives.” Historical institutionalism conceptualizes judicial decision-making as “a process in which judicial values and attitudes are shaped by judges’ distinct professional roles, their sense

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of obligation, and salient institutional perspectives.”\textsuperscript{234} They behave, in other words, with an awareness of the duty and purpose of the office that they hold.\textsuperscript{235} James March and Johan Olsen use the term “logic of appropriateness” to describe this.\textsuperscript{236} Individuals seek to make decisions that they believe are appropriate given their position and responsibilities.\textsuperscript{237} Their role perceptions preclude judges from being singularly guided by ideology or ‘best responses’.

Segal and Spaeth argue that proponents of historical institutionalism cannot devise falsifiable hypotheses about judicial behaviour.\textsuperscript{238} If nothing is falsifiable, then all choices and decisions must be regarded as consistent with the requirements of historical institutionalism. In their view, the notion of role perception and any resulting constraints on judges are simply a form of rationalization that obscures the fact that judges pursue ideologically-driven policy preferences.\textsuperscript{239} Judges, in other words, merely convince themselves of the propriety of their preferences. Clayton and May, echoing this criticism, observe that the notion of ‘role’ awareness on the part of judges lacks clarity and cannot be tested empirically.\textsuperscript{240} Such a notion cannot be readily quantified and, as a

\textsuperscript{234} Clayton and May, “A Political Regimes Approach to the Analysis of Legal Decisions,” 239.
\textsuperscript{235} The argument that the office itself influences and informs judicial decision-making predates the development of the historical instrumental model. C. Herman Pritchett, one of the early proponents of the attitudinal model, recognizes the importance of this sense of obligation and duty to judicial decision-making. Please see: C. Herman Pritchett, \textit{Civil Liberties and the Vinson Court}, 191.
\textsuperscript{238} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model}, 432-33.
\textsuperscript{239} Segal and Spaeth, \textit{The Supreme Court and the Attitudinal Model}, 235-36.
\textsuperscript{240} Clayton and May, “A Political Regimes Approach to the Analysis of Legal Decisions,” 241.
consequence, it is impossible to produce data for use in measuring the effect that this self-awareness might have on judicial decision-making.

Clayton and May also point out that:

if the distinction between ideas or patterns of cognitive meaning, and ‘real’ structures of authority and resources is blurred to far, then it becomes impossible to talk about particular institutions as either causing or being caused by particular patterns of beliefs or motives. If ideas and institutions are inseparable, if everything is connected to everything else, then it is unclear what institutional analysis actually examines or explains.\(^{241}\)

The fact that the two cannot be pulled apart, makes it impossible to determine how or if the former shapes the latter, and vice versa. It is also makes it difficult to identify all of the factors that influence and inform judicial decision-making.

Sotirios Barber expresses concerns about the possibility that the model reduces the analysis of judicial behaviour to little more than descriptive exercise.\(^{242}\) Any normative or prescriptive value is lost because each judicial decision or choice is conceptualized as only being understandable and explainable in the particular historical and institutional context in which it occurs. Nancy Maveety, picking up on this point, argues that studies conducted using the historical institutionalist model are ideographic and cannot, therefore, serve as the bases upon which to reach general findings conclusions that are applicable in other sets of circumstances.\(^{243}\)

The Model Employed in this Dissertation

This dissertation adopts a historical institutionalism to study judicial deference. If the decision to accord or withhold deference is reduced to little more than the application of ‘law’, a representation of the ideological preferences of individual Justices or the result of their strategic machinations, then its complexity is obscured. Members of the Supreme Court have, in their efforts to conceptualize the principle and to formulate an approach for its use in judicial reasoning, been guided and constrained by a self-awareness of their role and that of the judiciary in our system of government and in the governance of our representative democracy. This role perception has informed and influenced the choices that they have made about the meaning of deference and the rule governing its accordance. This self-conceptualization has had added significance in constitutional disputes involving electoral and referendum legislation alleged to infringe freedom of expression and/or the right to vote because of their subject matter. These cases have required the Justices of the Supreme Court to directly confront the democratic choices of the people, as represented in the will of Parliament, about their democracy.

Conclusion

The purpose of this chapter was twofold. It set out the debate among Ronald Dworkin, Jeremy Waldron and John Hart Ely about the involvement of the judiciary in the design and oversight of our democracy, its institutions and processes. All three express strong commitments to democracy and the importance of political participation, but each views the judicial review of legislative choices about elections and referendums differently.
Dworkin endorses diligence on the part of the courts because the protection of rights is a precondition of democratic legitimacy. Waldron favours deference because substantive decisions about the democratic process should be made by elected representatives. Ely calls for diligence because self-interested legislators cannot be trusted to make sound choices. While each theory provides insights into judicial reasoning, none fully explains the behaviour of the Supreme Court in its review of cases involving elections and referendums and the alleged violation of freedom of expression and/or the right to vote.

The second purpose of this chapter was to examine the four model of judicial decision-making – the legal model, the attitudinal model, the strategic model, and the historical institutional model – that are employed by political scientists when they examine the courts and their rulings. Each approach makes different assumptions about law and the judiciary. Each conceptualizes the relationship between law and politics and the judiciary and the political arena in a dissimilar fashion. They also adopt disparate understandings of how and why members of the bench make their decisions. This dissertation adopts a historical institutionalist approach to study judicial deference. Members of the Supreme Court have, in their efforts to conceptualize the principle of deference and to formulate an approach for its use, been guided and constrained by perceptions about their roles as judges and the role of the judiciary in our system of government and in the governance of our representative democracy. Their sense of these two things have informed and influenced the choices that they have made.
Chapter 3

The Theory of Deference

“The exercise of [judicial review] is always attended with a serious evil, namely, that the correction of legislative mistakes comes from outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors…”\(^1\)

The *Canadian Charter of Rights and Freedoms* recognizes that rights and freedoms are not absolute. They can, under section one, be limited by governmental actions and decisions as long as the limitations are “reasonable and justified in a free and democratic society”. The wording of the provision signals that ours is a society in which the exercise of power by the branches of government must be justifiable. The *Oakes* test, a constant feature of all *Charter* cases, serves as the framework within which the review of the Crown’s justification arguments takes place.

While the *Oakes* test has become a constant feature in *Charter* adjudication, the standard of review that the judiciary uses during its application and the standard of proof that the Crown must meet fluctuate. Before commencing its section one analysis, the judiciary must decide how stringently it will scrutinize the arguments advanced by the government in defence of reasonableness. Part of this decision incorporates concerns about its competence to review legislation and assess the reasonableness of infringements, and the democratic legitimacy of it doing so. If these concerns favour the

accordance of a high degree of deference, the stringency of review is relaxed and the evidentiary burden borne by the Crown is lightened. If they favour granting a low degree of deference, the stringency is intensified and the burden is rendered more onerous. The effect that the decision about deference has on how high or low the bar is set during the Oakes test speaks to a need to examine the concept, the rationales for its use in Charter adjudication and the analytical process or processes that the Court uses or should use.

The purpose of this chapter is to examine deference theory in constitutional adjudication. It is argued that there is a need for Canadians to move beyond the equation of judicial deference with government victories in a court of law or judicial acquiescence to the will of Parliament. These common understandings fail to convey the complexity of the concept and its effect on judicial reasoning. The degree of deference that is accorded affects the extent to which the Crown can rely on arguments rooted in common sense, logic and reason to reinforce the social science evidence used to justify infringing constitutionally-guaranteed rights and freedoms. This decision, rather than the application of the Oakes test, often determines whether the government will succeed or fail in demonstrating that an infringement is reasonable in a free and democratic society.

The chapter sets out two different conceptualizations of deference and the rationales for its use. In addition, it examines the three principal analytical approaches – non-doctrinism, formalism, and contextualism – used by courts for determining how high to set the bar. The first affords the judiciary absolute freedom in making its decision. The second establishes rigid lines of demarcation between circumstances in which the courts
should defer and those in which they should not. The third links the decision about
deferece to an understanding of the context in which the government acted, established
with reference to a set of variables, elements or factors. This chapter argues that
contextualism is the approach that is most compatible with the Charter. It proposes a
contextualized approach to deference that requires the Court’s decision to be informed by
three variables. They are the nature of the legislation, the nature of the right, and the
nature of the parliamentary discourse. The Supreme Court of Canada has, as will be
explained in the next chapter, used only the first two either singularly or in tandem when
establishing context.

The addition of the third variable reflects the fact that the constitutional obligation
to justify legislative choices does not begin in a courtroom. It begins in the deliberations
and debates of Parliament. The inclusion of section one in the Charter signals that all
branches of government have to justify actions and decisions that adversely affect rights
and freedoms. Janet Hiebert argues that “[l]egislation represents a final and authoritative
decision about how to balance social objectives with protected rights. Only a fraction of
legislative initiatives will ever be subject to Charter litigation.”

This finality means, Brian Slattery asserts, that the failure of Parliament to give consideration to constitutional
rights and freedoms when formulating public policy “would … be an abdication of its
Charter responsibilities…” The Court should examine parliamentary deliberations and

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2 Janet L. Hiebert, Charter Conflicts: What is Parliament’s Role?, (Montreal and Kingston: McGill-
Queen’s University Press, 2002), x.
debates in order to ascertain whether legislators engaged in substantive discussions about potentially affected rights and freedoms, and the effects that the proposed legislative measures has on them. It should, before determining what degree of deference to accord and prior to setting the standards of review and proof used during the section one analysis, satisfy itself that they seriously contemplated the justifiability of possible infringements as they made their choices.

**Conceptualizing Deference**

Deference is lauded by those who emphasize the principle of parliamentary sovereignty and value judicial caution in examining legislative choices. They deride the intrusion of the courts in public policy as being contrary to the constitutional principle of separation of powers and allege that the Court’s interpretation of the *Charter* has reversed the roles of the legislative and judicial branches of government. Deference is condemned by those who highlight the need to protect rights and freedoms from majoritarianism and favour judicial assertiveness in their protection. David Beatty argues that it insults “the principle of constitutional supremacy because it allows gratuitous (unnecessary)

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restrictions to be imposed on people’s rights and freedoms… It reflects a failure on the part of the judiciary to meet its constitutional responsibility to examine the choices made by the legislative branch. Courts, in according deference:

out of respect for the supposed sovereignty of the legislature, … risk a greater transgression of the constitutional order. They risk usurping the constituent authority, which has now expressly subordinated the ordinary legislative function to a system of rights-protection. They also expose themselves to the very critique that their deference is designed to avoid – that they are not adjudicating as independent actors, according to established legal rules and principles, but entering into the merits of the impugned law, choosing (in Justice Scalia’s words) to ‘impede modernity’, and/or preserving a preferred structure of legal authority.

In order to fully appreciate the importance of deference to Charter adjudication, it is necessary to escape the constraints of the concept as it is commonly understood. Deference is usually equated with the government victories in Charter disputes. The judiciary is said to be deferential when legislation is upheld as constitutional. It is described as lacking in deference when laws are struck down. The common understanding of the concept is a hangover from the pre-Charter era. Prior to 1982, the courts displayed a deferential attitude that bordered on judicial submissiveness. Courts seldom struck down legislation on the grounds that it violated civil liberties. The conservative approach to judicial review is laid bare when the Supreme Court’s Canadian

Bill of Rights jurisprudence is examined. Over the course of two decades, the federal government lost only five of the 34 cases involving alleged violation of rights that were heard by the Supreme Court of Canada.\(^\text{12}\)

This submissiveness of pre-Charter deference is a reflection of Westminster parliamentary democracy. A.V. Dicey explains that it is a model predicated upon the assumptions that Parliament has the authority to “make or unmake any law whatever; and … [that] no person or body … [has] a right to override or set aside the legislation of Parliament.”\(^\text{13}\) The judiciary in a governmental system of this sort behaves in a conservative manner and exercises self-restraint when called upon to review the actions and decisions of the legislative and executive branches.\(^\text{14}\) In Canada, pre-1982 judicial review was grounded in the principles of federalism and the division of powers contained in sections 91 and 92 of the Constitution Act, 1867. Prior to the entrenchment of the Charter, the courts struck down laws not because they violated civil liberties, but because they fell outside the jurisdiction of the enacting government.\(^\text{15}\)


\(^{15}\) Prior to the patriation of the Constitution in 1982, judicial deference to Parliament’s decisions, even in cases involving fundamental human rights, is the norm. Early rights and freedoms cases such as Reference re Alberta Statutes, [1938] S.C.R. 100; Boucher v. the King, [1951] S.C.R. 265; and Switzman v. Elbling, [1957] S.C.R. 285 involve jurisdictional disputes between the federal and provincial governments. Comments and observations made by the Justices about human rights and freedoms are made in obiter and are not the bases upon which the cases are decided. In each, the province in question is found to have intruded, through the enactment of specific pieces of legislation, in the domain of the federal government. There are individual Justices, prior to 1982, whose opinions reveal a concern about fundamental human rights and a belief that the legislative branch does not have the authority to infringe certain rights and freedoms. Chief Justice Duff in the Reference re Alberta Statutes, [1938] 2 S.C.R. 100 hints at the
The equation of deference with government victories in a court of law or judicial submission to the will of Parliament diminishes the concept to little more than a synonym of judicial consensus or agreement with legislative choices. It obviates the possibility that the courts can uphold legislative and executive decisions with which they disagree. Section one of the Charter requires the judiciary to determine whether an infringement is reasonable and demonstrably justified. It does not base its determination on whether a legislative or executive decision is one with which it agrees or would have made itself. Aileen Kavanagh, in her work on judicial review in the United Kingdom, highlights this point when she explains that deference is accorded “only if the decision is at variance with the court’s own assessment of the substantive issue, or where it is uncertain about the correct assessment of what the balance of reasons requires.”

The equation of deference with judicial agreement with legislative choices also treats the concept as an end result rather than a means to an end. It ignores the modifying effects that its accordance has on the manner in which the Court applies the proportionality test to determine whether an infringement is reasonable. It oversimplifies judicial reasoning and erases the inherent complexities of reviewing the justification arguments advanced by the government under section one of the Charter. It shrouds the reasons for the integration of deference in the Oakes test and obscures from view existence of an ‘implied’ bill of rights in our Constitution. Justice Abbott in Switzman v. Elbling, refers to it more explicitly, using it as one of the bases for nullifying the legislation. Justice Laskin attempts in Hogan v. The Queen, [1975] 2 S.C.R. 574, to bequeath quasi-constitutional status on the Canadian Bill of Rights. The existence of an implied bill of rights is rejected by the Supreme Court in Attorney General for Canada and Dupond v. City of Montreal [1978] 2 S.C.R. 770.


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alternative processes for determining when and if its accordance is appropriate. It nurtures an environment in which the judiciary, in reviewing the actions of government, is misunderstood and mischaracterized as overstepping the boundaries of its authority and power.

David Dyzenhaus, in his study of administrative law, argues that there are two distinct types of judicial deference. He differentiates between ‘deference as submission’ and ‘deference as respect’.\(^\text{17}\) This distinction is subsequently adopted by legal scholars, particularly in the United Kingdom, in their efforts to reconcile the principles of judicial review and parliamentary sovereignty. Many of them use the second type to shore up the constitutional and political foundations for the authority of the judiciary, under the 1998 *Human Rights Act (HRA)*, to examine decisions made by the legislative and executive branches of government and, on occasion, to find them at odds with the provisions of the statute.

Dyzenhaus argues that deference as submission occurs when the judiciary simply accepts, without question, that government actions are sound and do not violate rights or freedoms. The courts do not undertake independent examinations of their own. They instead regard and treat the issues at the centre of disputes as non-justiciable and, therefore, unsuitable for judicial determination.\(^\text{18}\) Such a conceptualization is reminiscent of the approach adopted by the judiciary in Canada prior to 1982. Dyzenhaus maintains


that, as a result of the rights and freedoms having been constitutionally entrenched, our political and legal cultures have undergone transformations that render this sort of deference outdated. They have become “culture[s] of justification”19 in which “every exercise of [governmental] power … is expected to be justified”20 with cogent reasons.

In lieu of deference as submission, the courts have to make use of deference as respect. It is based on the assumption that the judiciary has the authority and responsibility to examine government decisions and actions. The exercise of this authority requires institutional courtesy, but does not preclude the choices of the executive and the legislative branches of government from being overruled. The appropriate bases for judicial nullification are unreasonableness21 and the lack of justifiability.22 Deference as respect requires courts to uphold decisions, which differ from those that they would have made,23 as long as the government can justify them.24 Dyzenhaus’s requirement is echoed by Murray Hunt who argues that deference “must be earned by the primary decision-maker by demonstrating that the justifications for the decisions they have reached and by demonstrating the reasons why their decisions are worthy of curial respect.”25

Aileen Kavanagh criticizes the submission/respect dichotomy, expressing concerns about its compatibility with constitutional adjudication that involves the alleged violation of rights and freedoms. In her view, it gives an inaccurate impression that the courts are courteous and civil in some instances, but not in the others. She argues that respect is always “a requirement of interinstitutional comity….” The courts do not have to agree with all executive and legislative choices, but when assessing their constitutionality they have to approach them with civility.27 The decisions of the executive and legislative branches are “always due to respect, but [that respect] varies in degree such that it sometimes amounts to ... ‘deference as submission’.”28 Differences in the degree of deference ultimately reflect the amount of weight that the courts accord to individual legislative and executive choices. The greater the weight, the greater the deference must be.

In lieu of differentiating between respect and submission, Kavanagh draws a distinction between minimal deference and substantive deference. The courts owe the former to all decisions of the other branches of government. The latter is only owed under exceptional circumstances.29 Minimal deference, the weaker of the two forms, is a general principle of judicial review. It obliges the court to always attach “some

26 Aileen Kavanagh, “Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication” in Grant Huscroft, editor, Expounding the Constitution: Essays in Constitutional Theory, (New York: Cambridge University Press, 2008), 188; [emphasis in the original text]. This call for comity echoes one made by Hiebert who proposes a relational approach to the Charter. She argues, at page 52 of Charter Conflicts, that there was a need for the judiciary and legislature to have “respect for each other’s contrary interpretation.”
27 Kavanagh, “Deference or Defiance?” 189.
28 Kavanagh, “Deference or Defiance?” 188. [emphasis in the original text]
29 Kavanagh, “Deference or Defiance?” 191.
presumptive weight to the decision taken by the elected body, but it is not a very strong presumption.”

It reflects the fact that the primary decision-makers in our political and constitutional framework are the legislative and executive branches of government. The role of the judiciary is to review their choices in order to ascertain their constitutionality. These choices have to be treated with respect because they represent conscientious attempts to solve social problems.

Kavanagh argues that minimal deference precludes the courts from nullifying a decision “merely on the basis that they disagree with it or because they might have come up with a different solution….” They can only set aside the presumptive weight of the decision if it falls beyond a range of reasonable alternatives. Even when the decision is set aside because it cannot be justified, minimal deference mandates that the members of the bench always “display respect for it.” Substantive deference, the stronger of the two forms, has “to be earned by the elected branches and is only warranted when the courts judge themselves [to] suffer from particular institutional shortcomings with regard to the issue at hand.” The judiciary has to be less suited, less knowledgeable, and/or possessed a weaker democratic pedigree than the executive and the legislature to understand social problems and to devise appropriate remedies.

Kavanagh’s conceptualization of deference is more compatible with Charter adjudication than that of Dyzenhaus. Its adoption would permit Canadians to better

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30 Kavanagh, “Deference or Defiance?” 191.
31 Kavanagh, “Deference or Defiance?” 191. [emphasis in the original text]
32 Kavanagh, “Deference or Defiance?” 191. [emphasis in the original text]
33 Kavanagh, “Deference or Defiance?” 192.
34 Kavanagh, “Deference or Defiance?” 192-203.
understand the roles and responsibilities of the three branches of government in disputes involving the alleged violation of rights and freedoms. The call for respect, regardless of the degree of deference that is accorded in individual cases, would serve as a reminder that their protection is a shared responsibility of all branches of government within our constitutional construct. The minimal/substantive dichotomy would clarify the purpose of the section one analysis and highlight the effects that the accordance of deference has on the application of the Oakes test. The courts, in reviewing the justification arguments of the government, seek to determine whether a rights infringement is reasonable. This determination often turns on the stringency of the standard of review that the courts use. Kavanagh’s conceptualization would also allow Canadians to view deference as a matter of degrees rather than an ‘either/or’ decision. Finally, it would enable them to move beyond measuring judicial deference in terms of the number of government victories in the courtroom or equating it with judicial acquiescence.

**Rationales for Deference**

Two broad rationales are generally advanced to justify judicial deference. They are the institutional competence of the courts and the legitimacy of judicial review. While they reinforce one another, they can be separated and used independently one from the other. The first relates to concerns about the ability and expertise of the judiciary to understand and resolve societal problems. The second, rooted in preconceptions about the roles played by the individual branches of government, reflects worries about the counter-majoritarian or anti-democratic nature of judicial review.
In addition to the two broad rationales, there are others of a secondary nature. Alexander Bickel maintains that political prudence appears to inform many judicial decisions about deference by the Supreme Court of the United States.\textsuperscript{35} Richard Posner posits, but ultimately rejects, the weight of the Court’s caseload as a basis for deference. He suggests that courts should conserve their energy and efforts for important cases involving the most egregious of rights violations. He explains that “the danger is not that the judiciary may be starved for resources, but that it will expand so promiscuously, and be stretched so thin, that its effectiveness will be compromised.”\textsuperscript{36} The substantive basis of Posner’s suggestion appears to inform an observation made by Justice La Forest, a former member of the Supreme Court of Canada whose reputation is one of deference. Using a fishing metaphor, he observes that “[a]s a salmon fisherman, I know that deep waters afford better fishing grounds than broad but shallow waters. I suspect that they [the Justices] wanted to ensure that there was sufficient water – court resources – to make sure we got the big ones.”\textsuperscript{37} These secondary rationales are not examined more fully in this chapter of the dissertation.

\textit{Institutional Competence}

The first rationale for deference is institutional competence. It involves a comparative evaluation of the respective strengths of the branches of government. It argues that courts


are, when compared to Parliament, ill-suited to make public policy. Hiebert alleges that Parliament and the provincial legislatures are simply more capable of determining how best to respond to societal problems. Jeremy Waldron makes a similar claim, asserting that “legislatures are much better positioned to mount an assessment of the significance of an individual case in relation to a general issue of rights that affects millions and affects them in many different ways.” Justice La Forest, in his dissenting opinion in *RJR-MacDonald*, observes that “[c]ourts are not specialists in the realm of policy-making, nor should they be.” Their expertise rests in the interpretation of laws and the protection of rights and freedoms. Lord Steyn, writing in the British context, characterizes this rationale as the “true justification” for deference. Jeffrey Jowell, the British scholar, regards it as the only legitimate basis for according deference.

The rationale reflects concerns that the courts lack both the capacity and expertise to identify and understand some types of social issues and to provide remedies. These gaps in ability are said to be most pronounced in the social, economic, and political realms. The Supreme Court itself declares that these areas result in legislative choices that are:

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inevitably … the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components. They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have an advantage over members of the judicial branch.45

This advantage stems, in part, from the fact that parliamentarians have greater resources to make sound decisions. They have more information than the courts. They have access to experts and bureaucrats whose specialized knowledge about issues, competing normative theories and potential remedies assist them in making policy decisions. They are better able to evaluate “complex social science evidence and to mediate between competing social interests.”46 The courts should, as a consequence, accord a high degree of deference to these decisions.

The nature of the judicial process is another component of the competence rationale. The courts should defer to legislative decisions about complex issues because they are ill-suited for reviewing and assessing their merit. Lorne Sossin argues that there are no identifiable standards against which to measure the legislative choices and their reasonableness.47 The adversarial structure of court proceedings can, as a result, have a flattening effect on our understanding of the problem and the legislative remedy. Complex issues are reduced to two-sided debates that are resolvable using ‘either/or’ choices.48 Concerns about judicial competence are also tied to the sort of evidence to which judges, particularly at the higher levels of the judicial system, have access. The

47 Sossin, Boundaries of judicial review, 233.
48 Kavanagh, “Deference or Defiance?” 194.
multifaceted nature of a social problems and legislative remedies are lost to judges who
have to rely on a finite number of factum and legal briefs to make their rulings. The
resolution of many social, economic and political problems involves a balancing of
interests, rights, and values, the number and nature of which might not be fully evident in
the limited materials provided to the courts.

Paul Weiler explains that courts do not always have sufficient information to
adequately assess and evaluate governmental decisions and cannot fully appreciate the
broader or “real-world context” within which the issue initially arise and policy choices
are made. Lon Fuller, the late American scholar, argues that courts are less capable than
legislatures at resolving multifaceted problems. They fail to “take into account the
complex repercussions” of their rulings. They engage in the examination of a social
issue in a piecemeal and incremental fashion, overlooking the fact that it might be part
of a larger problem. They may also fail to identify and comprehend all of the relevant
actors, elements, facts, interests and variables. In addition, they may not fully appreciate
the implications of legislative decisions or anticipate all of the consequences and
repercussions of striking them down as unconstitutional. Using the metaphor of a spider
web, Fuller explains that:

Law,” University of Toronto Law Journal 40 (1990), 117; Aileen Kavanagh, “Judicial Restraint in the
Pursuit of Justice,” University of Toronto Law Review 60 (2010), 23.
51 Kavanagh, “Deference or Defiance?” 193.
52 Fuller, “The Forms and Limits of Adjudication,” 394-398. He does not believe that the multifaceted
nature of a dispute should automatically preclude adjudication. Legal decisions are of value because they
are based on the reasoned examination and evaluation of evidence, argument and principle.
[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a ‘polycentric’ situation because it is ‘many centered’ – each crossing of strands is a distinct center for distributing tensions.53

In focusing on a specific statutory provision, courts may ignore the fact that it is only one facet of a larger legislative structure whose component parts are inter-related.

**Democratic Legitimacy**

The legitimacy rationale for deference is comprised of two components. The first is rooted in our constitutional framework and its underlying principles. It emphasizes tensions that are said to exist between democracy and judicial review. The second component relates to the consequences of judicial review for a liberal democracy. It highlights the adverse effects that judicial review is said to have on our political behaviour, institutions and practices. Both components reflect the fundamental transformations that the entrenchment of the *Charter* has had on our constitutional structure. The boundaries among and between the individual branches of government have become blurred by the increased importance of the courts in democratic governance. It has created confusion about the extent and nature of specific responsibilities and duties of the executive, legislature and the judiciary.54 Jeffrey Jowell argues against the use of this rationale because it reduces our understanding of democracy and its underlying

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principles to little more than majoritarianism. Such an understanding, in his view, ignores the changes that the enactment or entrenchment of a bill of rights has in a democracy. Rights and freedoms have to be protected even in the face overwhelming public opposition and legislative decisions taken using the principle of majority rule.

The first component of the legitimacy rationale reflects concerns about judicial activism. It argues that the courts overstep their authority and intrude in the formulation of public policy and the making of laws when they undertake judicial review. These responsibilities are within the purview of the two other branches of government whose legitimacy stems from the fact that they are elected by and accountable to the people. Their decisions reflect the will of the people. Deference ensures that the courts do not act in a “counter-majoritarian” manner and negate the democratic will, which is expressed in the enactment of legislation. F.L. Morton and Christopher Manfredi both argue that the judiciary, in comparison to the executive and legislative branches of government, lacks democratic pedigree.

The Canadian Constitution does not expressly contain the principle of the separation of powers. Peter Hogg explains that the Constitution Act, 1867, formerly known as the British North America Act:

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does not separate the legislative, executive, and judicial functions and insist that each branch of government exercise ‘its own’ function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the Act does not call for such separation. As between the judicial and the two political branches, there is likewise no general separation of powers.\(^{59}\)

This absence from our foundational constitutional document does not negate the fact that our political and legal systems incorporate the principle of separation of powers.\(^{60}\) Sossin explains that they are “founded upon a functional division between the legislature which enacts laws, the executive which implements laws, and the judiciary which interprets, applies and enforces laws….”\(^{61}\)

Even in the absence of an express reference to the principle of separation of powers in our constitution, it and the resulting institutional division of labour have been recognized and given effect by the Supreme Court of Canada in a number of judicial opinions. Chief Justice Dickson observes in \textit{Fraser} that there is “a separation of powers among the three branches of government – the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is … to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.”\(^{62}\) Chief Justice Lamer in \textit{Cooper} describes the principle of separation of powers as “the backbone of our constitutional system.”\(^{63}\)


\(^{61}\) Sossin, \textit{Boundaries of Judicial Review}, 9; see also Knopff, “Federalism and the Charter and the Court,” 587.


Justice McLachlin observes in *New Brunswick Broadcasting* that “it is fundamental to the working of the government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the others.”

Peter Russell warns, more than two decades before the *Charter* is constitutionally entrenched, that a bill of rights will affect the allocation of responsibilities and duties among the different branches of government. He fears that a shift in the locus of policy-formulation and decision-making from parliament to the judiciary will adversely harm the health of our democracy. Knopff and Morton argue that the interpretation of the *Charter* undermines the principle of separation of powers, enabling the judiciary to enter into the political realm, seize power from the legislative branch and behave as legislators. It, in their view, makes laws rather than merely applying, enforcing and interpreting them. Christopher Manfredi characterizes the judiciary as a political actor that is heavily involved in the realm of public policy. Its interpretation of the *Charter* serves as a means of dominating the process through which public policy is formulated. Morton goes further than alleging judicial domination. He argues that the political system has been turned on its head and that the roles of the legislative and judicial branches of government have been reversed. He maintains that “[t]he constitutional judge decides

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policy, and the legislator implements judicial choice." Waldron is critical of a political system in which ultimate authority vests with the courts because of their non-democratic nature. He claims that the judicial process “inherently and necessarily does an injustice, in its operation, to the participatory aspirations of ordinary the ordinary citizen. And it does this injustice, tyrannises in this way, whether it comes up with the correct result or not.”

The first component of the legitimacy rationale also incorporates concerns about the bases upon which judicial decisions about the constitutionality of statutory provisions are made. Chief Justice McLachlin, shortly after being appointed to the Supreme Court, acknowledges that when interpreting the Charter “[t]here can be no doubt that the decisions of judges reflect to some extent their personal values.” Judicial reasoning is not an objective rational exercise of empirically establishing that a right has or has been violated and that the violation is or is not reasonable. Members of the bench cannot isolate personal beliefs, norms, and values and/or preconceptions of dominant societal beliefs, norms, and values from their reasoning. They are affected, constrained, and guided by them in their understanding of the issues at the centre of a dispute and the merits of legislative responses. This subjective nature of judicial reasoning is problematic in a political system rooted in the notion of ‘government by the people’. The decisions of

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the legislature – and by extension – the people are being scrutinized and nullified by a small coterie of individuals who base their decisions on personal choices and beliefs that might not be qualitatively better than those of elected representatives nor more objectively discerned. Waldron is emphatic in his belief that democratically-elected and accountable institutions of government, rather than the courts, should be endowed with the responsibility of interpreting and protecting rights and freedoms. He argues that “[t]he difference between decisions by the court and decision by the … legislature or by the electorate is not a difference in decision-procedure, it is a difference in constituency: a constituency of nine [Supreme Court Justices], as opposed to voting constituencies numbered in the hundreds (in our legislatures) or in the millions (among the voters…).”71

The second component of the legitimacy rationale relates to the potential adverse effects of judicial review has on our democracy. It reflects concerns that the political conventions, institutions and practices of our democracy are devalued by its presence.72 Waldron argues that judicial review is predicated upon a distrust of democratic politics73 and a distain for the dignity of the individual citizens because it presumes that they are incapable of acting with honour.74 The rationale also encapsulates worries about the diminished capacity of the people, through their elected representatives, to exercise self-

government\textsuperscript{75} and to engage in informed discussions about social issues and constitutional norms and values.\textsuperscript{76} This devaluation and loss of capacity causes people to alter their perceptions and understandings of the roles and responsibilities of citizens in a liberal democracy. They become increasingly unwilling and unable to participate in the political realm and influence elected representatives in their decisions about social problems and appropriate remedies. Judicial review is regarded as stripping the people and their elected representatives of their capacity and authority to make decisions. There is, in other words, an abandonment democracy which leaves a vacuum to be filled by a select and privileged group of judges and lawyers.

Peter Russell, writing in the 1960s, highlights the possible effects that judicial review can have on the manner in which decisions are made by a political community and the way in which individual citizens participate in the political arena.\textsuperscript{77} The constitutional entrenchment of a bill of rights and the resulting increased centrality of the courts in governance represent, in his view, a “flight from politics, a deepening disillusionment with the procedures of representative government and government by discussion as means of resolving fundamental questions of political justice.”\textsuperscript{78} Manfredi claims that the diminished appreciation of the political sphere by the people has been facilitated by courts, activist in temperament and inclination, having interpreted the

\textsuperscript{75} Bickel, \textit{The Least Dangerous Branch}, 21.
\textsuperscript{77} Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms,” 43-44.
provisions of the *Charter* in a manner that often defies the original intentions of its framers.⁷⁹

Russell expresses concerns about leaving decisions about public policy to “appointed judges in the cloistered sanctuaries of judicial tribunals.”⁸⁰ He fears that they will inevitably transform them into matters of law rather than politics. Russell explains that:

[e]xcessive reliance on litigation and the judicial process for settling contentious policy issues can weaken the sinews of our democracy. The danger here is not so much that non-elected judges will impose their will on a democratic majority, but that questions of social and political justice will be transformed into technical legal questions and the great bulk of the citizenry who are not judges and lawyers will abdicate their responsibility for working out reasonable and mutually acceptable resolutions of the issues which divide them.⁸¹

Manfredi argues that “the spectre of unelected, virtually life-tenured officials reviewing the decisions of elected legislators poses a special dilemma for democratic theory…. ”⁸² Mandel maintains that judicial review transforms our political system into one which embraces “the rule of lawyers [rather] than the rule of law.”⁸³ Allan Hutchinson and Andrew Petter claim that the acquisition by the courts of the authority to review

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parliamentary decisions leads to judicial “power without responsibility or accountability … [which] is not the apotheosis of democratic politics but its nemesis.”

Waldron argues that judicial review interferes with the right of all citizens “to participate on equal terms in social issues of high principle…” and results in the “disempowerment of ordinary citizens on matters of the highest moral and political consequence.” Janet Ajzenstat believes that judicial review threatens the very “essence of democracy.” It challenges the underlying assumption that social problems must be remedied through deliberations and debates by elected members of the legislative assembly. Morton and Knopff argue that Parliament is discredited as the appropriate venue in which to influence and shape government decisions. Judicial review leads to “traditional democratic processes of collective self-government through popular elections and responsible parliamentary government” being bypassed. Rather than seeking to directly influence the formulation of public policy in the legislative arena, citizens choose instead to challenge democratically-enacted legislative choices in courts. This is of

86 Waldron, “A Rights-Based Critique,” 45.
great concern to Knopff because he believes that Parliament is better positioned and better able than the courts to protect rights and to protect democracy itself.⁹¹

Knopff and Morton also fear that the effect of judicial review on democracy ultimately leads the people to be unwilling to abide by and be bound by legislative decisions with which they disagree.⁹² They argue that the Charter allows individuals and groups, who have failed in the political arena to garner broad support for their demands and views, to use the courts to mount rear-guard assaults on legislative choices. Charter adjudication compels a re-examination of social issues that have already been resolved through our democratic institutions.⁹³ The two scholars are particularly critical of the types of groups that have been successful in challenging governmental actions and decisions. They argue that special interest groups, most notably feminists,⁹⁴ have used the courts to pursue political agendas that are neither reflective nor representative of the general needs and interests of Canadians.⁹⁵ Characterizing the Charter as “a perversion of democracy”,⁹⁶ Mandel calls for judicial review to “be made to wither away”⁹⁷ because it permits “individuals to shortcircuit representative institutions and groups….”⁹⁸

The adverse effects of judicial review on liberal democracy have in part, according to Morton, been propelled by parliamentarians themselves. They have, on

⁹³ Morton and Knopff, Charter Politics, 3.
occasion, wilfully and knowingly evaded and abdicated their responsibility to make
decisions and resolve social disputes.99 This evasion and abdication has been made
possible by the knowledge that the courts will, when petitioned by a Charter claimant,
intervene. His argument echoes one made by Mark Tushnet. He claims that judicial
review distorts and debilitates the formulation of policy by elected representatives.
Distortion occurs when “too many constitutional norms [are injected] into the lawmaking
process, supplanting legislative consideration of other arguably more important
matters.”100 Members of the legislative assembly, in other words, exclude or marginalize
relevant factors other than constitutionally-guaranteed rights and freedoms. Debilitation
results when “legislatures … enact laws without regard to constitutional considerations,
counting on the courts to strike from the statute books those laws that violate the
constitution…. ”101 Elected representatives ignore rights when formulating policy, safe in
the knowledge that any omissions will be remedied by the judiciary.

Morton and Knopff fear political deliberations are transformed into “political
controversies [which are] … cast in the technicalities and abstractions of legalise.”102 The
democratic notions of compromise and negotiations are de-legitimated or, at the very
least, made more difficult because judicial review fosters an environment that
“encourages participants to speak in the language of extremism both in and out of the

100 Mark V. Tushnet, “Policy Distortion and Democratic Deliberation: Comparative Illumination of the
102 Morton and Knopff, Charter Politics, 1.
court house.”\textsuperscript{103} The constitutional entrenchment of a bill of rights changes the political discourse, becoming “much more closed intolerant character… [because] the point of the formalized courtroom combat … [is] to determine which side [holds] uncompromisable trumps….”\textsuperscript{104}

Ajzenstat argues that judicial review shakes public “confidence in the power of debate to effect laws for the common good”\textsuperscript{105} and fosters “doubts … about the appropriateness of partisan debate in determination of policies to benefit the nation as a whole”.\textsuperscript{106} Mandel echoes these worries, questioning whether our ability, as a self-governing people, to collectively make decisions about our political community has been compromised.\textsuperscript{107} Morton and Knopff maintain that the judicial review leads to the erosion of “the habits and temperament of representative democracy”\textsuperscript{108} and the abandonment of “the willingness to engage those with whom one disagrees in the ongoing attempt to combine diverse interests into temporary viable governing majorities”.\textsuperscript{109} Tushnet argues for judicial restraint because “we [the people] all ought to participate in creating constitutional law through our actions in politics.”\textsuperscript{110} Waldron emphasizes the intrinsic value of citizens participating in the political process that which serves as “a mode of self-protection: each individual acts, to some extent, as a voice for those of her own

\textsuperscript{103} Knopff, “Populism and the Politics of Rights,” 702; see also Morton and Knopff, \textit{The Charter Revolution and the Court Party}, 158.
\textsuperscript{104} Morton and Knopff, \textit{The Charter Revolution and The Court Party}, 158.
\textsuperscript{105} Ajzenstat, “Reconciling Parliament and Rights,” 661.
\textsuperscript{107} Mandel, \textit{The Charter of Rights and the Legalization of Politics in Canada}.
\textsuperscript{109} Morton and Knopff, \textit{The Charter Revolution and the Court Party}, 149.
interest that ought to be taken seriously in politics.” The second component of the legitimacy rationale for deference presumes that the occurrence of this erosion and abandonment can be prevented or contained, if the courts exhibit restraint when examining governmental decisions and assessing their constitutionality.

The Approaches to Judicial Deference

The academic literature identifies three general approaches that the courts use when deciding whether or not to accord deference. They are non-doctrinism, formalism and contextualism. Each of the three approaches explains the analytical process that courts either do or should use. The efforts of the Supreme Court, to be discussed more fully in the next chapter of this dissertation, to devise an approach to deference fit within the parameters of contextualism.

A review of the academic literature reveals that deference theory has garnered relatively little attention among Canadian scholars who study constitutional law. Academics have observed and commented on the inconsistent and unpredictable manner in which the courts have approached the matter. They have, however, only sparingly engaged in the theoretical debate about how deference ought to be integrated in Charter adjudication in a principled and coherent fashion. When the concept is raised in the literature, it is often left undefined or equated with judicial agreement with legislative choices. It is also treated as tangential to the study of the Court’s application of the Oakes test in individual cases or the evaluation of judicial behaviour. One of the few scholars to

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give consideration to the analytical processes used by the judiciary in Charter adjudication is Guy Davidov.\textsuperscript{112} He argues that one of the factors that courts have to consider when determining whether to accord deference is the possibility of judicial error. They have to “ask themselves, before making a decision, what … the consequences [will be] should they mistakenly invalidate a piece of legislation or government action.”\textsuperscript{113} What is left unexplained in his proposal is how the courts should undertake measuring the risk of such a mistake.

The paucity of Canadian literature on deference theory requires one to look abroad for literature on the issue of how courts should determine the appropriate degree of deference to accord. Scholars in the United Kingdom have, in recent years, engaged in heated debates about how to integrate judicial review in a Westminster parliamentary democracy. The British literature on deference is of value even though it does not involve a constitutionally-entrenched bill of rights. Scholars have examined deference in relation to the Human Rights Act, a statute enacted in 1998 which draws heavily on the wording and structure of the Charter of Rights and Freedoms. While it was enacted by Westminster as an ordinary statute, it has come to be regarded by both jurists and academics as quasi-constitutional in nature.\textsuperscript{114} The value of this literature stems form the fact that the interpretation of the statute and the British conceptualization of deference have been influenced by the jurisprudence of the Supreme Court of Canada. The British

\begin{thebibliography}{11}
\bibitem{113} Davidov, “The Paradox of Judicial Deference,” 161.
\end{thebibliography}
judiciary has adopted a proportionality test similar in nature to that of Oakes when assessing the reasonableness of an infringement. The British literature offers insight into the complexities of the concept, the alternative analytical processes employed by courts, and the justifications and consequences of its use in disputes involving the infringement of civil liberties.

**The Non-Doctrinal Approach**

The non-doctrinal approach rejects a pre-ordained analytical framework for judicial decisions about deference. It argues that they cannot and should not be structured. It leaves the courts with absolute freedom to make choices on a case-by-case basis and without the need to devise and make known the specific analytical process that is used. TRS Allan, the British legal scholar, argues that there is “no logical space for any free-standing doctrine of deference since the identification of areas of legitimate government discretion is an intrinsic feature of the judicial process.” The approach rejects the need for or value of pre-designating certain governmental action and decisions, because of their subject matter, as always warranting deference. It also dismisses the need for or value of identifying specific variables that have to be considered when deciding whether or not to relax the standard of review. Such efforts short-circuit judicial reasoning and discourage courts from delving into the merit of the government’s arguments.

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only be answered by examining and assessing the facts of the individual case as well as the arguments and evidence that are provided by claimants and the government.

The integration of this approach in Charter adjudication would be problematic for a number of reasons. While the Oakes test would continue to structure the section one analysis, there would be no rules or guidelines governing the judicial decision about how high or low to set the standard of review and the standard of proof. The repeated and failed attempts by the Supreme Court to formulate a structured and coherent approach to deference would cease. Its decision, in individual cases, would be reduced to “a subjective ‘smell test’ rather than a set of established principles in a coherent and pragmatic fashion.”¹¹⁸ This approach would leave the courts’ discretionary powers unfettered. The only possible constraints are legal standards whose meanings and applications are themselves subject to judicial interpretation.

Absolute judicial discretion would require Canadians to place inordinate faith in the courts to always make wise and sound choices. Such faith would ignore the fact that judicial mistakes have been made in the past. It would also overlook the likelihood that seemingly unstructured decisions about deference are in practice structured by the preconceptions and beliefs of individual judges about the roles of the individual branches of government as well as the relationship between them. Jeff King claims that there is always “a set of considerations conditioning restraint and these will not be set out in full

¹¹⁸ Sossin, Boundaries of judicial review, 237.
Finally, the approach would prevent governments and rights claimants from knowing in advance what standard has to be met in order to establish that the infringement of a right or freedom was justified. This absence is troubling in a political community predicated upon the principle of the rule of law and the constitutional assumption that the protection of rights and freedoms is a shared responsibility of all branches of government.

**Formalism**

Formalism emphasizes the separate roles of the individual branches of government under our constitutional construct. It seeks to impose tight constraints on the discretionary powers of the judiciary, narrowing the scope of its authority to judicially review the actions and decisions of the legislative and executive branches. The unique functions of each one determine when courts should defer to the choices of the executive and legislative branches and when they should not. Hunt argues that the approach creates “zones of immunity” that are premised on there being respective areas of responsibility of the courts and the political branches within which each has exclusive competence. Dimitrios Kyritsis, in his critique of Ronald Dworkin, claims that it represents an attempt to “carve out for each [governmental] institution a province, in which it is sovereign.” The decision about whether to accord deference in individual cases rests on rigidly-drawn distinctions between politics and law or between policy and principle. It does not require

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the courts to give any consideration to the context in which the government acted. If a dispute involves a political issue or a question of policy, the courts should relax the standard of review of governmental decisions. If it involves a legal matter or a question of principle, they should engage in a more stringent scrutiny of them.

The approach assumes that differentiating between the politics and law or policy and principle can be done impartially. The preconceptions and personal biases of judges do not affect the categorization of an issue as political/policy or legal/principle. Members of the bench are capable of “deduc[ing] objective and apolitical legal answers from abstract legal rules, principles or categories, without recourse to policy considerations.” The approach also assumes judicial reasoning is not swayed by any contemplation of the possible adverse consequences including rights violations that might result from a ruling. Any collateral damage is irrelevant to the decision. Hunt is of the view that formalism “inevitably leads to an unduly submissive stance by the courts.”

(i) Politics and Law

The first stream of formalism draws a distinction between politics and law. It reflects the belief that ‘political’ disputes should be resolved through the political process and that ‘legal’ ones should be remedied in the courts. The former “typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process.”

126 Sossin, Boundaries of judicial review, 132.
formalist approach argues that the courts should, as a consequence of this insusceptibility, defer to parliamentary decisions involving ‘political’ issues. Deference is also owed because the courts, whose expertise is law, are not competent to review ‘political’ decisions.

Hogg concludes that any real and substantive distinction between politics and law ceased to exist in Canada after 1982. The constitutional entrenchment of the *Charter* erases the line of demarcation between the two.\(^{127}\) Every governmental action and decision can be challenged as unconstitutional, creating both the opportunity and the need for courts to intervene. There are, in his view, no longer any ‘purely’ political disputes. They all have legal components, and all legal disputes have political repercussions. Hogg bases his conclusion on Justice Wilson’s dissenting opinion in *Operation Dismantle*. She holds that the judiciary cannot refuse to fulfil its responsibility to protect fundamental rights and freedoms simply because a dispute involves an issue that “raises a so-called ‘political question’.”\(^{128}\)

Sossin challenges Hogg’s conclusions, arguing that the distinction between politics and law should not be discounted out of hand.\(^{129}\) He claims that the judiciary still possesses the authority to defer to the government on the grounds that a dispute is political in nature and in substance. The Supreme Court of Canada relies on the politics/law dichotomy in a number of rulings, including some that involve electoral and

\(^{127}\) Hogg, *Constitutional Law in Canada*, volume 2, 36-20.1.
referendum laws. The drawing of the distinction between politics and law by the courts is inconsistent and unpredictable and, as a result, the line of demarcation is not fixed in place. Sossin describes judicial decisions on its placement as “often boil[ing] down to just … semantic labelling.” Individual judges, making use of the dichotomy, move the line in order to accommodate the ebbing and flowing of their decisions about deference.

(ii) Policy and Principle

The second stream of the formalist approach to deference draws a distinction between policy and principle. It is informed by the work of Ronald Dworkin who maintains that courts are forums of principle and legislative assemblies are not. The judiciary should not be swayed in its rulings by policy considerations because it is not democratically-elected and accountable. In explaining the difference between policy and principle, Dworkin defines the former as a:

kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community … [and the latter as] a standard that is to be observed, not because it will advance … an economic, political, or social situation seemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.

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131 Sossin, Boundaries of judicial review, 147.

132 Ronald Dworkin would oppose the ‘hiving’ off of certain types of actions and decisions, affecting rights and freedoms, in order to reduce the stringency of judicial scrutiny.

Put simply, “[p]rinciples are propositions that describe rights; policies are propositions that describe goals.”\textsuperscript{134} The former, in his view, always have paramountcy over the latter.\textsuperscript{135} Dworkin believes that questions of policy fall within the purview of the legislative and executive branches of government because of their democratic accountability and representativeness. The role of the courts is to ensure that majoritarian preferences, as expressed in legislative choices, do not override constitutionally-guaranteed rights and freedoms.

It is difficult to make the policy and principle distinction fit comfortably within the confines of Charter adjudication. Judicial decisions about the alleged violation of constitutionally-guaranteed rights and freedoms are not based exclusively on matters of principle.\textsuperscript{136} Implicit in the wording of section one of the Charter is the recognition that principle does not always have paramountcy over policy. Rights and freedoms can be infringed by policy when they are reasonable and demonstrably justified in a free and democratic society. The very essence of the Oakes test obliges the judiciary to examine the substance of policy decisions made by the government to determine whether there is proportionality between the legislative ends and means.

Related to the question of what should inform judicial decision-making is the question of how to distinguish between policy and principle. Joseph Raz, Kent

\textsuperscript{134} Dworkin, Taking Rights Seriously, 22.
\textsuperscript{136} This is a point to which Dworkin gives some recognition. He acknowledges that policy and principle are not hermetically sealed in their respective realms when he states that the courts, in identifying and defining relevant principles, may contemplate the consequences of their rulings. Dworkin, Taking Rights Seriously, 294 and 297.
Greenawalt and Bradley Miller dispute the ease with which Dworkin believes it can be done. King observes that judicial reliance on a distinction between the two is characterized by inconsistency and unpredictability. Kavanagh concludes that:

> [t]he allure of the principle/policy distinction was that it purported to … provide a clear-cut method of identifying in advance which subject matter is appropriate for judicial decision-making and which is not. However it could not deliver on this promise partly, because it exaggerated the differences between the subject matter and decision-making processes appropriate to the judicial bodies on the one hand, and the elected branches on the other. In so doing, it distorted the extent to which both principle and policy have a role to play in both spheres.

The use of the dichotomy within the Canadian context is of little value because it downplays the fact that Parliament often considers both when drafting and enacting pieces of legislation. Kyristis describes political decisions as a “mixture of considerations of principle and policy.” This specific point is recognized by Dworkin himself. He maintains that “strands of principle” do in fact inform many of the policy decisions made by the legislative and executive branches. This recognition leaves King to ponder whether the distinction that supposedly exists between manner in which decisions are

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139 Kavanagh, “Deference or Defiance?” 198.


141 Dworkin, Taking Rights Seriously, 83.
taken in the political and legal realm has been gutted. The dichotomy also downplays the fact that judicial analysis and reasoning are informed by policy.

The policy and principle distinction has been used on occasion by Supreme Court Justices to explain their decisions. It is a distinction that has, however, little value for Charter adjudication because it perpetuates the misconception that judiciary is, by its nature, more principled than the legislative and executive branches and is, as a result, more worthy of the public’s trust to guard the Constitution and protect rights. It also reinforces a judicial-centric understanding of the protection of rights and freedoms, ignoring the political and constitutional fact that in Canada this responsibility is shared among the branches of government. This fact is central to the ‘dialogue’ theory of judicial review that has dominated the academic discourse about the Charter for more than ten years.

Brian Slattery explains that the branches of government:

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differ somewhat in their particular aptitudes, experience, and expertise, and sometimes also in their assessment of what ails members of the community and the proper course of treatment … Although the various bodies may at times be at odds with one another, they more usually work in a coordinated way, for only thus are they able to achieve the broader goals they all share. Each body recognizes that it would be unable to minister alone to the needs of the entire community and that the pool of wisdom present in the group as a whole is far greater than that held by any single member. This model of the Charter then, lays stress on the equal responsibilities of each … to carry out the Charter’s mandate and the reciprocal nature of their roles.\textsuperscript{144}

Hiebert, echoing his observation, asserts that:

both Parliament and courts have valid insights into how legislative objectives should reflect and respect the Charter's normative values. Yet their judgment may be different. The benefits of conceiving Charter judgment in relational terms arise from the responsibility each body incurs to respect Charter values, from the exposure to judgments made by those differently situated, and from the opportunity to reflect upon the merits of contrary opinion.\textsuperscript{145}

The policy/principle dichotomy fails, as a consequence, to acknowledge “the interrelation of legislatures and courts” and “the common project” in which they are engaged.\textsuperscript{146}

\textit{Contextualism}

The third approach to deference strives to overcome the shortcomings of non-doctrinism and formalism. It rejects leaving the discretionary decision of the courts about deference unbridled, recognizing a need for it to be structured and constrained.\textsuperscript{147} This decision has such a significant impact on the outcomes of cases involving constitutional law that it cannot occur in the complete absence of guidelines and rules. Contextualism claims that

\begin{itemize}
\item \textsuperscript{145} Hiebert, \textit{Charter Conflicts}, 52.
\item \textsuperscript{146} Kyritsis, “Principles, Policies and the Power of Courts,” 397.
\item \textsuperscript{147} King, “Institutional Approaches to Judicial Restraint,” 433.
\end{itemize}
the reasonableness of a rights infringement cannot be determined by the mechanical application of abstract legal rules that are completely disconnected from the facts of the particular case. This claim precludes the existence of pre-designated areas that are beyond the reach of the judiciary.\textsuperscript{148} Reasonableness can only be ascertained by understanding the specific set of circumstances in which the action or decision of the government occurred.\textsuperscript{149}

Proponents of contextualism share three assumptions. The first assumption is that the power of judicial review is expansive in scope and nature. All actions and decisions of the legislative and executive branch are subject to challenge because our political culture has become one of justification. The expansiveness of judicial review does not prevent proponents of contextualism from recognizing that “in certain circumstances there may be good reasons why it is appropriate for courts not to interfere with the decisions of the legislature [or] executive….”\textsuperscript{150} The government, when facing allegations of rights violations, must be able to mount a cogent defence of all of its exercises of power.\textsuperscript{151} They must be shown to be justifiable rather than justified.\textsuperscript{152} The decision by the judiciary to intervene or refrain from intervening is not based on the perceived ‘correctness’ of the legislative or executive choice or the fact that it “coincides

\textsuperscript{150} Hunt, “Sovereignty’s Blight,” 340.
\textsuperscript{151} Dyzenhaus, “Law as Justification,” 11.
with what the court would have decided.”

It is, instead, grounded in the persuasive nature of the arguments and evidence advanced by the government to show that the choice was ‘reasonable’.

The second assumption that proponents of contextualism share is that weight of some sort must be accorded to the decisions of government. This accordance reflects and recognizes the role of Parliament as the primary decision-maker in our political and constitutional construct. Chief Justice McLachlin alludes to the need for mutual respect and courtesy among the executive, legislature and judiciary. Kavanagh makes use of the notion of ‘interinstitutional comity’, arguing that the judicial review of the actions of the other two branches of government must never “belittle or ridicule [them] … or deligitimise them.” This notion is evocative of Hiebert’s ‘relational approach’ to the Charter which is predicated upon principles of institutional modesty and respect.

The third assumption is that the context in which the government acted can be established using a set of variables, elements, factors or principles. By establishing context, the courts are able to determine the appropriate degree of deference to accord

154 Kavanagh, “Deference or Defiance?” 191.
158 Hiebert, Charter Conflicts, 52-72; Hiebert does not explicitly and expressly identify herself as embracing a contextualized approach to deference. Its traces are, however, discernable in her work.
and whether the standard of review for use in assessing the government action or decision should be stringent or relaxed. There are disagreements among proponents of contextualism about which specific variables, elements, factors or principles should be included in the set and how they should be balanced against each other. Hunt makes express reference to the nature of the law, the nature of the right and the nature of the inquiries by parliamentarians that precede the decision or action at the heart of a dispute.\textsuperscript{160} Davidov emphasizes the need to consider the risk of judicial error, particularly when rulings have far-reaching implications.\textsuperscript{161} King lists a number of other potential variables including the complexity and polycentricism of the issue, the vulnerability groups affected by government actions and decisions, and government reliance on social science evidence.\textsuperscript{162} He also argues that the factors will vary depending upon the subject matter of the dispute and the rights involved.\textsuperscript{163} Kavanagh identifies the severity of the violation and the degree of institutional self-confidence as two additional ones.\textsuperscript{164}

The uncertainty surrounding the variables, factors, elements and principles that should be used by the courts to establish context is one of the key problems with contextualism. The claimant and the government may not know, with any great certainty, the standards that they must meet in order to demonstrate the merit of their arguments. The judiciary, in exercising its discretionary power to accord deference, has treated the set of variables as non-exhaustive in nature, adding new ones or subtracting old ones.

\textsuperscript{160} Hunt, “Sovereignty’s Blight,” 353-54.
\textsuperscript{161} Davidov, “The Paradox of Judicial Deference,” 156-162.
\textsuperscript{162} King, “Institutional Approaches to Deference,” 433.
\textsuperscript{163} King, “Institutional Approaches to Deference,” 435.
\textsuperscript{164} Kavanagh, “Defending Deference in Public Law and Constitutional Theory,” 226.
Hunt observes in his defence of the approach that “the outcome of the inquiry is likely to depend on the interaction of a number of different factors.”\textsuperscript{165} The judiciary also retains the authority to define and prioritize variables, leading to shifts in their meaning and relevance based on the specific set of circumstances of individual disputes. Contextualism obliges the judiciary to engage in a balancing exercise of variables that can, in the end, rest upon and reflect the beliefs of the members of the bench as well as their preconceptions about justice and the role of the courts in resolving societal disputes.\textsuperscript{166} These fluctuations render even more flexible an approach that is already, by its very nature, flexible.

Davidov maintains that the contextualized approach can potentially short-circuit judicial analysis. He claims that the Court, in making its decision about deference based on the specific set of variables, elements or factors, signals the end result of an individual case before it examines and evaluates the substance of the justification arguments.\textsuperscript{167} Allan echoes these concerns, fearing that the focus of analysis is shifted from the proportionality of the rights infringement to “a wider range of competing considerations, relating to characteristics of the decision-maker or its procedures rather than the intrinsic quality of its decision.”\textsuperscript{168} This shift results, he argues, in rights claims failing, not because they lack merit, but because context, as established by a set of variables, mandates it. While these criticisms cannot be fully discounted, they do not negate the

\textsuperscript{165} King, “Institutional Approaches to Deference,” 433.
\textsuperscript{167} Davidov, “The Paradox of Judicial Deference,” 139.
compatibility of contextualism with Charter adjudication. Non-doctrinism leaves the decision completely without structure, affording the judiciary absolute freedom to grant or withhold deference. Formalism is employed to hive off certain types of government actions and decisions, shielding them from stringent judicial scrutiny. It pre-ordains a submissive stance because of policy and/or political concerns.

When the approach of the Supreme Court of Canada to deference is examined in detail, as will done in chapters four and five of this dissertation, traces of contextualism are discernable. The court has engaged, over the course of more than two decades, in an exercise of formulating and reformulating an analytical process that ties its decisions about the standard of review and standard of proof used during the Oakes test to the context in which the government acted. The Court has identified two variables – the nature of the legislation and the nature of the right – that guide it in determining how high or low to set the bar. In its recent reformulation of the analytical process, the first variable is dismantled into the three factors of the vulnerability of the group that the legislature seeks to protect, the subjective fears and apprehension of harm of the group, and the difficulty of measuring scientifically a particular harm in question or the efficaciousness of a remedy. The nature of the legislation guides the judiciary in determining its level of competence and legitimacy to review the government action or decision. The Supreme Court has expressed particular concerns about its ability and expertise to assess those that involve public policy of an economic, political or social nature. The nature of the right

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169 Thomson Newspapers, paragraph 90-91.
guides the judiciary in identifying the specific interest or value that is affected by the infringement. The Court has held that the meaning of rights and freedoms and the level of constitutional protection to which they are entitled are not static. They change depending upon the context in which they are exercised.

Reliance on only two variables raises concerns about how fully the judiciary understands the context in which the government acted. The small number indicates that the focus of the judiciary has been decidedly narrow and suggests that other relevant variables may have been ignored. Concerns about judicial understanding of context are magnified by the fact that the Court has in some cases, as will be discussed in chapter five of this dissertation, privileged one of the variables to examine and identify context. The reliance on one or, at most, two variables has dissuaded the Supreme Court from delving in sufficient depth into the question of how much deference should be accorded in individual Charter challenges and how that decision ought to be taken.

**A Contextualized Approach to Deference and the Democratic Process**

This chapter concludes by arguing for the need of a contextualized approach to deference for specific use in cases involving the electoral and referendum legislation. Colin Feasby asserts that “the intersection of constitutional law and the democratic process is a distinct subdiscipline of constitutional law with recognizable parameters.”

The government has a positive obligation to design democratic processes and, in

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particular, to hold regulation elections. It must create the frameworks within which
democratic rights are exercised. These creations are characterized by fixed life spans and
forms of collective or communal decision-making about government and governance.
They result in decisions that are, in all of the cases examined in this dissertation, binding
and definitive. The disputes examined in the dissertation share a commonality in subject
matter and in the allegedly affected rights and freedoms whose importance to democracy
is such that it cannot exist without them. Six of the nine cases involve provisions of the
same statute, the Canada Elections Act. Six of the nine cases rely on the Final Report of
the Royal Commission on Electoral Reform and Party Financing as the primary piece of
evidence. Six of the nine impugned laws are the subject of deliberation and debate by the
same parliamentary committee. Despite these shared attributes, the Supreme Court does
not adopt a standard approach to its decision about deference.

This dissertation proposes that the judiciary employ three variables to set the
appropriate degree of deference in cases involving the democratic process. They are: (1)
the nature of the legislation; (2) the nature of the right; and (3) the nature of the
parliamentary discourse. Their use would allow to judiciary to establish a better
understanding of the context in which the government acted to identify and to remedy
problems that affects the ability of ordinary Canadians to participate in the political
process and to be represented in our democratic institutions. This would, in turn, ensure
greater structure and coherence to judicial decisions about deference and about the

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171 Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995, 1032; Figueroa v. Canada (Attorney
standards of review and proof used during the section one analysis. The judiciary, in applying this approach, would also have to examine the relationship among the three variables and set out criteria for assessing their relative priority. These tasks would be of particular importance in cases in which the variables do not align and the judiciary is obliged to weigh and balance them.

The nature of the legislation permits the judiciary to establish its competence to review government decisions and the democratic legitimacy of it doing so. The Supreme Court, as will discussed more fully in chapter four of this dissertation, has held that the judiciary lacks the capacity to review of executive and legislative decisions in certain areas of public policy. It has expressed particular concern about laws that are of a social, economic or political nature, holding that the courts do not have the experience and expertise to evaluate the merit of decisions that involve the mediation of competing interests and rights that “require the assessment of conflicting evidence and differing justified demands on scarce resources.”¹⁷² The Court has also emphasized the weaker democratic pedigree of the judiciary, observing that the representativeness and accountability of Parliament and the provincial legislative assemblies permit citizens to “all share in the responsibility for … difficult choices.”¹⁷³

The nature of the right is relevant to the decision about deference because the constitutional protection which individual rights and freedoms warrant is not static and unchanging. A right or freedom has a different meaning and purpose depending on the

context in which it is exercised. The courts are, as a consequence, obliged to identify “the aspect of the right which is truly at stake in the case as well as the relevant aspects of any values in competition with it.” ¹⁷⁴ This permits them to determine, for the purpose of the section one analysis, the specific value of the right or freedom at issue in the individual case. The more valuable the exercise of a right or freedom is in a particular context, the more difficult it is for the Crown to justify its infringement.

The nature of the parliamentary discourse that precedes the enactment or amendment of the impugned laws has bearing on the decision about deference because it contains the reasons that legislators give for their votes, just as judicial opinions contain the reasons that judges give for theirs. ¹⁷⁵ The substance of these discourses is to be found in *Hansard*, the transcripts of parliamentary committees and published government reports and documents. These discourses form the only official public record we have of how parliamentarians, in enacting an impugned law, attempt to balance the resolution of societal problems with the protection of constitutionally-guaranteed rights and freedoms. Their study would allow the Court to more fully understand the issues that propelled Parliament to act. It would also permit it to ascertain whether an impugned law reflects and resulted from a reasoned and thorough exploration of pertinent issues and interests, potentially affected rights and freedoms, and the reasonableness and justifiability of possible infringements. Hiebert calls for sensitivity on the part of the courts to the question of whether parliamentarians gave consideration to the *Charter* when

deliberating, debating and enacting statutes. Their failure to do so, according to Brian Slattery represents “an abdication of their responsibilities.”

The inclusion of section one in the Charter signals a transformation in our political and legal systems. It serves as a standard for evaluating all governmental actions and decisions. The Crown, in defending them as constitutional, must demonstrate that the infringement of a right or freedom is justifiable. It is important to remember that the obligation of the government to justify its actions or decisions is not triggered by an individual alleging, after the fact, that a law violates their Charter rights and freedoms. Careful consideration must be given to this obligation in the debates, discussions and deliberations undertaken by elected representatives as they wrestle with serious social problems and attempt to devise constitutionally-sound legislative remedies. The accordance of a high degree of deference in the absence of a serious contemplation of Charter rights and the reasonableness of their infringement is, using the proposed contextualized approach, inappropriate.

Conclusion

This purpose of this chapter was to examine deference theory in constitutional adjudication. The competing definitions of deference and the rationales for its use were laid out and examined. It was argued that the use of Kavanagh’s minimal/substantive deference dichotomy best suited Charter adjudication. Its adoption would allow Canadians to move beyond the oversimplified equation of judicial deference with

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176 Hiebert, Charter Conflicts, 70-71.
government successes in the law courts. In addition, the three principal approaches – non-doctrinism, formalism, and contextualism – to deference were discussed. This chapter argued that contextualism was compatible with the Canadian constitutional framework and was reflected in the efforts of the Supreme Court of Canada to formulate and reformulate rules governing the use of deference in Charter adjudication.

This chapter argued finally that the variables used by the judiciary to establish the context in which the government acted must be expanded. It proposed three variables including the nature of the legislation, the nature of the right and the nature of the parliamentary discourse that preceded the enactment or amendment of the impugned law. The courts must, before setting the standard of review and standard of proof used during the section one analysis, satisfy themselves that parliamentarians, when debating public policy, engaged in deliberations and discussions about rights and freedoms, and the effects that their legislative choices might have on them. A high degree of deference may be inappropriate if they have failed to do so.
Chapter 4

The *Oakes* Test and the Integration of Deference

“Such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”

The purpose of this chapter is to describe the integration of deference in *Charter* adjudication. Its integration and the problems that have ensued must be understood before the examination of its use in cases involving electoral/referendum legislation can be undertaken. Section one of the *Canadian Charter of Rights and Freedoms* “guarantees the rights and freedoms set out in it only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democracy society.”¹ Deference, rooted in concerns about institutional competence and legitimacy, was not a feature of the original formulation of the *Oakes* test which has, since 1986, served as the framework within which the judiciary conducts its analysis to determine the reasonableness of a rights infringement. Its integration has modified the way in which the Court undertakes its section one analysis.

The Supreme Court of Canada faces the dilemma of determining which cases warrant high degrees of deference and which ones do not. If it is overly deferential, constitutionally-guaranteed rights are too easily compromised. If it is insufficiently deferential, the ability of the government to formulate and implement public policy is hindered. The Court, in setting a high degree of deference, willingly limits its authority to

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¹ Part One of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (1982)*, (U.K.), 1982, c. 11.
review government decisions and to assess their effects on constitutionally-guaranteed rights and freedoms. It does so by giving “weight to the judgments of the elected branches of government out of respect for their superior expertise, knowledge, or legitimacy….“2

This chapter argues that the Court has, since its earliest attempt to insert deference in its section one analysis, favoured a contextualized approach. It has tied its decision about the standards of review and proof to the context in which the government acted. The non-doctrinal approach would have given it free reign to make decisions about deference in the absence of any rules and guidelines. The formalist approach would have made use of abstract delineations between law and politics, or policy and principle. The Court’s use of a civil standard of proof – on balance of probabilities – in Charter adjudication made the adoption of contextualism a natural fit. The civil standard, rooted in the circumstances of individual cases, requires the government to show that an infringement is probably more reasonable than not. The chapter also argues that the most recent formulation of the contextualized approach – the contextual factors approach – does not provide a coherent and structured approach to deference. It remains, almost 25 years after deference was integrated in the Oakes test, difficult to predict when the judiciary will assume a relaxed stance during its section one analysis and when it will not.

This chapter traces the efforts of the Supreme Court to develop a coherent and structured approach to the question.

Judicial deference, as discussed in the previous chapter, is not synonymous with government victories in a court of law or judicial acquiescence to the will of Parliament. The decision about deference affects how the Court applies the Oakes test, either in its entirety or in its component parts. It determines how high or low the bar will be set, affecting the level of stringency with which the reasonableness and justifiability of an infringement will be reviewed. It dictates the nature and sufficiency of evidence that the government must provide in order to demonstrate that a law is constitutional. This decision is, in many cases, the determinant and determinative factor in the success or failure of the government in defending legislation.

The chapter begins by setting out the Oakes test out in its original form, which for the sake of clarity will be referred to as Oakes Classic. It then lays the test out in its present form – Oakes 2.0 – in order to show that the analytical exercise has evolved from rigor and stringency to laxity and flexibility. This evolution was triggered by the Court’s efforts to integrate deference in Charter adjudication. The chapter uses four cases – Edwards Books, Irwin Toy, RJR-MacDonald, and Thomson Newspapers – to trace the emergence of the contextualized approach to deference that the Court has formulated and reformulated over the course of more than two decades. Each of these cases represents a

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seminal shift in the Court’s understanding of deference and how it affects the standard of review used to assess the justification arguments of the government and the evidentiary requirements of the Oakes test. The first of these cases opens the door to deference, but omits to set out a process for use in future constitutional disputes. The three subsequent ones contain formulations and reformulations of the contextualized approach whose purpose is to remedy this omission.

The Court’s efforts to devise a structured and coherent approach to deference expose tensions between the political realities of designing and implementing public policy in the absence of absolute certainty about the nature of social problems and the effectiveness of legislative remedies, and the legal need for proof to justify the infringement of constitutionally-guaranteed rights and freedoms. The evidence proffered by the government in defence of its legislative decisions can, on first impressions, appear to be insufficient grounds for their violation. Legislative decisions, the Supreme Court declares, are “inevitably … a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components.”4 They are “often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available.”5

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**Charter Adjudication**

When legislation is challenged as unconstitutional, the individual bringing the claim must establish that a specific right or freedom has been infringed. If no infringement is established, the claim fails and the law is upheld as constitutional. If the infringement is established, the Court proceeds to its section one analysis. The government bears the responsibility of demonstrating that the infringement is reasonable and justified in a free and democratic society. The government must, under the *Oakes* test, establish that a law: (i) has a pressing and substantial objective; (ii) is rationally connected to the objective; (iii) minimally impairs rights and freedoms; and (iv) has salutary effects that outweigh deleterious ones.⁶ If it fails to meet the requirements of any of the four components, the law is found to be unconstitutional.

The *Oakes* test structures the section one analysis, but does not explain how the government must actually demonstrate that a violation is reasonable and justified in a free and democratic society. Chief Justice Dickson, who crafted the test, provided the instrument used for the section one analysis, but failed to include an operating manual. The test has become a constant feature of all disputes involving the *Charter* and has, in Peter Hogg’s view, “taken on some of the character of holy writ.”⁷ In spite of its sanctification, changes to its pith and substance have occurred. These changes have added great flexibility to its application and the evidentiary requirements of the component parts.

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In *R. v. Oakes*, Chief Justice Dickson sets out the analytical framework within which the justification analysis occurs. Section one of the *Charter*, he declares, serves two functions. It protects rights and freedoms and contains the criteria against which infringements are measured. It encapsulates the constitutional recognition that rights and freedoms are not absolute in nature and that they can be limited by the government when done in a reasonable fashion. The Chief Justice clearly believes that justified infringements will be rare and that the government will face an onerous task in providing persuasive arguments and evidence to meet all of the components of the *Oakes* test.

There is no indication that the Chief Justice contemplates relaxing the standard of review in particular cases out of concerns about the judicial competence to review government actions and the legitimacy of it doing so. He expects that the courts will be stringent in their evaluation of the justification arguments advanced by the government in defence of laws and that they will impose an onerous evidentiary burden on the government. He states that it is:

> clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word ‘demonstrably’ which clearly indicates that the onus of justification is on the party seeking to limit.

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The Court’s section one analysis is to be guided by the fact that allegedly infringed rights and freedoms are “part of the supreme law of Canada.”13 Chief Justice Dickson states that the wording of section one establishes that “the very purpose for which the Charter was originally entrenched in the Constitution… [is that] Canadian society is to be free and democratic.”14 The judiciary, in assessing the reasonableness of a rights violation, has to:

be guided by the values and principles essential to a free and democratic society which … embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.15

The first component of Oakes Classic requires the government to demonstrate that the legislative objective is “of sufficient importance to warrant overriding a constitutionally protected right or freedom’ … [and] relates to concerns which are pressing and substantial in a free and democratic society….“16 The legislative goal has to advance “the realization of collective goals of fundamental importance.”17 The judiciary has to be assured that the objective is not “trivial or discordant with the principles integral

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to a free and democratic society….“18 The second component of the Oakes Classic requires the government to show that there is a rational connection between the legislative means and ends. The former has to be “carefully designed to achieve the objective in question … [and] must not be arbitrary, unfair or based on irrational considerations.”19 The government also has to specify “what alternative measures for implementing the objective were available to the legislators when they made their decisions.”20 The third component requires the government to demonstrate that the legislative measures “impair ‘as little as possible’ the right or freedom in question.”21 The legislative choice has, in other words, to be the least restrictive option available. The fourth component requires the government to show that there is “a proportionality between the effects of the measure which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’. “22 The benefits resulting from the law have, in other words, to outweigh the costs of limiting a constitutionally-guaranteed right or freedom. The more serious the infringement, the important the objective has to be.

Chief Justice Dickson expects that the application of the test will be rigorous.23 He is, however, aware of the potential difficulties faced by the government in defending the constitutionality of its actions. This awareness is reflected in his rejection of the

19 R. v. Oakes, 139.
22 R. v. Oakes, 139. [emphasis in the original text]
23 R. v. Oakes, 137.
criminal standard of proof in Charter adjudication. Such a standard would require the government to establish that an infringement is justified beyond a reasonable doubt. The Chief Justice argues that “[c]oncepts such as ‘reasonableness’, ‘justifiability’ and ‘free and democratic society’ are simply not amenable to such a standard.” A criminal standard would, in his view, prove an insurmountable obstacle to the government in its attempts to demonstrate that an infringement meets the requirements of section one. The civil standard of a preponderance of probability is, instead, adopted. It requires the government to establish that the infringement is probably more reasonable than unreasonable.

Chief Justice Dickson also signals that the section one analysis is not to occur on an abstract theoretical level far removed from the facts of the specific dispute. The framework of the test will remain constant, but its “nature … w[ill] vary depending on the circumstances.” The judiciary, in assessing the reasonableness of an infringement, will have to consider the nature and subject-matter of the constitutional dispute in order to set the correct level of probability. The Chief Justice clearly anticipates, as seen by the adoption of a civil standard, that there will be some degree of fluctuation in the standard of review used by the courts. This fluctuation will, however, never obviate the need for a

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24 R. v. Oakes, 137.
25 R. v. Oakes, 139; This emphasis on the specific set of circumstances is clearly the genesis of the ‘contextual approach’ set out by Justice Wilson in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, 1352. She argues that the meaning of a right or freedom depends on context in which it is being exercised.
26 R. v. Oakes, 137.
“very high degree of probability … ‘commensurate with the occasion.’”\(^27\) While there might be instances in which “certain elements of the s. 1 analysis are obvious or self-evident”,\(^28\) the government will in most cases have to provide proof that is “cogent and persuasive and makes clear to the Court the consequences of imposing or not imposing the limit.”\(^29\) The government has, in other words, to *demonstrate* that an infringement is reasonable and justified.

*Oakes* Classic appears to give truth to predictions that the Court would interpret section one of the *Charter* in a way that aided individuals who alleged rights violations.\(^30\) Peter Hogg characterizes the test as an almost insurmountable obstacle in the way of legislative efforts to formulate constitutionally-sound public policy. He argues that “the process of s.1 justification look[es] like the camel passing through the eye of the needle.”\(^31\) Lorraine Weinrib predicts that the government will “seldom satisfy section 1 justification because the supreme law states that certain rights and freedoms are to be honoured in the normal course.”\(^32\) Pamela Chapman also believes that the test mandates the adoption of “a very high level of scrutiny” and imposes “a fairly onerous burden” on the government.\(^33\) Choudhry claims that the *Oakes* Classic “clarified the Court’s


\(^{32}\) Lorraine Eisenstat Weinrib, “The Supreme Court of Canada and Section One of the *Charter,*” *Supreme Court Law Review* 10 (1988), 492.

interpretative methodology for Charter cases, perhaps most centrally that rights are of presumptive importance, and limitations the exception that are only acceptable if governments meet a demanding test of justification.”

Guy Davidov describes the test as “an attempt to turn the courts’ task into a principled and systemic analysis, and avoid as much as possible subjective, unpredictable reasoning.”

Several scholars regard Oakes Classic as flawed because the Chief Justice provides an analytical framework, but fails to offer any insight into how to measure and evaluate reasonableness. Sidney Peck argues that it is “neither determinate nor determinative of decisions…[and] does not control the decisions of judges.”

Janet Hiebert asserts that it contains a “glaring contradiction between the seemingly objective standard in the Oakes test and individual judges’ ad hoc and discretionary section 1 interpretations….” As a consequence, individual Justices continue to rely on “their particular normative perspectives of liberty or democracy or institutional assumptions about the appropriate role of courts in a representative democracy” when reviewing laws. Andrew Lokan describes the test in its original formulation as an “unsuccessful attempt to mask the arbitrariness of the Court’s exercise of its new found power” that is largely “devoid of content” and fails to provide “an intelligible standard” to guide the

38 Hiebert, Limiting Rights, 71.
courts in their task of review.\textsuperscript{39} Timothy Macklem and John Terry are critical of the standards contained in the test. They are, in their view, “not in the least demanding, however difficult they may be for the government to meet in a particular case … [and, in fact] they are plainly minimal.”\textsuperscript{40}

These criticisms cannot be discounted outright. The discretionary powers of the courts are at best corralled rather than bridled. Concerns about the discretionary power of judges survive the construction of a framework for section one analysis. That said, Chief Justice Dickson clearly anticipates the government to face an onerous task in providing cogent and convincing proof. He expects the courts to engage in the rigorous review of government actions. The test, which is changed and reformulated by the Court over the course of more than two decades, shows that Dickson’s expectations have not been met.

The \textit{Oakes} Test 2.0

The \textit{Oakes} test has, with the passage of time, become almost synonymous with section one itself. It is applied in all cases in which the Court’s ruling turns on the reasonableness of a rights violation. While the general framework has remained intact, internal changes have occurred. Each of the four components has been altered by the Supreme Court in reaction to its growing awareness that government decisions and actions are not always rooted in cogent evidence that can withstand the rigors of stringent judicial review. The centre of gravity of the test has shifted to the minimal impairment component which has

\textsuperscript{39} Andrew Lokan, “The Rise and Fall of Doctrine under Section 1 of the \textit{Charter},” \textit{Ottawa Law Review} 24(1) (1992), 169, 177 and 190.
\textsuperscript{40} Timothy Macklem and John Terry, “Making the Justification Fit the Breach,” \textit{Supreme Court Law Review (2\textsuperscript{nd})} 11 (2000), 599.
emerged as “the heart and soul of s. 1 justification.”

The other three components have become largely marginalized, fading almost to the point of irrelevance.

The first component of Oakes Classic originally required the government to demonstrate that the objective was sufficiently important to warrant limiting a right or freedom. It had to reflect and relate to pressing and substantial concerns. It also had to further the values of a free and democratic society. The Court diminishes the component to such an extent that almost any law can meet its requirements. The Court declares in Harper, one of the cases examined in this dissertation, that “the proper question at this stage of the analysis is whether the Attorney General has asserted a pressing and substantial objective.” It does not, in other words, have to provide evidence that a pressing and substantial reason to impose limits actually exists. A review of the Court’s record leads Hogg to conclude that government actions and decisions seldom fail the first component of the Oakes test.

The rational connection component originally required the government to demonstrate that the legislative measures were carefully designed to achieve the objective. It also had to specify any possible alternative ones. The Supreme Court relaxes the requirements of the component. As a consequence, legislation no longer has to be

42 Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827, paragraph 25. [emphasis in the original text]
“tuned with great precision….”\textsuperscript{44} The government must simply establish “a \textit{reasonable basis}” for assuming that a link between the legislative means and ends exists.\textsuperscript{45} This has been done by relying on common sense, reason, logic,\textsuperscript{46} reasonable presumptions and reasonable anticipations.\textsuperscript{47} Hogg’s research shows that the Court has “not always insisted on direct proof of the causal relationship.”\textsuperscript{48} Such insistence would prevent the government from defending its actions and decisions because the link between the legislative objective and measures is “often a difficult matter to establish by evidence.”\textsuperscript{49} This lack of insistence, Robin Elliot claims, causes the component to degenerate into little more than “minimal rationality.”\textsuperscript{50} Lokan alleges that there is a “complete lack of application” of this component by the courts.\textsuperscript{51} Christopher Dassios and Clifton Prophet believe that as long as the legislative measure advances the legislative objective in some manner, however remotely or indirectly, it will pass the rational connection component of the \textit{Oakes} test.\textsuperscript{52} Hogg concludes that the diminishment of the component has resulted in it having “very little effect”\textsuperscript{53} on the outcome of cases.

\textsuperscript{44} \textit{Edwards Books}, 772.  
\textsuperscript{46} \textit{RJR-MacDonald}, paragraphs 86, 156-158, 184-1.  
\textsuperscript{47} \textit{R. v. Butler}, 502.  
\textsuperscript{48} Hogg, \textit{Constitutional Law of Canada}, volume 2, 38-35; see also Hiebert, \textit{Limiting Rights}, 75.  
\textsuperscript{49} Hogg, \textit{Constitutional Law of Canada}, volume 2, 38-35; see also Hiebert, \textit{Limiting Rights}, 75.  
\textsuperscript{51} Lokan, “The Rise and Fall of Doctrine,” 10.  
\textsuperscript{53} Hogg, \textit{Constitutional Law of Canada}, volume 2, 38-34; see also Morton and Brodie “The Use of Extrinsic Evidence,” 24. They argue that 11 per cent of cases are decided at this stage; Trakman, Cole-Hamilton and Gatien, \textit{“R. v. Oakes 1986-1997 Back to the Drawing Board,”} 146. They claim that the rate
The minimal impairment component of the Oakes test has become pivotal to the resolution of constitutional disputes that turn on the reasonableness of an infringement.\textsuperscript{54} The component originally required the government to demonstrate that the legislation impaired a right or freedom in the least restrictive manner possible. Hogg explains that in its original formulation there is “little room for even a narrow margin of appreciation”\textsuperscript{55} on the part of the government. The Court, as will be discussed more fully in the next section of this chapter, relaxes the requirements of the component by adopting a standard of reasonableness. The adoption affords the government leeway in the formulation of public policy. It is required to only demonstrate that the right or freedom is infringed as “as little as is reasonably possible”\textsuperscript{56} and that the legislative choice falls within a range of reasonable alternatives. The government is able to meet the requirements of this component by using arguments based on common sense, logic and reason.\textsuperscript{57}

The final component of Oakes Classic required the government to show that there was proportionality between the legislative goal and the effects of the infringement. The benefits accruing from the infringement had to be substantial enough to justify infringing a constitutionally-guaranteed right or freedom. This component is the only one whose requirements, at least on paper, have become more onerous. The government is now

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\item of failure is 8 per cent; Rothstein “Section 1: Justifying Breaches of Charter Rights and Freedoms”, 177. He also sets the rate at 8 per cent.
\item Hogg, \textit{Constitutional Law of Canada}, volume 2, 38-36; Morton and Brodie “The Use of Extrinsic Evidence,” 23 and 25. They state that 55 per cent of all cases are decided at this stage; Trakman, Cole-Hamilton and Gatien, “\textit{R. v. Oakes} 1986-1997 Back to the Drawing Board,” 145. They claim the rate is 49 per cent; Rothstein “Section 1: Justifying Breaches of Charter Rights and Freedoms,” 178. He sets the rate at 49 per cent.
\item \textit{Edwards Books}, 772.
\end{enumerate}
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required to demonstrate that there is “a proportionality between the deleterious effects of the measure which are responsible for limiting the rights or freedoms in question and the objective, and … a proportionality between the deleterious and the salutary effects of the measure.” The infringement must, in other words, be balanced against the importance of the government’s goal. Its positive effects must also be balanced against the negative ones and must be shown to outweigh them.

Hogg, in reviewing case law, concludes that this component has “never had any influence on the outcome of any case.” Hiebert regards the addition to the proportionality test as a positive change. She initially hopes that it will require “legislatures [to] exercise more care in ensuring that their policies respect rights as much as possible and impose measures which impair rights as little as practically possible.” The change has not, however, had significant impact on Charter adjudication. Michael Johnston suggests that there has been little, if any, alteration to the Court’s approach to the component and that the requirements of the component have not become more difficult to meet.

58 Dagenais v. Canadian Broadcasting Corp. [1994] 3 S.C.R. 835, 889. [emphasis in the original text]
59 Hogg, Constitutional Law of Canada, volume 2, 38-44; Morton and Brodie “The Use of Extrinsic Evidence,” 23 and 25. They state that 28 per cent of all cases are decided at this stage; Trakman, Cole-Hamilton and Gatien, “R. v. Oakes 1986-1997 Back to the Drawing Board,” 145. They find only one case; Rothstein “Section 1: Justifying Breaches of Charter Rights and Freedoms,” 182. He also argues that only one case has failed this component.
60 Hiebert, Limiting Rights, 84.
The Integration of Deference in the *Oakes* Test

The transformation of the *Oakes* test is explained by the insertion of deference in the section one analysis. Under *Oakes* Classic, the government faced evidentiary hurdles that, if retained, would have been insurmountable. The Crown simply does not always have sufficient proof to defend its choices against rigorous and stringent judicial scrutiny. The lack of compelling evidence to establish the existence of harm or the effectiveness of the legislative measure reflects the political realities surrounding the formulation of public policy. Governments make choices about the nature of social problems and possible remedies even in the absence of certainty. They make use of incomplete and contradictory information, estimates, guesses, hunches and value judgments. The paucity of evidence creates the very real possibility that the *Charter* will hinder government efforts to formulate public policy, particularly of a sort aimed at bettering the lives of marginalized and disadvantaged members of society. The Court, as a consequence, recognized the need to relax the requirements of *Oakes* Classic. It has struggled in the decades that have ensued since this recognition with the question of how much deference to accord and what effects its accordance should have on the section one analysis.

*Edwards Books: Reasonableness and Context*

Chief Justice Dickson lays out *Oakes* Classic in 1986, but begins tinkering with its component parts less than a year later in *Edwards Books*, a case involving freedom of religion. Although he does not expressly refer to deference in his ruling, the modifications he makes to the test create the space upon it can be grafted. The impugned
provincial law bans, with minor exceptions, all Sunday shopping. The decision facing the Court is made difficult by the fact that the Crown does not present compelling evidence to demonstrate that the law can be saved by section one of the Charter.\textsuperscript{62} Under Oakes Classic, the legislation would not be upheld as constitutional because the government has simply not provided enough proof to demonstrate that the legislative measure impairs the freedom in the least restrictive manner possible.

The difficulties experienced by the Crown lead Chief Justice Dickson to alter the requirements of the minimal impairment component. It originally obliged the government to show that the legislative measure is the least-impairing option possible. The modification instead requires it to show that the legislation impairs the right and freedom “as little as is reasonably possible.”\textsuperscript{63} This change means that government can justify an infringement if it is able to demonstrate that its legislative choice falls within a range of reasonable options. The majority declares that the law is “a satisfactory effort on the part of the legislature … and is, accordingly, permissible.”\textsuperscript{64} While it is possible to conceive of other legislative measures, none will allow the government “to achieve its objective with fewer detrimental effects....”\textsuperscript{65}

Chief Justice Dickson emphasizes that the need to give the government some leeway in crafting legislative remedies to social issues is particularly important when they

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\textsuperscript{62} G.D. Creighton, “Edwards Books and Section 1: Cutting Down Oakes?” \textit{Criminal Reports} (3\textsuperscript{rd}) 55 (1987), 275. The factual record presented by the Crown is characterized as “woefully inadequate.”
\textsuperscript{63} Edwards Books, 772.
\textsuperscript{64} Edwards Books, 782.
\textsuperscript{65} Edwards Books, 772.
\end{flushright}
involve the protection of disadvantaged and vulnerable members of society.\textsuperscript{66} He cautions that the judiciary should not, through its rulings, transform the \textit{Charter} into “an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.”\textsuperscript{67} Such a transformation will, in his view, occur if the standard of review used by the courts to scrutinize governmental action is too stringent.

Chief Justice Dickson anchors his opinion in the principle of the separation of powers, highlighting the different responsibilities of the judiciary and the two other branches of government under our constitutional framework. The role of the courts is to review the choices made by the executive and the legislature and to assess their compatibility with the \textit{Charter}. They, rather than the judiciary, are primary decision-makers in our model of government. The courts, when reviewing their decisions, are not “called upon to substitute judicial opinions for legislative ones….”\textsuperscript{68} They are not responsible for “devis[ing] legislation that is constitutionally valid … [or] consider[ing] what legislation might be the most desirable. The discussion of alternative legislative schemes … is directed at one end only, that is, to address the issue of whether the existing scheme meets the requirements of … s. 1 of the \textit{Charter} as set down in \textit{Oakes}.”\textsuperscript{69}

Justice La Forest, in a concurring opinion, also emphasizes the distinct roles of the branches of government. In order to fulfill its responsibilities under our constitutional

\textsuperscript{66} Edwards Books, 772.
\textsuperscript{67} Edwards Books, 772.
\textsuperscript{68} Edwards Books, 782.
\textsuperscript{69} Edwards Books, 779.
construct, the legislative branch has to have “reasonable room to manoeuvre”\textsuperscript{70} when formulating public policy. Cautioning against too stringent a standard of review, he explains that “the business of government is a practical one” which involves responding to “practical living facts” rather than engaging in an exercise of theoretical abstractions.\textsuperscript{71} The courts, as a consequence, have to be cognizant of “the nature of the interest infringed and the legislative scheme sought to be implemented”\textsuperscript{72} when determining whether a law can be saved under section one of the \textit{Charter}. The reasonableness of a government decision can, in other words, only be ascertained by identifying and examining the circumstances in which it was made. Justice La Forest also expresses doubts about the competence of the courts, openly questioning their ability to second-guess the legislature in some areas of public policy.\textsuperscript{73}

The \textit{Edwards Books} ruling triggers heated discussion among scholars. Some academics downplay its significance, arguing that the inclusion of a reasonableness standard in the minimal impairment component has little real consequences. Allan Hutchinson and Joel Bakan both emphasize the inherent malleability and indeterminacy of the \textit{Oakes} Classic.\textsuperscript{74} Even in the absence of deference, the intensity of scrutiny fluctuates because of the civil standard of review. Robin Elliot, by contrast, maintains that the analytical certainty that the test originally offered has been lost. He believes that

\textsuperscript{70} \textit{Edwards Books}, 795.
\textsuperscript{71} \textit{Edwards Books}, 795.
\textsuperscript{72} \textit{Edwards Books}, 795.
\textsuperscript{73} \textit{Edwards Books}, 797.
the “prospect that we will see a single, uniform approach to s. 1 emerging from the Court in the foreseeable future…” 75 has been greatly reduced. Weinrib asserts that the standard of protection afforded to constitutionally-guaranteed rights and freedoms has been diminished. 76 Andrew Petter and Patrick Monahan describe the Supreme Court as having “recoiled from all but the formal trappings of the Oakes test.” 77 Hogg fears that the changes to the minimal impairment component will lead to greater unpredictability in the behaviour of the courts because there is “no practical way to avoid uncertainty in the application of the requirement of least drastic means.” 78

A number of scholars seize on the inclusion of the reasonableness standard to argue that it signifies the adoption by the judiciary of a restrained approach to its review of governmental action. Monahan characterizes the case as “a key turning point, signalling a new era in which the watchwords would be restraint, moderation and judicial deference to legislative choices.” 79 Dassios and Prophet maintain that Edwards Books represents a shift from interventionism towards deference. 80 Hiebert argues that the changes reflect the Court’s recognition of the complexities of policy-making and the need to ensure that the judiciary does not scuttle the government’s pursuit of legitimate goals. 81 Lokan argues that the case shows that the Court has embraced the principle of deference.

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76 Weinrib, “The Supreme Court of Canada and Section One,” 469.
81 Hiebert, Limiting Rights, 64.
at the expense of its responsibility to defend Charter rights. Chapman is of the view that the stringency of Oakes Classic has been jettisoned and will lead to the courts deferring with greater frequency and ease to legislative choices.

This ruling is significant when studying the use of deference in Charter adjudication for a number of reasons. First, one can see early traces of the contextualized approach that the Court will ultimately adopt. The ruling recognizes that the standard of review used to scrutinize governmental action is dependent upon the particular set of circumstances of the specific case. Chief Justice Dickson identifies two variables – group vulnerability and the type of legislation – that inform his decision to relax the intensity of his scrutiny. The two are subsequently re-cast as contextual elements and/or contextual factors by the Court. Second, the integration of the reasonableness standard to determine whether the impairment is minimal in nature contains the Court’s express recognition that Charter adjudication is not an exercise of finding the ‘one’ correct solution to a social problem. There will seldom be only one possible constitutionally-sound legislative remedy. The government, in formulating public policy, faces a number of reasonable alternatives from which to choose. This recognition by the Court creates a venue within which it shifts its scrutiny to look at the social problems from the perspective of the legislative branch. The failure of Chief Justice Dickson to explain how reasonableness ought to be measured indicates that he has not yet devised a coherent and structured approach to determining when how much deference is warranted in individual cases. He

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explains in a rather circular fashion that “[a] ‘reasonable limit’ is one which, having regard to the principles enunciated in Oakes, it was reasonable for the legislature to impose.” The third reason for the importance of this ruling to the study of deference is that Chief Justice Dickson and Justice La Forest both allude to, without fully exploring, the rationales for judicial deference. Reference is made to the separate roles of the branches of government, revealing concerns about the legitimacy of courts reviewing the choices of primary decision-makers. Justice La Forest also expressly questions their competence to do so.

Irwin Toy: The Nature of the Legislation

The Supreme Court of Canada revisits the issue of deference in Irwin Toy and makes an initial attempt to set out guidelines for its accordance. Its efforts reveal the Court’s ongoing concerns about its competence to examine and evaluate some types of legislative choices and the legitimacy to do so. The case involves provincial legislation that banned advertising directed at children under the age of 13. The toy company argues that that its freedom of expression has been violated. The constitutionality of the law hinges on the minimal impairment component of the Oakes test. The evidence establishes that commercials influence the behaviour of children under the age of seven. What remains unclear is the effect that they have on older ones. There is uncertainty about the age at which children develop “the cognitive ability to recognize the persuasive nature of

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84 Edwards Books, 781-82.
advertising and to evaluate its comparative worth.” Because the government has not provided much evidence on point, rigorous scrutiny by the Court during the minimal impairment component of the Oakes test would result in the legislation being struck down.

The majority opinion, written by Chief Justice Dickson and Justices Lamer and Wilson, finds that the infringement of the toy company’s expression is as little as is reasonably possible. The majority opinion declares that it would “not, in the name of minimal impairment, take a restrictive approach … and require legislatures to choose the least ambitious means to protect vulnerable groups.” The availability to the government of “other less intrusive options reflecting more modest objectives…” does not obviate the constitutional soundness of its choice. As long as “the legislature has made a reasonable assessment …, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.”

Relying on Edwards Books, the Court draws a distinction between cases in which the minimal impairment component should be strictly applied and those in which a high degree of deference is appropriate. It adopts the practice of categorizing cases based on the nature of the legislation. Some types of laws warrant a more relaxed standard of

85 Irwin Toy, 989.
86 Irwin Toy, at 994.
87 Irwin Toy, at 994.
88 Irwin Toy, 990.
review than others. The focus on the nature of the legislation stems from the Court’s concerns about its competence to evaluate parliamentary choices and the legitimacy of it doing so. The Court states in relation to the first concern that it is more capable of reviewing some types of legislation than others. It observes with reference to the second one that “[d]emocratic 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.”

The Court differentiates between cases in which the government acts as the “singular antagonist” and those in which it acts as a mediator among competing groups. In the first category, which typically involve disputes about criminal justice, the government acts on behalf of the community against the individual making the rights claim. The judiciary is well-equipped to understand and resolve them because it has the necessary expertise and experience to examine legislative choices whose purpose is the maintenance of “the authority and impartiality of the judicial system.” It has the ability to “assess with some certainty whether the ‘least drastic means’ for achieving the purpose had been chosen....” As a result of this high level of competence, the standard of review used for the minimal impairment component ought to be rigorous. In the second category, which typically involved matters of policy of a socio-economic nature, the

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90 Irwin Toy, 993.
91 Irwin Toy, 994.
92 Irwin Toy, 994.
93 Irwin Toy, 994.
government mediates among the competing claims and interests of disparate groups and individuals.⁹⁴ The judiciary is not well-equipped to understand them because it lacks the necessary expertise and experience to examine and assess legislative choices that are often based on incomplete information and/or involved the allocation of scarce resources.⁹⁵ As a result, the courts have to avoid “tak[ing] a restrictive approach to social science evidence and requir[ing] legislatures to choose the least ambitious means to protect vulnerable groups.”⁹⁶ They have to “allow a margin of appreciation to the government despite the fact that less intrusive measures … [might be] available.”⁹⁷ In deciding whether a law meets the requirements of the minimal impairment component of the Oakes case, the judiciary has to ask itself “whether the government had a reasonable basis, on the evidence tendered, for concluding that… [the right or freedom is] impaired as little as possible given the government’s pressing and substantial objective.”⁹⁸

Hogg fears that the ruling will ultimately lead to the failure of worthy Charter claims.⁹⁹ Elliot regards the use of categories as a drastic modification of the Oakes test.¹⁰⁰ David Beatty characterizes it as erosive.¹⁰¹ Jamie Cameron laments the demise of principled judicial analysis, arguing that the Charter’s structural integrity has been

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⁹⁴ *Irwin Toy*, 993, 994.
⁹⁵ *Irwin Toy*, 993-94.
⁹⁶ *Irwin Toy*, 999.
⁹⁷ *Irwin Toy*, 999.
⁹⁸ *Irwin Toy*, 994.
compromised. The ruling, in her view, represents an abdication of the Court’s responsibility to protect constitutionally-guaranteed rights and freedoms. The Court significantly modifies the *Oakes* test, but fails to provide a blueprint for future reference. Davidov believes that the ruling represents a shift in judicial focus from the alleged infringement of the right to the legislature itself. The courts have to examine laws “through the legislature’s eyes” in order to ascertain whether it acted in “good faith”. He fears that laws will be upheld as constitutional as long as the Crown can demonstrate that the legislature acted in such a fashion.

Hiebert argues that the Court has effectively removed the “most important and difficult aspects of the proportionality criteria in *Oakes*”. In doing so, it has failed to establish an objective standard against which to evaluate reasonableness. The removal signals, in her view, an:

increased awareness that the difficulty judges face when evaluating the reasonableness of policy is particularly acute when identifying whether less restrictive means provide a practical or workable alternative… [and] recognition that judges are not as well situated to evaluate a particular legislative scheme as are those working within the legislative realm, particularly in the social policy context….

Judicial reliance on categories also attracts the ire of scholars who argue that there is nothing in the Canadian Constitution in general or in the *Charter* more specifically

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which mandates a differentiation in the Court’s section one analysis based on the nature of the impugned law. Dassios and Prophet regard the distinction as “unsustainable”.108 Manfredi describes the exercise as “extremely unsatisfactory … [and] not sufficiently tangible to provide the foundation for a principled guide to judicial action.”109 Beatty characterizes the difference as “false and meaningless”, arguing that the formulation of public policy always requires governments to mediate among interest and rights when formulating public policy.110 Choudhry echoes this observation, explaining that criminal laws balance the “interests of the victims and the accused. Indeed, one could push this line of analysis even one step further, and argue that in many cases, the criminal law is a form of protective legislation which is designed to protect vulnerable groups, and, indeed, the Charter interests … of those groups.”111 Macklem and Terry believe that the use of categories is “not so much a retreat as an endeavour to develop a test that is properly responsive to the values and interests at stake in each case.”112 They, however, assert that it is “inherently indeterminate and, consequently, open to manipulation.”113 Lokan argues that the approach will become “a tool of advocacy, to be wielded when convenient…” and will be reduced to “a statement [by the court] that ‘it all depends’. “114 Davidov reviews the Court’s use of the approach and concludes that it is characterized by

112 Macklem and Terry, “Making the Justification fit the Breach,” 579.
113 Macklem and Terry, “Making the Justification Fit the Breach,” 593.
inconsistency and unpredictability. The Court, in his view, deviates from the approach as and when it serves its purposes.\footnote{115}

The \textit{Irwin Toy} ruling confirms that the Court has adopted a contextualized approach to decisions about the appropriate degree of deference. The use of categories might, on first appearances, suggest a step toward formalism, but such a suggestion would be erroneous. It does not, as formalism would, involve the courts in “deduc[ing] objective and apolitical legal answers… without resource to policy considerations.”\footnote{116} The Court’s reiteration of the need to establish minimal impairment in relation to reasonableness shows that its decisions are still informed by political factors and policy matters. Categorization is intended to serve as a means through which the types of laws, one of the features of context earlier identified in \textit{Edwards Books}, can be differentiated. It is a problematic approach because, as the Court itself discovers, cases are not easily and neatly classified based on the type of impugned legislation. The approach emphasizes one specific contextual variable at the expense of other equally important ones. The singular antagonist/mediator dichotomy at the heart of the approach permits the Court to short-circuit its analysis of the justification arguments. It can relax the standard of review in some cases, but not in others. And in doing so, the judiciary flattens the multidimensional nature of some constitutional disputes.

The problem with focusing on the type of legislation is ultimately acknowledged by individual members of the Supreme Court. The distinction is described in their opinions as “crude”,117 “difficult to draw…”118 and “not always easy to apply.”119 Justice L’Heureux- Dubé opines that “to accord deference merely because the issue is a ‘social’ one would be to issue a licence to discriminate in favour of the status quo.”120 The inherent problems of the approach are magnified by the erratic behaviour of the Court in subsequent cases. The self-imposed rule does not structure nor give coherence to its decisions about deference. Its record is one in which the antagonist/mediator dichotomy and criminal justice/socio-economic policy distinctions are often ignored without explanation.121 There continues, as a result, to be no way to anticipate when and how the Court will make its decision about deference.

**RJR--MacDonald: The Contextual Elements Approach**

The concept of deference is revisited by a divided Court in *RJR-MacDonald*. The case involves the alleged violation of freedom of expression by the complete ban on advertising of tobacco products. The government provides little evidence establishing the actual effect that advertising has on the behaviour of smokers. In order to compensate for

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118 *Thomson Newspapers*, paragraph 90.
119 *RJR-MacDonald*, paragraph 135.
121 Criminal justice cases in which deference is accorded include: *United States of America v. Controni*, [1989] 1 S.C.R. 1469; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Butler*, [1992] 1 S.C.R. 452. Among socio-economic cases in which the categorization is ignored are those examined in this dissertation. Five of the democratic process disputes occur after the ruling. They all involve an area of public policy other than criminal justice. The government, in each of them, mediates rights and interests rather than acting as a singular antagonist. If the approach that is laid out in *Irwin Toy* had been applied, the Court would have deferred to the choices of the legislative branch.
the paucity of proof, it relies on arguments based on common sense, inference and logic to meet the requirements of the *Oakes* test in general, and the minimal impairment component more particularly.

Justices McLachlin, La Forest and Iacobucci, who each write opinions, are in agreement that the Court has to pay attention to the factual and social context in which the government acted when applying the *Oakes* test.\(^{122}\) This is necessary in order to avoid a mechanical ‘formalistic’ application of the test. There is consensus that context affects the degree of deference that ought to be accorded to the legislative choice.\(^{123}\) There is also a shared belief that context, in turn, is somehow related to the standard of proof that the government has to meet in defending its choices as constitutional.\(^{124}\) Disagreements among the members of the bench revolve around the nature of the relationship among context, deference and evidence. They also disagree about the point in the section one analysis at which the decision about deference ought to be made. The majority addresses the matter during the minimal impairment analysis. The minority argues that the whole of the *Oakes* test is affected. Finally, the Justices take opposing views on the sufficiency and type of proof needed to establish that an infringement is reasonable on a balance of probabilities.

Writing for the majority, Justice McLachlin finds that the effect of according deference is limited to the minimal impairment component of the *Oakes* test. She accepts

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\(^{122}\) *RJR-MacDonald*, at paragraphs 62-63, 138, 189.

\(^{123}\) *RJR-MacDonald*, at paragraphs 68, 135, 189.

\(^{124}\) *RJR-MacDonald*, at paragraphs 64, 137, 182.
that there is a need to give the government some leeway in the formulation of public policy. The Court should uphold laws that fall within the range of reasonable alternatives.\textsuperscript{125} She, however, cautions that “care must be taken not to extend the notion of deference too far.”\textsuperscript{126} The judiciary has to guard against:

relieving the government of the burden which the \textit{Charter} places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justified…. To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.\textsuperscript{127}

Justice McLachlin holds that the government is obliged to meet the civil standard of proof at all stages of the \textit{Oakes} test. It cannot simply be taken at its word. It has to be able to justify its choices, demonstrating that they are on a balance of probabilities reasonable. She finds that the government has failed to provide any arguments to demonstrate that the right is impaired as little as possible. It has not provided any proof showing that the complete ban on advertising is more effective than less intrusive alternatives.\textsuperscript{128}

The consideration of context does not, in her view, “reduce … the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified.”\textsuperscript{129} If the government cannot provide evidence to substantiate each of the components, upholding the law as constitutional would amount to

\textsuperscript{125} RJR-MacDonald, at paragraph 160.
\textsuperscript{126} RJR-MacDonald, at paragraph 136.
\textsuperscript{127} RJR-MacDonald, paragraph 136, see also paragraph 138.
\textsuperscript{128} RJR-MacDonald, paragraphs 163-167.
\textsuperscript{129} RJR-MacDonald, paragraph 134; Justice Iacobucci, at paragraph 182, expresses agreement with Justice McLachlin’s concerns about the relaxed standard of review. He fears that such a standard dilutes section 1 too easily and undercut constitutional principles.
an abdication of responsibility on the part of the judiciary.\textsuperscript{130} Justice McLachlin observes that section one of the \textit{Charter} requires the Court to examine the actual legislative objective, the actual connection between means and end, the actual degree of impairment of the right, and the actual benefits of the infringement in relation to its actual disadvantages.\textsuperscript{131} The legislative branch does “not have the right to determine unilaterally the limits of its intrusion on rights and freedoms, guaranteed by the \textit{Charter}. The Constitution, as interpreted by the courts, determines those limits.”\textsuperscript{132} Justice McLachlin rejects Justice La Forest’s claim that the nature of the expression affects the stringency of the review.\textsuperscript{133} He, as will be discussed shortly, argues that the low value of commercial advertising make it easier for the government to demonstrate that the infringement is reasonable. Justice McLachlin cautions that the infringement of even the least important forms of speech should not be approached lightly.\textsuperscript{134}

The dissenting opinion, written by Justice La Forest, argues in favour in judicial deference. The Crown should, in his view, be permitted to rely on arguments rooted in common sense to demonstrate that the curtailment of free speech is justified. He emphasizes the issues of institutional competence and democratic legitimacy when defending his decision to accord deference. He observes that:

courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to

\textsuperscript{130} RJR-MacDonald, paragraph 136.
\textsuperscript{131} RJR-MacDonald, paragraph 133.
\textsuperscript{132} RJR-MacDonald, paragraph 168.
\textsuperscript{133} RJR-MacDonald, paragraph 169.
\textsuperscript{134} RJR-MacDonald, paragraph 170.
enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups.\textsuperscript{135}

Justice La Forest argues that the accordance of deference affects more than the question of minimal impairment. It has, in his view, bearing on the whole of the section one analysis.\textsuperscript{136} The decision about deference, as a result, has to be taken before the \textit{Oakes} test is applied. The evaluation of the government’s justification arguments can only be undertaken with a clear understanding of the context in which it acted.\textsuperscript{137} That understanding guides the courts in scrutinizing the government’s arguments with the appropriate degree of intensity. It also dictates the evidentiary standard that the government has to meet during the section one analysis.

Justice La Forest holds that context is established by looking at two elements. They are the nature of the legislation and the nature of the right. The two, which guide judicial reasoning rather than determine outcome,\textsuperscript{138} are “highly relevant to a proper application of the section 1 analysis.”\textsuperscript{139} The nature of the legislation, the first element, is ascertained by looking for a number of markers that included group vulnerability, conflicting social science evidence and the mediator/antagonist dichotomy. They allow

\textsuperscript{135} \textit{RJR-MacDonald}, paragraph 68.
\textsuperscript{136} Please see \textit{RJR-MacDonald}, paragraph 82. Justice La Forest declares, during his rational connection analysis, that it is “unnecessary... for the government to demonstrate a rational connection according to a civil standard of proof. Rather, it is sufficient for the government to demonstrate that it had a reasonable basis for believing such a rational connection exists.”\textsuperscript{137} \textit{RJR-MacDonald}, paragraph 64.
\textsuperscript{138} \textit{RJR-MacDonald}, paragraph 60.
\textsuperscript{139} \textit{RJR-MacDonald}, paragraph 64.
courts to determine their level of competence. In the case at bar, Justice La Forest concludes that the impugned law is:

the very type of legislation to which this Court has generally accorded a high degree of deference. In drafting this legislation, which is directed toward a laudable social goal and is designed to protect vulnerable groups, Parliament was required to compile and assess complex social science evidence and to mediate between competing social interests. Decisions such as these are properly assigned to our elected representatives, who have at their disposal the necessary resources to undertake them, and who are ultimately accountable to the electorate.

The second contextual element that has to be considered by the courts is the nature of the infringed right or freedom which determine the level of constitutional protection that is warranted. The meaning and purpose of a right or freedom change depending on the set of circumstances in which it is exercised. This flexibility in meaning and purpose oblige the judiciary to identify the specific aspect of the right or freedom at stake in the individual dispute. Justice La Forest holds that, in the case at bar, commercial advertising is less worthy of stringent protection than other forms of expression. It is not a core expression and is further removed from the underlying values of section 2(b) of the Charter which include “the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public

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140 RJR-MacDonald, paragraphs 65-70.
141 RJR-MacDonald, paragraph 70.
143 RJR-MacDonald, paragraph 75.
participation in the democratic process.” As a consequence, its infringement is more easily justifiable by the Crown.

Jamie Cameron argues that approach advocated by Justice La Forest undermines the integrity of section one and contorts the nature and substance of the Court’s reasoning. Lokan asserts that it likely will lead to the “rough-and-ready classifications” of cases by courts. Leon Trakman, William Cole-Hamilton and Sean Gatien claim that the approach lacks “adequate and principled constraints” and fails to structure judicial decision-making. They also worry that the evidentiary requirements of constitutional adjudication have been greatly diminished. Manfredi believes that it turns the analytical process on its head. The Court, in applying the approach, will “generate … evidence from the outcome [of the case] rather than vice versa.” Davidov maintains that “even if one can find, under the surface, some logic in the way deference was practically applied (which is extremely difficult and often impossible), the logic is not one that can be coherently defended.” He also disputes the claim made by Justice La Forest that the contextual elements only guides judicial reasoning. Davidov argues that the approach pre-determines the outcome “before all the facts and considerations are examined; by choosing a ‘flexible’ changing level of review in each case, the Court in fact determines,

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144 RJR-MacDonald, paragraph 72.
a-priori, the result of that case.”¹⁵⁰ The approach, in his view, erases the possibility of a ‘normal’ level of review or a ‘standard’ degree of deference from which deviations occur in exceptional circumstances. All cases become unique because the context in which the government acted is never the same.

*RJR-MacDonald* confirms that all of the Justices expressly recognize that there are cases in which a high degree of deference is appropriate. Judicial concerns about competence and democratic legitimacy have to inform how high or low the bar is set by the Court for the section one analysis. It also reveals disagreement among the Justices about the variables that should be used to identify the context in which the government acted. The majority expresses grave reservations about the employing the nature of the right to determine the appropriate standard of review and standard of proof to use during the *Oakes* test. This disagreement may explain, in part, why the Supreme Court remains fickle in subsequent cases.¹⁵¹ The Crown and rights claimants have no way of foreseeing whether the Court will base its decision about deference on the singular variable of *Irwin Toy*, the *RJR-MacDonald* twosome or some other basis.

**Thomson Newspapers: The Contextual Factors Approach**

The Court’s most recent attempt to formulate a process governing the accordance of deference occurs in *Thomson Newspaper*. The case, which will be more fully analyzed in

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¹⁵¹ The contextual elements approach of *RJR-MacDonald* is used most notably in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825. It is, however, ignored in many other cases.
the next chapter of this dissertation, involves a ban on the publication, broadcast and dissemination of new public opinion polls during the final three days of federal election campaigns. The purpose of the prohibition is to prevent surveys, whose validity cannot be sufficiently assessed, from adversely influencing voters and distorting election outcomes. The evidence about the actual effects that polls have on voter behaviour is, at the very least, inconclusive and, according to the majority opinion, “in a state of some controversy.” The government relies on arguments based on logic, inference and common sense to reinforce what little social science evidence it has. In a split decision, the Court strikes down the law as unconstitutional.

Justice Bastarache, writing for the majority, seeks to cut through the confusion surrounding deference and its consequences by setting out the contextual factors approach. He also attempts to refute claims that the subject matter of the impugned legislation alters the intensity of judicial scrutiny, declaring that “nothing … suggests that there is one category of cases in which a lower standard of justification under s.1 is applied and another category in which a higher standard is applied.” The review of legislation is, he argues, always stringent. What fluctuates is “the type of proof which a court can demand of the legislator to justify its measures under s. 1.” The evidentiary requirements of the Oakes test are “satisfied in different ways…” in cases in which a

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152 As a result of its detailed examination in chapter five of this dissertation, only the approach advocated by Justice Bastarache in the majority opinion is set out in this chapter.
153 Thomson Newspapers, paragraph 89.
154 Thomson Newspapers, paragraph 90.
155 Thomson Newspapers, paragraph 88.
156 Thomson Newspapers, paragraph 88.
high degree of deference is appropriate than in those in which it is not. In some disputes, the government can rely on arguments based rely on common sense, logic and reason to aid in the defence of the reasonableness of an infringement while in others, it could not.

The Crown’s justification arguments, Justice Bastarache explains, can only be properly understood by paying “close attention” to the context in which government acted. He argues that context is “the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right.” Context, as a consequence, has to be considered at “the outset [of the Oakes test] because it affects the entirety of the s. 1 analysis…” It determines the standard of review the court uses when reviewing the government’s justification arguments and sets the evidentiary requirements.

Justice Bastarache reformulates the contextual elements approach set out in RJR-MacDonald. He retains the nature of the right, re-branded as the nature of the activity suppressed by the legislation, as one of four contextual factors. The remaining three factors - the vulnerability of the group that the legislature seeks to protect.

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157 Thomson Newspapers, paragraph 87.
158 Thomson Newspapers, paragraph 87.
159 Thomson Newspapers, paragraph 88.
161 Thomson Newspapers, paragraph 90. Bastarache cites Irwin Toy, 995 and Ross, paragraph 88.
subjective fears and apprehension of harm of the group,¹⁶² and the difficulty of measuring scientifically a particular harm in question or the efficaciousness of a remedy¹⁶³ - are culled from the Supreme Court’s freedom of expression jurisprudence. Justice Bastarache, in essence, disassembles the nature of the legislation, the other RJR-MacDonald contextual element, into three separate factors. They had, in earlier cases in which the contextual elements approach had been applied, been used as markers to identify the nature of the legislation at issue. The four contextual factors do not represent “categories of standard of proof which the government must satisfy, but … rather … go to the question of whether there has been a demonstrable justification.”¹⁶⁴ Their purpose is to inform the Court’s decision about deference.

Choudhry, lamenting the fact that Thomson Newspapers has not garnered much academic attention, argues that Bastarache’s approach “could undermine entirely the idea that governments can only justifiably limit constitutional rights to respond to real problems.”¹⁶⁵ He believes that the majority opinion signals the emergence of “context as the new touchstone of section 1.”¹⁶⁶ He expresses concerns about the failure to provide “any clear criteria as to the … relationship and relative priority” of the contextual factors.¹⁶⁷ Davidov argues that the contextual factors approach lacks principle and leaves “the result of any given case wide open to the judgment and personal opinions of the

¹⁶⁴ Thomson Newspapers, paragraph 90.
¹⁶⁵ Choudhry, “So What’s the Real Legacy of Oakes?” 528.
¹⁶⁶ Choudhry, “So What’s the Real Legacy of Oakes?” 521. [emphasis in the original text]
¹⁶⁷ Choudhry, “So What’s the Real Legacy of Oakes?” 521.
specific judges.”¹⁶⁸ Rather than structuring and constraining the court’s discretionary powers, it unbridles them further. He believes that the approach represents an abandonment of any pretence of objective and principled judicial reasoning because each case is treated as unique.¹⁶⁹ Macklem and Terry are also critical of the ruling, describing the approach as flawed. It adds, in their view, so much flexibility to the Oakes test that it renders the Court’s reasoning unprincipled.¹⁷⁰ Cameron, by comparison, regards the ruling as “one of the Court’s most principled.”¹⁷¹ Her focus is, however, on the outcome of the case rather than the analytical process through which the decision to accord deference is taken. Weinrib asserts that the contextual factors approach will lead to greater and more frequent deference on the part of the Court at the expense of constitutionally-guaranteed rights and freedoms.¹⁷²

The Thomson Newspapers ruling is significant for a number of reasons. First, the contextual factors approach represents yet another attempt on the part of the Supreme Court to set out a coherent and structured analytical process for determining how much deference to accord. Second, its positioning at the beginning of the section one analysis indicates acceptance of Justice La Forest’s holding in RJR-MacDonald that deference has bearing on the standard of review used in all components of the Oakes test and the

¹⁷⁰ Macklem and Terry, “Making the Justification Fit the Breach,” 593.
evidentiary requirements of each. Third, the increase in the number of variables to be considered by the courts when establishing context suggests that the judicial analysis will be broadened in scope and substance in future cases. Fourth, the ruling does not, in the end, alleviate the confusion surrounding deference. Justice Bastarache identifies four factors in *Thomson Newspaper*, but, as will be discussed in chapter five, privileges one in making his decision. The set of factors proves problematic because their meaning, relevance and number are fluid. Fifth, the Court is inconsistent and unpredictable in its application of the contextual factors approach.

**Conclusion**

The Supreme Court has struggled to devise and apply a coherent and structured analytical process for determining what degree of deference is appropriate in individual cases. As a consequence, it remains difficult for the Crown and rights claimants to anticipate how the Court will approach the evidence and arguments used to defend an infringement under section one of the *Charter*. This chapter began by setting out *Oakes* Classic and emphasizing the rigor and stringency which characterized it. The diminishment in the standard of review and standard of proof was revealed with the presentation of *Oakes* 2.0. In its current form, the test has become divested of its rigor and stringency. This divestment stems from the Court’s efforts to graft deference on the section one analysis.

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173 *Thomson Newspapers*, paragraph 95.

174 The use of the approach in later cases reveals that the list of factors is neither constant nor closed. Please see: *R. v. Bryan*. The majority opinion holds at paragraph 30 that the factor of group vulnerability is largely irrelevant in establishing context; Please see: *R. v. Sharpe*, [2001] I S.C.R. 45, 2001 SCC 2. The majority opinion holds at paragraph 157 that other factors such as “the enhancement of other *Charter* values, which recognizes the right of Parliament to give effect to moral values, [and] the *Charter* rights of other members of society…” have to be considered when establishing context.
Its efforts were motivated by concerns about its competence to examine legislative decisions and the democratic legitimacy of it doing so. They resulted in the adoption of a contextualized approach to deference that has been reformulated again and again. None of these reformulations has resulted in greater structure and coherence to judicial decisions about deference.
Chapter 5

Judicial Deference and the Democratic Process

“For electoral arrangements of this kind, when Parliament prefers, the courts defer – except where the Constitution otherwise dictates.”  

The purpose of this chapter is to examine the substance of the democratic process rulings of the Supreme Court of Canada. Deference is not synonymous with legislation being upheld as constitutional. It cannot be measured by tallying up government victories and losses. Deference incorporates and reflects the self-expressed concerns of the Court about its competence to review some legislative decisions and the democratic legitimacy of it doing so. It reveals a level of self-awareness on the part of the Justices about the role of the judiciary in the design and oversight of democratic processes.

The concept serves as an analytical tool that the judiciary uses when applying the Oakes test. The Court’s decision about deference affects the standard of review that is used to assess the reasonableness of an infringement. It either intensifies or relaxes the standard proof that the Crown must meet, establishing “the nature and sufficiency of the evidence required.” The decision about deference is “essentially directed at determining to what extent the case before the court is a case where the evidence will rightly consist of ‘approximations and extrapolations’ as opposed to more traditional forms of social

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2 Bryan, paragraphs 10, 11 and 28.
science proof, and therefore to what extent arguments based on logic and reason will be accepted as a foundational part of the s. 1 case.”

The Supreme Court has heard nine cases involving democratic process laws that allegedly violate freedom of expression and/or the right to vote. It has overturned five of them. Four of the nine cases involved freedom of expression, guaranteed by section 2(b) of the Charter, as the primary rights claim. The resolution of all of the four revolved around the question of whether the infringement could be justified under section one of the Charter. In the remaining five cases, the primary claim was the alleged violation of the right to vote, which is protected by section 3 of the Charter. Two of these disputes were resolved at the infringement stage of the analysis, while the remaining three centred on the question of the reasonableness of the infringement.

This chapter argues that the Supreme Court of Canada has failed to develop and apply a standard approach to deference in cases involving the democratic process. While its decisions in individual cases have been contextualized, the specific elements and factors used to identify the context in which the government acted have not been constant. The lack of a standard approach has meant that the elements and factors have

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3 Bryan, paragraph 29.
fluctuated in number and relevance, making it difficult for the Crown and rights claimants to anticipate the standards of review and proof that the Court will employ during the application of the *Oakes* test. While it is not surprising that a standard approach has not developed given that these disputes involve two separate provisions of the *Charter*, it is troubling. Their shared features suggest the need for uniformity.

Their subject matter is our democracy and its processes and institutions. Democratic rights impose a positive duty on the government to design electoral and referendum processes. It must create structures within which these rights can be exercised. Six of the nine cases involve provisions of the *Canada Elections Act*. Six of the nine rely on the Final Report of the Royal Commission on Electoral Reform and Party Financing (the ‘Lortie Commission’) as the primary piece of evidence. Six of the nine laws, whose constitutionality is challenged, were examined by the Special Committee on Electoral Reform, the parliamentary body which was expressly established to examine the Lortie Commission Final Report and to propose changes to the *Canada Elections Act*. They all, when viewed together, share “common themes that are not apparent when the issues are relegated to separate doctrinal silos.”

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6 The Committee indicated that it intended to study the recommendations of the Lortie Commission in three stages, beginning with those that must be addressed before the next federal election which is expected to occur within 12 months. It ultimately proved short-lived and did not survive beyond the first round of amendments.

In the absence of a standard analytical process, the Court embraces two distinct approaches to the question of deference. The first, specific to disputes involving freedom of expression as the primary claim, inconsistently and unpredictably privileges either the nature of the right or the nature of the legislation when identifying the context in which the government acted. There is no way to anticipate the degree of deference that will be accorded. There is also no way to foresee whether the judiciary will adopt relaxed or stringent standards of review and proof when examining the reasonableness of an infringement. The second approach, used in cases in which the right to vote is the primary claim, privileges the nature of the right to the exclusion of all other considerations. The degree of deference is set low and, as a consequence, precludes the Crown from reinforcing incomplete social science evidence with arguments based on common sense, logic and reason.

**Freedom of Expression and Charter Adjudication**

Section 2(b) of the Charter guarantees freedom of expression. Expression is constitutionally protected because “it contributes to the public’s recognition of truth or to the growth of public knowledge; or because it is necessary to the operation of a democratic form of government; or because it is an important aspect of individual autonomy.” The cases examined in this dissertation involve political expression whose roots are in the second value underlying the inclusion of the freedom in a bill of rights. In *Libman*, the Supreme Court explains that:

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The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

Freedom of expression has been interpreted in a broad, almost boundless, fashion by the Supreme Court. It has held that almost any activity that “conveys or attempts to convey a meaning” is protected. The one exception is expression that is violent in form. The individual alleging that his freedom has been violated must only “demonstrate that his activity did in fact have expressive content…” in order to fall “within the protected sphere….” This protection is afforded “irrespective of the particular meaning or message sought to be conveyed.” The specific worth of the expression and its link to the three underlying values of free speech are not taken into consideration by the Court at this stage of Charter adjudication because “[c]ontent is irrelevant… [as] the result of high value being placed on freedom of expression in the abstract.” The Court does, however, draw a distinction during its section one analysis. 

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11 Irwin Toy, 970.
12 Irwin Toy, 969.
14 Keegstra, 760.
proximity to the underlying values of free speech and that which is at the periphery or margins of the guarantee.

As a result of the expansive interpretation of section 2(b) of the Charter, the success or failure of the government in defending legislation almost always occurs during the section one analysis. The alleged infringement of the freedom is usually conceded by the Crown. In those rare instances in which such a concession does not occur, the Court almost always finds that freedom of expression has been violated by the impugned legislation. It is for this reason that the Court’s decision about deference has particular significance in cases involving free speech. The persuasiveness of justification arguments is dependent upon the standard of review that the Court adopts when applying the Oakes test and the standard of proof that it employs to determine whether the infringement is probably more reasonable than unreasonable.

With the exception of Libman, the Supreme Court uses the contextual factors approach to deference in cases involving campaign speech. It requires the Court to examine four factors – the difficulties of measuring the harm, the vulnerability of the protected group, the subjective fears and apprehensions of harm and the nature of the right – in order to determine whether the context in which the government acted favours the accordance of deference and the adoption of an expansive understanding of the nature and sufficiency of evidence. Its repeated use suggests that the approach has become a

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15 Two notably exceptions to this propensity to concede the infringement are Haig and Libman. The Court finds in the first case that the federal Referendum Act does not violate freedom of expression by failing to ensure that all Canadians had the right to vote in the Charlottetown Accord referendum. It finds in the second that the provincial Referendum Act does violate the freedom by preventing third parties from spending more than $600.
permanent feature of disputes involving political expression. There is, as a consequence, an impetus for the government and rights claimants to craft their arguments about deference with reference to the four contextual factors. The difficulty they face, as will be made clear in the chapter, is that the Court has applied the approach in an inconsistent and unpredictable manner.

**Libman v. Attorney General (Quebec) (1997)**

The first case heard by the Supreme Court of Canada involves Quebec’s *Referendum Act*. Robert Libman argues that a legislative restriction on third party expenditures violates section 2(b) of the *Charter* and prevents him from participating fully in the political discourse. This case turns on the question of whether the National Assembly balanced the competing values of equality, freedom of expression, political participation and procedural fairness in a reasonable manner. It also turns on the question of whether political equality is to be conceptualized as formal or substantive in nature.

The Supreme Court, in a unanimous ruling, finds that the law violates freedom of expression.\(^{16}\) It holds that “[t]here is no doubt that the appellant is attempting to convey meaning through the form of communication at issue; he wishes to express his opinions on the referendum question independently of the national committees ….”\(^{17}\) The Court characterizes the legislative objectives as laudable.\(^{18}\) By containing the distorting influence that money has on political debate, the law safeguards the democratic nature of

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\(^{16}\) This is one of the few cases in which the Crown did not concede that the law violated freedom of expression.

\(^{17}\) *Libman*, paragraph 32.

\(^{18}\) *Libman*, paragraphs 42 and 56.
provincial referendums, protects procedural fairness and equality, ensures that voting is free and informed, and preserves public confidence in the process.\textsuperscript{19} Affluent members of society are prevented from using their wealth to dominate the political discourse and to bury the points of view of others.\textsuperscript{20} The Supreme Court determines that there is a rational connection between the objectives and legislative measures.\textsuperscript{21} It observes that referendums and elections are “fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that … [the] discourse is not dominated by those with access to greater financial resources.”\textsuperscript{22} This observation evidences the judicial embrace of a substantive understanding of equality.

The Court only addresses the question of deference at the minimal impairment stage of the \textit{Oakes} test, thereby localizing its effect. Its observation that “[r]eferendum campaigns fall within the realm of social science, which does not lend itself to precise proof”\textsuperscript{23} indicates an institutional predisposition towards restraint. In setting the level of deference, the Court examines two elements - the nature of the legislation and the nature of the right - in order to establish the context in which the government acted. The first element aids the judiciary in determining its level of competence and democratic legitimacy. It declares that the law required “the legislature … [to] reconcile competing

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\item \textsuperscript{19} \textit{Libman}, paragraphs 40-41.
\item \textsuperscript{20} \textit{Libman}, paragraph 41; The Court expressed acceptance, at paragraphs 44, 47 and 84, of the conclusion drawn by the Lortie Commission that money had a distorting effect on political campaigns.
\item \textsuperscript{21} \textit{Libman}, paragraph 57.
\item \textsuperscript{22}\textit{Libman}, paragraph 47; quoting from Lortie Commission’s \textit{Reforming Electoral Democracy}, 324.
\item \textsuperscript{23}\textit{Libman}, paragraph 39.
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interests in choosing one policy among several that might be acceptable, [and that] courts must accord great deference to the legislature’s choice because it is in the best position to make such a choice.”24 The Court adds that the National Assembly must “be accorded a certain deference to enable it to arbitrate between the democratic values of freedom of expression and referendum fairness ... [and] to try to strike a balance between absolute freedom of individual expression and equality among the different expressions for the benefit of all.”25 The second element aids the judiciary in identifying the specific interest at issue. The Court characterizes the expression as political in nature and, as a consequence, at the core of section 2(b) of the Charter. It is the sort of speech that “should normally benefit from a high degree of constitutional protection…. ”26

The Supreme Court finds itself being pulled in opposite directions by the two contextual elements when resolving the question of deference. The nature of the legislation favours the accordance of a greater degree while the nature of the right points to a lesser degree. The Court ultimately privileges the latter and employs a standard of justification during the minimal impairment component of the Oakes test that precludes it from accepting the government’s claim that the right is minimally impaired. If the nature of the legislation had been privileged, the standard of would have been relaxed. The Court finds that the statutory provisions are “so restrictive that they come close to being a

24 Libman, paragraph 59.
25 Libman, paragraph 61. It reiterates, at paragraph 62, that the choices of the elected representatives are worthy of “a considerable degree of deference.”
26 Libman, paragraph 60.
total ban”\textsuperscript{27} and that other less impairing alternatives exist\textsuperscript{28}. In particular, it expresses approval of the Lortie Commission recommendation that would allow third parties to spend a maximum of $1,000 during a federal election.

The first case about campaign speech heard by the Supreme Court ends with the law being nullified. This ruling is significant to the examination of deference for a number of reasons. It confirms that the decision about deference is contextual. The judiciary has to establish the context in which the government acted before it can determine the standard of review and standard of justification to employ. Establishing context involves the consideration of a specific set of elements which, in this case, involve the nature of the right and that of the legislation. The ruling suggests that context is only relevant to the minimal impairment component of the \textit{Oakes} test. The Court’s concerns about judicial competence and democratic legitimacy appear, as a consequence, to be limited in scope. The ruling also demonstrates that the question of deference is a matter of degrees rather than absolutes. It is not a question of whether or not deference is accorded. It is a question of how much deference is accorded.

Finally, the case is significant because of its discussion about political expression. It holds that safeguarding the integrity of “referendum campaigns … will \textit{necessarily} involve certain restrictions on freedom of expression”\textsuperscript{29} because the principle of fairness “presupposes that certain rights or freedoms can legitimately be restricted in the name of

\textsuperscript{27} \textit{Libman}, paragraph 75. It was even more forceful at the conclusion of the ruling when it described, at paragraph 82, the magnitude of the infringement as “a total ban.”

\textsuperscript{28} \textit{Libman}, paragraphs 77-81.

\textsuperscript{29} \textit{Libman}, paragraph 84. [emphasis in the original text]
a healthy electoral democracy.”\textsuperscript{30} These remarks signal that while all political expression is at the core of the section 2(b) guarantee, not all of it warrants the strictest of constitutional protection. The infringement of some can be more easily justified by the government. This holding, which had no bearing on the Court’s ruling in \textit{Libman}, notifies the Crown and rights claimants that expression of a political nature does not, in and of itself, preclude a lower degree of deference being accorded and more stringent standards of review and proof being adopted.


Section 322.1 of the \textit{Canada Elections Act} prohibits the broadcast, dissemination, or publication of public opinion poll results during the last three days of a federal election campaign. The Thomson Newspapers Company and other media organizations argue that the statutory provision violates section 2(b) of the \textit{Charter}. In a five-to-four ruling, the Court strikes down the law as unconstitutional. The disagreement between the Justices revolves around the question how much deference to accord to the decision taken by Parliament. They have to determine whether the federal government balanced the values of freedom of expression, freedom of the press, political equality, and procedural fairness in a reasonable fashion.

Before commencing his section one analysis, Justice Bastarache, writing for the majority, declares that context is “the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that

\textsuperscript{30} \textit{Libman}, paragraph 47.
objective is justified, and to weighing whether the means are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right.  

It has to be established prior to the application of the Oakes test because context “determines the type of proof which a court can demand of the legislator to justify its measures under s.1 [and]…affects the entirety of the s.1 analysis…”

Justice Bastarache, as discussed in chapter four, identifies four factors - the vulnerability of the group that the legislature seeks to protect, the subjective fears and apprehension of harm of the group, the difficulty of measuring scientifically a particular harm in question or the efficaciousness of a remedy and the nature of the activity suppressed by the legislation – to use in establishing the context in which the government acted. He argues that they influence “the degree of deference which a court should accord to the particular means chosen to implement a legislative purpose” and aid the judiciary “in assessing whether a limit has been demonstrably justified according to the civil standard of proof. They do not represent categories of standard of proof which the government must satisfy, but are rather factors which go to the question of whether there has been a demonstrable justification by the Crown.”

While the factors are laid out at the beginning of the section one analysis, Justice Bastarache delays any substantive discussion of them, with the exception of the nature of

31 Thomson Newspapers, paragraph 87.
32 Thomson Newspapers, paragraph 88.
33 Thomson Newspapers, paragraph 80.
34 Thomson Newspapers, paragraph 90.
the right, until he commences the minimal impairment analysis. This delay means that the impact of his decision about deference is restricted to the question of whether freedom of expression has been impaired as little as is reasonably possible. His discussion of the nature of the right, at the outset of the Oakes test, hints that deference, when it is ultimately accorded, will be minimal in nature. Justice Bastarache finds that “the nature of the expression … does not prima facie suggest that a deferential approach is appropriate….” This finding rests on the distinction that he draws between different forms of political speech. He argues that the third party advertising is likely to “significantly manipulate the political discourse to the advantage of those with greater financial resources…” and, as a consequence, is “inimical to free and informed voting.” Polls, by comparison, do not “systematically and consistently undermine … the position of some members of society” nor do they cause “systemic or structural damage” to the democratic process. There is also no evidence, he asserts, of systemic conflicts of interests among voters, pollsters, and the news media.

The law’s objectives are accepted by Justice Bastarache as pressing and substantial. The three-day publication ban prevents inaccurate polls, released late in an electoral campaign, from adversely affecting voters in their choices and preserves the integrity of the electoral process. It ensures that the information, upon which voters might

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35 Thomson Newspapers, paragraph 90.
36 Thomson Newspapers, paragraph 95.
37 Thomson Newspapers, paragraph 94.
38 Thomson Newspapers, paragraph 94.
39 Thomson Newspapers, paragraph 91.
40 Thomson Newspapers, paragraph 94.
41 Thomson Newspapers, paragraph 93.
rely, is accurate. He holds that the need for accuracy stems from the fact that polls are susceptible to methodological errors and misrepresentation and can be manipulative because of the close relationship between polling organizations and political parties. Justice Bastarache also finds, albeit with some reservation, that there is a rational connection between the legislative objective and measures. The publication ban “serves, to some degree, the purpose of preventing the use of inaccurate polls by voters.” It creates an opportunity for candidates and parties to examine polls and respond to them.

Justice Bastarache begins his minimal impairment analysis by characterizing the publication ban as “a very crude instrument....” Returning to the question of deference, he explains that “the type of proof required to discharge the burden of justification on the government may vary from case to case depending on the context.” The contextual factors, which relate “to the seriousness and likelihood of the harm, as well as the standard and methods of proof in a case”, have bearing on the degree of deference that the judiciary should accord to the legislative means.

Justice Bastarache concludes that, in this case, little deference should be accorded. This conclusion is informed by the four contextual factors. He, it will be recalled, declares at the outset of the Oakes test that the nature of the right does not favour a high degree of deference. Canadian voters cannot, in his view, be characterized

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42 Thomson Newspapers, paragraph 109.
43 Thomson Newspapers, paragraphs 104 and 106.
44 Thomson Newspapers, paragraph 110.
45 Thomson Newspapers, paragraph 111.
46 Thomson Newspapers, paragraph 111.
47 Thomson Newspapers, paragraph 111.
48 Thomson Newspapers, paragraphs 117, 118, 122.
as vulnerable and disadvantaged or in need of protection from pollsters and the news media because of a conflict of interests.⁴⁹ They are “rational actor[s] who can learn from experience and make independent judgments about the value of particular sources of electoral information.”⁵⁰ Justice Bastarache finds that voters do not have subjective fears and apprehensions about possible manipulation and oppression by pollsters and the news media.⁵¹

Justice Bastarache turns, finally, to the difficulties faced by the Crown in measuring the harm caused by faulty public opinion polls released late in electoral campaigns. He rejects its bid to overcome these difficulties by employing a reasoned apprehension of harm.⁵² The Supreme Court had, in earlier cases involving pornography and advertising, accepted as reasonable the presumption that there are causal relationships between the impugned expression and the alleged harm. This acceptance led it to employ “a deferential approach to determining whether the harm exists and in assessing the justification of the measures chosen to prevent those harms.”⁵³ Justice Bastrache holds that its use in this case is inappropriate for three reasons. The presumption of a causal link between the expression and the harm is “refuted by contrary logical reasoning.”⁵⁴ Canadians are able to assess the value of polls and are aware of the

⁴⁹ Thomson Newspapers, paragraphs 112 and 117.
⁵⁰ Thomson Newspapers, paragraph 112.
⁵¹ Thomson Newspapers, paragraph 114. Justice Bastarache makes this statement in spite of the fact that the Lortie Commission had found, as he himself acknowledges at paragraphs 104 and 106, that such a possibility exists because of the close relationship between some polling organizations and political parties.
⁵² Thomson Newspapers, paragraphs 113 and 122.
⁵³ Thomson Newspapers, paragraph 113.
⁵⁴ Thomson Newspapers, paragraph 113.
dangers of inaccuracy, leading Bastarache to question whether the alleged harm actually exists.\textsuperscript{55} There is, unlike cases involving third party advertising, no conflict of interest or systemic manipulation of the electorate voters by more powerful groups and individuals.\textsuperscript{56} Finally, public opinion polls, unlike pornography, do threaten the status of voters as equal members in society.\textsuperscript{57} The four contextual factors, as a consequence, all point to the need to adopt a low level of deference.

Justice Bastarache concludes his ruling by finding that the deleterious effects of the law far outweigh the few speculative salutary ones. The impact of the statutory provision is “profound” and amounts to “a complete ban on political information at a crucial time in the electoral process.... It is an interference with the flow of information pertaining to the most important democratic duty which most Canadians will undertake in their lives: their choice as to who will govern them.”\textsuperscript{58} In addition, the prohibition hampers the ability of the news media to fulfil its responsibility of informing the citizenry. It also conveys “the general message that the media can be constrained by the government not to publish factual information.”\textsuperscript{59}

Justice Gonthier, writing for the minority, accused the majority of mischaracterizing the proof that the Crown has provided and denying Parliament to right to make legislative choices as long as they are reasonable.\textsuperscript{60} He observes that democratic

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\begin{itemize}
\item 55 \textit{Thomson Newspapers}, paragraph 113.
\item 56 \textit{Thomson Newspapers}, paragraph 114.
\item 57 \textit{Thomson Newspapers}, paragraph 115.
\item 58 \textit{Thomson Newspapers}, paragraph 127.
\item 59 \textit{Thomson Newspapers}, paragraph 129.
\item 60 \textit{Thomson Newspapers}, paragraph 20.
\end{itemize}
process laws fall within the “within the realm of social science, which does not lend itself to precise evidence.” Justice Gonthier accepts that the objective of preventing the late publication of inaccurate polls is pressing and substantive. It enhances “the ability of voters to make informed choices and the promotion of political and social participation…. [It] is directed to the realisation of the important collective goal of safeguarding the integrity of the electoral process.” He also finds that the rational connection between the legislative measures and the objective is logical and self-evident.

The disagreement between the majority and the minority centres on the question of deference and the appropriate standards of review and proof to employ during the minimal impairment component of the Oakes test. Justice Gonthier holds that the government, in formulating the law, had to rely on social science evidence and mediate between competing rights and interests in order to strike a reasonable balance. Justice Gonthier gives consideration to the four contextual factors, and, in doing so, reveals the flexibility of each. He overcomes the evidentiary difficulties faced by the Crown by remarking that the Court should “take a restrictive approach to social science evidence” because it is charged with assessing the reasonableness of parliamentary decisions rather
He finds that the Canadian electorate can be characterized as vulnerable because of its inability to verify misinformation. The electorate possess subjective fears and apprehensions of harm. They are related to the adverse effects that polls, which are “subject to error, misrepresentation and open to manipulation”, have on elections. They also reflect the fact that an election is, by its very nature, “a battleground for diverging interests”, fostering an environment in which “intense conflicts” are “an inducement to manipulation.” Public opinion polls, while a form of political expression, are not worthy of stringent constitutional protection because they “mainly constitute information as to the effect of relevant political information on potential voters.” Justice Gonthier concludes that the publication ban is reasonable and the most effective measure for remedying the problem. He also finds the salutary effects of the blackout outweigh any deleterious ones by promoting truth and political discourse and affording voters the opportunity to become aware of misleading information that might adversely affect their right to vote.

The Thomson Newspapers case is significant for a number of reasons. It confirms, once again, that the judiciary employs a contextualized approach to the decision about deference. It must examine the set of circumstances in which the government acted in order to determine the appropriate degree of deference to accord. It also explicitly links
the degree of deference to the determination of whether the standards of review and proof employed during the minimal impairment component of the *Oakes* test should be stringent or relaxed. In addition, the majority opinion signals the reformulation of the contextualized approach to include four specific factors. The manner in which Justice Bastarache undertakes his analysis of the factors suggests, without explicitly stating, that they are not equally weighted and may not have the same degree of relevance in establishing context. He privileges freedom of expression in the case at bar by addressing it at the beginning of his section one analysis. Its placement suggests uncertainty surrounding the question of when the decision about deference should be taken and how broad the scope of its impact is. Finally, the majority opinion confirms that not all political expression is worthy of the strictest of constitutional protection.

While the contextual factors approach provides the appearance of a rigid framework within which the decision about deference is to be made, the minority opinion exposes some of its structural weaknesses. These weaknesses become more evident in the *Harper* and *Bryan* rulings. The minority expressly limits the question of deference to the minimal impairment component of the *Oakes* test, curtailing its relevance. It also reveals that the factors are fluid in nature and substance and that their meanings change. These changes permit different understandings of context, decisions about deference, and determinations about the appropriate standards of review and evidence.

The third freedom of political expression case involved, once again, the issue of spending limits on third party advertising during political campaigns. Stephen Harper, as president of the National Citizens’ Coalition, argues that the legislation violates section 2(b) of the Charter. The Supreme Court faces the task of determining whether Parliament has struck a reasonable balance between the competing values of freedom of expression, equality, meaningful participation, and procedural fairness. In a five-four split, it upholds the provision as constitutional.

Writing for the majority, Justice Bastarache, describes the impugned law as “Parliament’s response to this Court’s decision in *Libman*.”\(^74\) This description, placed near the beginning of the opinion, informs his analysis. He addresses all of the contextual factors at the outset of his section one analysis. Beginning with difficulties of measuring the harm caused by third party advertising,\(^75\) he holds that when “faced with inconclusive and competing social science evidence, relating the harm to the legislature’s measures, the Court may rely on a reasoned apprehension of harm.”\(^76\) The Crown had, in *Thomson Newspapers*, faced similar evidentiary problems, but had been barred from relying on such an apprehension.

The position assumed by Justice Bastarache in *Thomson Newspapers* with respect to the vulnerability of the Canadian electorate is abandoned. Voters, who once possessed

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\(^{74}\) *Harper*, paragraph 63.

\(^{75}\) *Harper*, paragraph 79.

\(^{76}\) *Harper*, paragraph 77.
of the necessary intelligence and maturity to assess the value and veracity of methodological information about public opinion polls, are dispossessed of these same attributes when confronted with third party advertising. This dispossession occurs because advertising of this sort seeks to “systematically manipulate voters” and, as a result, they are rendered vulnerable.77 Justice Bastarache makes this holding, as he himself acknowledges, in the absence of any proof of intent on the part of third parties to manipulate.78 The findings by the Lortie Commission that public opinion polls can be manipulative were sufficient grounds in *Thomson Newspapers* for him to accept that the electorate was vulnerable.79

Justice Bastarache shifts the object of the subjective fears and apprehensions from the electorate to the electoral system. He held in *Thomson Newspapers* that Canadian voters did not have fears about their general position in society or their vulnerability in relation to others. In *Harper*, the objects of their fears and apprehensions swing from their own position to that of the electoral process, its fairness and legitimacy.80

With respect to the final contextual factor, Justice Bastarache acknowledges that third party advertising “enriches the political discourse [,] … lies at the heart of the expression guaranteed by the *Charter* and warrants a high degree of constitutional protection.”81 This acknowledgment raises the possibility that the nature of the right has greater relevance than the other three factors in setting the context in which the

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77 *Harper*, paragraph 80.
78 *Harper*, paragraph 85.
79 *Thomson Newspapers*, paragraphs 58, 104 and 106.
80 *Harper*, paragraph 82.
81 *Harper*, paragraph 84.
government acted. Its privileging would lead to a low degree of deference being accorded. Justice Bastarache returns, however to the finding in *Libman* that while all political expression is at the core of the section 2(b) guarantee, not all political expression warrants the most stringent of constitutional protection. He compares the harm caused by third party advertising and public opinion polls, holding that the former poses a danger to the electoral process, its fairness and legitimacy because it can manipulate and oppress the electorate. It is this manipulation and oppression that obliges the judiciary to accord “some deference to the means chosen by Parliament ….”

82 He makes this holding in spite of the fact that the Lortie Commission found that public opinion polls could be manipulative.

His discussion of the contextual factors enables Justice Bastarache to conclude that:

> [g]iven the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference…. In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament.

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The high degree of deference results in the standard of proof used during the *Oakes* test, most notably during the minimal impairment component, being relaxed to permit the Crown to reinforce the limited social science evidence about political advertising with arguments rooted in common sense, logic and reason.

82 *Harper*, paragraph 85.
83 *Thomson Newspapers*, paragraph 58.
84 *Harper*, paragraph 87; please also see paragraph 88.
Justice Bastarache identifies the objectives of the legislative provision only after the contextualized approach has been applied, holding that they are pressing and substantial. The law protects electoral fairness and promotes “equality in political discourse … by restricting those who have access to significant financial resources.”\(^{85}\) It ensures that voters make meaningful and informed choices and fosters public confidence in the electoral process. Finally, it safeguards the integrity of the statutory regime that governs the expenditures of candidates and political parties.\(^{86}\) Justice Bastarache also finds that the legislative measures are rationally connected to the legislative ends, observing that any the paucity of evidence of this connection is remedied with logic and common sense.\(^{87}\)

At the start of his minimal impairment analysis, Justice Bastarache reiterates the need for a high degree of deference towards parliamentary decisions that balance political expression against competing democratic values.\(^{88}\) While conceding that there are less impairing alternatives, he finds that the law does not unduly affect freedom of expression and does not prevent information from being dispersed and received.\(^{89}\) He determines finally that the salutary effects of the statutory provisions outweigh their deleterious ones.\(^{90}\) The equality of citizens is enhanced because wealth is removed as an obstacle to participation in the political discourse. The spending limits ensure that the electoral

\(^{85}\) Harper, paragraph 91; please also see paragraph 101.
\(^{86}\) Harper, paragraphs 91 and 101-103.
\(^{87}\) Harper, paragraphs 104 and 106.
\(^{88}\) Harper, paragraph 111.
\(^{89}\) Harper, paragraph 118.
\(^{90}\) Harper, paragraph 120.
process is fair and accessible to all, thereby fostering public confidence. They also protect the regime that controls the expenditures of political parties and candidates.

The minority opinion, written by Chief Justice McLachlin and Justice Major, privileges the nature of the right when examining the context in which the government acted.91 They do not expressly employ nor make references to the contextual factors approach. They hold that type of expression which is violated by the law “warrants the greatest protection” because it is exercised in “the sphere of political discourse.”92 Without such protection, political debate and free and informed voting are not possible.93 Chief Justice McLachlin and Justice Major describe political speech as “the single most important and protected type of expression.”94 The right of the people to express their political views and hear those of others “underpins”95 and “forms the very foundation of democracy….”96 A democracy should, as a consequence, strive “to bring the views of all citizens into the political arena for consideration….”97

Little energy is expended by Chief Justice McLachlin and Justice Major on the first two components of the Oakes test, who hold that the resolution of the dispute revolves around the question of the nature of the impairment.98 They find that “common sense dictates that promoting electoral fairness is a pressing and substantial

91 Harper, paragraphs 2 and 10.
92 Harper, paragraph 2.
94 Harper, paragraph 11.
95 Harper, paragraph 41.
96 Harper, paragraph 12. Justice McLachlin and Major return to this point at paragraph 41 stating that it “underpins the very foundation of our democracy.”
97 Harper, paragraph 14.
98 Harper, paragraph 31.
objective...” They also hold that it is not irrational to accept that spending limits promote electoral fairness. Even in the absence of evidence, the causal link between the legislative means and ends can be established using reason and logic.

Beginning their minimal impairment analysis, Chief Justice McLachlin and Justice Major observe that the Crown has failed to show that an actual harm exists. This observation signals that they reject the Crown’s use of a reasoned apprehension of harm as way of overcoming the difficulties of measurement. This rejection also reveals that while they have given consideration to a contextual factor other than the nature of the right, they have deemed it to be a lesser importance.

Chief Justice McLachlin and Justice Major describe the harm as “wholly hypothetical” and regard the law as a “draconian” “overreaction to a non-existent problem.” There is, in their view, a “disproportion between the gravity of the problem – an apprehended possibility of harm – and the severity of the infringement on the right of political expression.” They also view the fact that the branches of government are engaged in an ongoing dialogue as having little bearing on the how to set the level of deference. Even the accordance of “a healthy measure of deference” cannot, in their

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99 Harper, paragraph 26. The Crown, they observe at paragraph 25, does not have to prove that the objective is pressing and substantial. It need only assert a worthy goal.

100 Harper, paragraph 30.

101 Harper, paragraph 29.

102 Harper, paragraph 34.

103 Harper, paragraph 34.

104 Harper, paragraph 39. The Chief Justice and Justice Major also described the measure as a “near total ban” at paragraph 36, and “a virtual ban” at paragraphs 35 and 39.

105 Harper, paragraph 34.

106 Harper, paragraph 32.

107 Harper, paragraph 37.
view, circumvent the fact that there is no evidence supporting the government’s claim that “the virtual ban is required to avoid the hypothetical evils of inequality, a misinformed public and loss of public confidence in the system.”108 The Crown has to demonstrate that limitations “ensure fairness and faith in the electoral process … [and to] permit citizens to conduct effective and persuasive communication.”109

The minority opinion concludes with the finding that the negative effects of the statutory provisions outweigh the positive ones. Chief Justice McLachlin and Justice Major state that “[g]iven the unproven and speculative nature of the danger….the possible benefits conferred by the law are illusory.”110 The law effectively denies individuals the right to convey and receive political information. As a consequence, it “actually causes more inequality, less civic engagement and greater disrespect….”111

The Harper ruling represents the second time that the Court makes use of the contextual factors approach to deference. Its use confirms that the decision about deference affects the whole of the section one analysis rather than being limited in relevance to the minimal impairment component. The application of the approach by the majority conveys the impression that the judiciary is bound by a rigid analytical process that allows it to set, in a coherent and structured fashion, the appropriate degree of deference and standards of review and standard of proof for use during the Oakes test.

110 Harper, paragraph 41.
111 Harper, paragraph 41.
When the opinion is examined more closely, doubts arise about much structure and coherence the approach actually brings to the decision about deference.

Voters, who had been experienced, intelligent, mature, and without fear when assessing the value and veracity of public opinion polls and their methodological information in Thomson Newspapers, become vulnerable and prey to manipulation when assailed by third party advertising in Harper. Voters, who had not feared for their own wellbeing in Thomson Newspapers, are fearful for that of their democracy in Harper. The political nature of the expression which had precluded a high degree of deference in Thomson Newspapers is less of an obstacle in Harper. Finally, the difficulties of measuring harm that could not be overcome by relying on a reasoned apprehension of harm in Thomson Newspapers can be remedied with its use in Harper. In addition, the application of the approach at the beginning of the section one analysis expands the scope of its relevance to include all components of the Crown’s justification argument.

The Harper ruling is significant because it exposes four rifts between the members of the bench. The first relates to the contextualized approach to deference. The majority, as already discussed, employs the contextual factors approach. The minority, which includes the Chief Justice, does not. Their decision is guided by their privileging of the nature of the right. It is not, however, the singular determinative factor. They allude to the difficulties of measuring harm with their rejection of reliance by the Crown on reasoned apprehension of harm. This demonstrates that they do consider more than one
factor when establishing context and determining the appropriate degree of deference to accord.

The second relates to the placement of the decision about deference and the scope of its impact. The majority, in applying the contextual factors approach at the outset of the Oakes test, signals that the decision affects the whole of the section one analysis. The minority, in delaying the decision, limits its effect to the question of minimal impairment. The third rift relates to the question of evidence. The Justices are divided on the question of what sort of proof the government must provide to establish the reasonableness of an infringement. The majority holds that, unlike in Thomson Newspapers, the Crown can overcome evidentiary difficulties by relying on a reasonable apprehension of harm. The minority expressly rejects the use of such proof as insufficient. The fourth rift relates to the fact that this is the second time that the Supreme Court has heard a constitutional dispute involving third party advertising. The ruling by the majority, while not expressly guided by the existence of a dialogue between the branches of government, is informed by it. It views the impugned law as the legislative response to the stance assumed by the Court in Libman. The minority, conversely, finds that the existence of a dialogue does not affect the degree of deference that the judiciary should grant when examining the Crown’s justification arguments.


Section 329 of the Canada Elections Act prohibited the public transmission of federal election results to regions of the country, in which voting had not ended. Paul Bryan, the
first individual ever charged with the offence, is convicted and fined $1,000. He appeals his conviction, arguing that the law infringes section 2(b) of the Charter. The Supreme Court is faced with the task of determining whether the values of freedom of expression, informational and political equality, political participation and procedural fairness have been balanced in a reasonable manner. In a five-four split, the Supreme Court of Canada upholds the statutory provision as constitutional.

The lead opinion, written by Justice Bastarache, refers once again to the contextual factors approach to deference.\(^\text{112}\) He declares, before establishing context, that courts should adopt “a natural attitude of deference” to parliamentary choices about the democratic process.\(^\text{113}\) Justice Bastarache examines the four contextual factors only after having identified the legislative objectives to include the protection of informational parity among voters and the prevention of the perception of electoral unfairness that stems from unequal access to information as the objectives of the law.\(^\text{114}\) He explains that the factors have to “be understood as being about the provision.”\(^\text{115}\) In Thomson Newspapers and Harper, the identification of legislative goals occurred only after the decision about deference had been taken.

Embracing the tact pursued in Harper, Justice Bastarache accepts that the Crown can rely on a reasonable apprehension of harm because of the difficulties involving in

\(^{112}\) The use of the approach is applauded by Justices Fish, Deschamps, Charron and Rothstein in two concurring opinions. Please see paragraphs 60, 62, 67, 68, 70, 74, 82 and 83.

\(^{113}\) Bryan, paragraph 9.

\(^{114}\) Bryan, paragraphs 12, 13 and 14.

\(^{115}\) Bryan, paragraph 11. [emphasis in the original text]
measuring the harm and the effectiveness of the legislative remedy. He holds that “it may not be appropriate to require proof according to the usual civil requirements” in cases in which the government’s objective is “largely a matter of the values and principles essential to a free and democratic society.” He returns to his Thomson Newspapers characterization of the Canadian electorate as mature and intelligent. They cannot be viewed as vulnerable because election results do “not seek to influence voters as did the advertising in Harper.” The subjective fears and apprehensions of harm of Canadian voters are, as they were in Harper, about the fairness of the electoral system rather than their own wellbeing. The nature of the expression is described of “fundamental importance to a free and democratic society.” As in both Libman and Harper, however, it does not mandate stringent constitutional protection. Justice Bastarache holds that:

to suggest that election results are an important political form of expression in the hands of those still to vote is to prejudge the entire s. 1 inquiry. Whether the s. 2(b) interest in receiving or disseminating political information, or both, is at the centre of this case, it is not at all clear that that interest can supersede the value of the countervailing principle that no voter should have general access to information about the results of the election unavailable to others.

The decision to accord a high degree of deference ultimately rests on two of the four contextual factors. Justice Bastarache discounts the relevance the nature of the

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116 Bryan, paragraph 16.  
117 Bryan, paragraph 22.  
118 Bryan, paragraph 24.  
119 Bryan, paragraph 24.  
120 Bryan, paragraph 25.  
121 Bryan, paragraph 26.  
122 Bryan, paragraph 27. [emphasis in the original text]
expression to the decision, remarking that election results have less value before the polls close than after they do and, as a consequence, warrant less stringent constitutional protection.\textsuperscript{123} He sets aside the issue of vulnerability as unimportant, without explaining why. His decision is based on public fears about the fairness of the electoral system and the difficulties surrounding the measurement of harm.

Justice Bastarache accepts that the law’s objectives are pressing and substantive. Information equality is “a fundamental principle of electoral democracy … a centrally important element of the concept of electoral fairness”\textsuperscript{124} and essential for the maintenance of public confidence in the electoral system.\textsuperscript{125} He also finds that the rational connection between the legislative means and ends is established by coupling the available evidence with the logic and reason.\textsuperscript{126}

Context, Justice Bastarache holds, has its greatest significance during the minimal impairment component of the \textit{Oakes} test.\textsuperscript{127} It helps to determine whether a specific case is one in which “logic and reason … constitute appropriate supplements to what evidence there is.”\textsuperscript{128} He characterizes the Final Report of the Lortie Commission as the most important piece of evidence available, asserting that it clearly establishes that informational imbalances are viewed by Canadians as a problem to the integrity of our

\begin{footnotes}
\begin{enumerate}
\item \textit{Bryan}, paragraph 30.
\item \textit{Bryan}, paragraph 35.
\item \textit{Bryan}, paragraphs 36 and 37; He observes, at paragraph 32, that the first step of “the section 1 analysis is not an evidentiary burden” and adds, at paragraph 34, that “some objectives … can be simply accepted by the Court as \textit{always} pressing and substantial in any society that purports to operate in accordance with the tenets of a free and democratic society.”
\item \textit{Bryan}, paragraph 41.
\item \textit{Bryan}, paragraph 42.
\item \textit{Bryan}, paragraph 43.
\end{enumerate}
\end{footnotes}
democratic process. It also demonstrates that public confidence in the electoral system depends on a shared belief that the principles of procedural fairness and information equality are being upheld.\textsuperscript{129}

Justice Bastarache completes his one analysis by finding that the salutary effects of the law outweigh its deleterious ones. The law reflects and represents a respect for the principle of informational equality. It sustains public confidence, prevents voters from being unduly swayed in their choices, and protects the fairness of the electoral system.\textsuperscript{130} There are, in his view, no negative consequences to the law.\textsuperscript{131}

Justice Fish, in a concurring opinion, voices support for the approach adopted by Justice Bastarache. He cautions against the dangers of an insufficiently deferential judiciary usurping the legislative role in the design and oversight of democratic processes and intruding on the legislative prerogative.\textsuperscript{132} Elected representatives, he asserts, gave due consideration to the publication ban and chose to retain it as part of electoral system.\textsuperscript{133} In reviewing statutory provisions, it must be borne in mind that “when Parliament prefers, the courts defer … [because their] role is simply to decide whether Parliament’s impugned preference passes constitutional muster.”\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{129} Bryan, paragraph 44.
\item \textsuperscript{130} Bryan, paragraphs 49-50.
\item \textsuperscript{131} Bryan, paragraph 51.
\item \textsuperscript{132} Bryan, paragraphs 58-59.
\item \textsuperscript{133} Bryan, paragraph 71.
\item \textsuperscript{134} Bryan, paragraph 59.
\end{itemize}
The minority opinion, written by Justice Abella for Chief Justice McLachlin and Justices Binnie and LeBel, emphasizes the political nature of the expression.\textsuperscript{135} The privileging of this contextual factor ultimately precludes according a high degree of deference. Justice Abella accepts that the protection of information equality and the promotion of public confidence in the fairness and integrity of the electoral system are pressing and substantial objectives.\textsuperscript{136} She also finds that there is “little dispute” that the legislative means are rationally connected to the ends.\textsuperscript{137} She finds it difficult to accept that the impairment is minimal in nature, but declares further consideration is unnecessary because the law fails the final stage of the \textit{Oakes} test.\textsuperscript{138}

Justice Abella holds that the Crown has not demonstrated that the salutary effects of the ban are proportional to its deleterious ones. In her view, the latter “far outweigh” the former.\textsuperscript{139} She holds that the communication and receipt of information about election results is “a core democratic right” whose infringement can only be justified with clear and convincing proof.\textsuperscript{140} She describes the Crown’s evidence as “speculative, inconclusive and largely unsubstantiated”, “unpersuasive”, “hypothetical”, “weak” and lacking in “reasoned or logical basis for inferring its validity.”\textsuperscript{141} The alleged harm caused by the information imbalance rests on “a combination of speculation and theory,

\textsuperscript{135} Bryan, paragraph 99.
\textsuperscript{136} Bryan, paragraph 104.
\textsuperscript{137} Bryan, paragraph 105.
\textsuperscript{138} Bryan, paragraph 106.
\textsuperscript{139} Bryan, paragraphs 106-107.
\textsuperscript{140} Bryan, paragraph 110.
\textsuperscript{141} Bryan, paragraphs 107, 110, 131, 133 and 125.
unsubstantiated by cogent evidence.” She concludes that “the government’s justification fails the proportionality branch since there can be nothing proportional between the benefits of a limitation and its harmful effects if there is no demonstrated benefit to the limitation.”

The Bryan ruling is the third democratic process dispute in which the majority opinion refers to the contextual factors approach. Its presence confirms that it provides the framework within which arguments about deference must be constructed by the Crown and rights claimants. They must address the four factors in order to establish the context in which the government acted. The placement of the Court’s decision about deference is taken at the outset of the Oakes test, indicating that it affects all of stages of the justification analysis. The privileging of some factors and the setting aside of others reaffirms that they are not all equal in weight.

The presence of the contextual factors approach suggests that judicial decision about deference is structured and coherent. The fact that the decision about deference is taken prior to Justice Bastarache applying the approach raises questions about how much structure and coherence it actually provides. He establishes the context in which the government acted only after having already decided to employ a high degree of deference. The decision about deference is based on the nature of the legislation. It can be regarded as having been prioritized over the other three contextual factors. The concern, however, is that this ruling raises the possibility that the judiciary, in future cases

142 Bryan, paragraph 126.
143 Bryan, paragraphs 131 and 132.
involving the democratic process, will begin its section one analysis with a presumption of deference towards parliamentary choices. Such a presumption would seem to preclude the use of stringent standards of review and proof by the judiciary during its section one analysis.

The majority opinion also reveals the expansive nature of the discretionary power of the courts to set the standard of proof used during application of the *Oakes* test. Justice Bastarache expressly declares that, in certain circumstances, the Crown does not have to meet the usual civil requirements of evidence in order to justify an infringement. The adoption of a very high degree of deference can, in other words, relieve the government of its obligation to demonstrate that the infringement of a constitutionally-guaranteed right or freedom is reasonable on a balance of probabilities.

The *Bryan* ruling confirms, once again, the presence of a group of Justices, including the Chief Justice, whose decision about deference is not expressly tied to the contextual factors approach. They privilege the nature of the right, pushing other possibly relevant factors to one side. The narrowness of their exploration of context raises questions about how fully they understand it. The privileging of the right also means that the evidentiary burden borne by the Crown is onerous. The minority, as in *Harper*, rejects government attempts to use a reasoned apprehension of harm to overcome a paucity of proof. Justice Abella argues that however high the appropriate degree of deference, judicial scrutiny of the constitutionality of government decisions is never precluded.
Freedom of Expression and the Contextualized Approach to Deference

The adoption of the contextual factors approach in three of the four rulings appears to offer structure and coherence to the Court’s decision about deference. It sets out a framework within which the judiciary establishes the context in which the government acted. Context determines the degree of deference to accord to its choices. Deference, in turn, establishes the appropriate standards of review and proof to employ during the section one analysis. When the four cases involving political expression are examined, the structure and coherence is found to be wanting. The placement of the approach in judicial opinion is flexible, resulting in the scope of its effect being expanded or contracted. In some cases, all of the section one analysis is affected. In others, only the minimal impairment component is affected. The meanings and relevance of the individual factors lack constancy. The relationship among the factors as well as their relative prioritizing is left unexplored and unexplained by the Supreme Court. As a consequence, the Crown and rights claimants have no way to anticipate how deferential the judiciary will be in any given case.

The inconsistent manner in which the decision about deference has been taken reflects the Supreme Court’s own disquiet and uncertainty about its role in the design and oversight of democratic processes. While decisions about elections and referendums affect our constitutional rights and freedoms, they are also highly normative in nature. They rest upon choices involving incomplete social science evidence, democratic theory, and pragmatic considerations. There is consensus that a democracy cannot exist without
free speech, but there is disagreement about how it should be balanced against other
democratic values such as fairness, political participation, and equality, be it substantive
or formal. The judicial opinions reveal that the Justices have self-imposed preconceptions
of where the judiciary fits within the government framework and what its relationships
with the executive and legislative branches ought to be. They define the responsibilities
of the judiciary in relation to those of the other branches.

The Right to Vote and Charter Adjudication

The right to vote is guaranteed by section three of the Charter which states that “[e]very
citizen has the right to vote in an election of members of the House of Commons or of a
legislative assembly....” The wording suggests that nothing more than the act of the
individual citizen “enter[ing] a voting booth once every four or five years and mark[ing]
an ‘X’ on a piece of paper” is guaranteed and protected. The Supreme Court of Canada
has chosen, however, not to adopt a narrow understanding of either the right itself or the
purpose for which it was constitutionally entrenched. In its first ruling on section three of
the Charter, the Court holds that its purpose is ‘effective representation’. In a
succession of cases, it fleshes out the meaning of the right to vote to include rights to: fair
and effective representation; play a meaningful role; informed decision-making;

146 Saskatchewan Reference, 198.
148 Thomson Newspapers, paragraph 82.
meaningful participation;\textsuperscript{149} effective participation;\textsuperscript{150} and informed voting.\textsuperscript{151} The Court also holds that the right has an informational component that is separate and distinct from the constitutionally-guaranteed freedom of expression.\textsuperscript{152}

An expansive understanding of the right to vote on the part of the Supreme Court is not, in and of itself, noteworthy given its long-stated approach to defining rights and freedoms. Justice Dickson in \textit{R. v. Big M Drug Mart Ltd.} holds that “[t]he interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the \textit{Charter}'s protection.”\textsuperscript{153} The content of rights and freedoms should be determined “in a broad and purposive way, having regard to historical and social context”\textsuperscript{154} in order “to ensure that duly enacted

\begin{footnotes}
\footnote{\textit{Haig}, 1031.}
\footnote{\textit{Figueroa}, paragraph 71.}
\footnote{\textit{Thomson Newspapers}, paragraphs 19 and 82. Please see: Jamie Cameron in “Governance and anarchy in the s. 2(b) jurisprudence: A comment on \textit{Vancouver Sun} and \textit{Harper v. Canada},” \textit{National Journal of Constitutional Law} 17 (2005), 71. She alludes to a possible conflict between freedom of expression and the informational component of the right to vote, but does not explore it in any detail. The identification of such a component could result in the development of two streams of jurisprudence involving electoral information. The scope and nature of the right to information contained in the right to vote differs from that contained in freedom of expression. The Court has interpreted section 2(b) of the \textit{Charter} in such a manner that protects almost all forms of expression. The opinions of Justices Bastarache and Gonthier in \textit{Thomson Newspapers} holds that the right contained in section three is not as expansive in nature and scope. Individuals, making parallel claims, and the Crown, in defending the constitutionality of statutory provisions, may be obliged to make separate arguments for each \textit{Charter} challenge and offer separate section one analyses of the reasonableness and justification of infringements. They may also be precluded from piggybacking the weaker or less important of the two claims on the stronger or primary one. Finally, the location of a right to information could preclude Parliament or the provincial legislative assemblies from ever using section 33 of the \textit{Charter} to fully shield electoral laws from constitutional challenge.}
\footnote{\textit{R. v. Big M Drug Mart Ltd.}, [1985] 1 S.C.R. 295, 344.}
\footnote{\textit{Saskatchewan Reference}, 179.}
\end{footnotes}
legislation is in harmony with the purposes of the Charter."155 What is noteworthy is the effect that such an expansive interpretation has on adjudication.

The Supreme Court has, with the exception of the second Sauvé case,156 devoted very little energy to substantive discussion about deference in cases involving the right to vote. This absence is a consequence of its engagement with the meaning, scope and purpose of the right and the construction of a guardianship over section 3 of the Charter. This guardianship explains why the Court, in the three cases that turn on the question of the reasonableness of the infringement, never accords a high degree of deference to legislative decisions. It has not been accorded because the nature of the right has been privileged over other factors, including the nature of the legislation or the three contextual factors that make up its disassembled form, when identifying the context in which the government acted.

Reference re Provincial Electoral Boundaries (Saskatchewan) (1991)

The Supreme Court of Canada first examines the right to vote in an appeal by the provincial government of a reference opinion by the Saskatchewan Court of Appeal. The lower court ruled that the electoral boundaries map, which permits deviations in the population densities of ridings, was unconstitutional. The government, in mandating deviations, had sought to balance the values of voting, equality, political participation, and quality of representation. The Supreme Court of Canada, in a six-three decision, rules that the legislation does not infringe the right to vote.

155 Figueroa, paragraph 20.
Writing for the majority, Justice McLachlin holds that the purpose of section three of the *Charter* is “‘effective representation’. Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one’s grievances and concerns to the attention of one’s government representative.”\(^{157}\) She expressly rejects the use of the principle of one-person-one-vote, which is used in American jurisprudence, to define the right to vote because it would bar consideration of any factors other than equality.\(^{158}\) Justice McLachlin holds that the interpretation of the right to vote has to reflect our understandings, traditions and history. Canadians have always “tolerate[d] deviations from voter parity in the interests of better representation … [because] [p]ragmatism, rather than conformity to philosophical ideal, has been its watchword.”\(^{159}\) She holds that the principle of equality must be balanced against other factors including geography, community history, community interests, minority representation, communications difficulties, the absence of public services and resources in rural ridings, recognition of cultural and group identity, and respect for the diversity of the cultural mosaic.\(^{160}\) Deviations that "contribute to better government of the populace as a whole”\(^{161}\) do not infringe section three of the *Charter*. In the absence of an infringement, there is no need to apply the *Oakes* test.

\(^{157}\) *Saskatchewan Reference*, 183.

\(^{158}\) *Saskatchewan Reference*, 185.

\(^{159}\) *Saskatchewan Reference*, 186.

\(^{160}\) *Saskatchewan Reference*, 181, 184, 195.

Justice Cory, writing for Chief Justice Lamer and Justice L’Heureux-Dubé, finds that section three has been violated. The government, in his view, failed to balance equality with other relevant factors in a reasonable manner that ensured effective representation.\(^{162}\) This failure stemmed from the fact that insufficient weight was given to the principle of equality.\(^{163}\)

In his brief section one analysis, Justice Cory holds that decisions about electoral boundaries must begin with “the initial premise of equality.”\(^{164}\) He argues that “[t]he fundamental importance of the right to vote demands a reasonably strict surveillance of legislative provisions pertaining to elections.”\(^{165}\) He expresses doubts about the legislative objective, observing that the Crown has failed to provide a reasonable explanation for the changes in permissible deviations in population density.\(^{166}\) He holds that the right is not minimally impaired. Earlier legislation, which permitted deviations of 15 per cent, established that effective representation was possible with less inequality in voting power. He concludes that the Crown has not provided any “sound basis … to justify legislation which clearly has the effect of diminishing the rights … and reducing the representation … in the legislature”\(^{167}\) of voters who live in ridings with large population densities.

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\(^{162}\) *Saskatchewan Reference*, 170.

\(^{163}\) *Saskatchewan Reference*, 172.

\(^{164}\) *Saskatchewan Reference*, 172.

\(^{165}\) *Saskatchewan Reference*, 172.

\(^{166}\) *Saskatchewan Reference*, 171.

\(^{167}\) *Saskatchewan Reference*, 173.
The first right to vote case heard by the Supreme Court is resolved at the infringement stage. The majority, as a consequence, does not undertake a section one analysis. This absence does not, however, negate the fact that Reference Saskatchewan offers insight into the Court’s approach, in subsequent disputes, to the question of deference. Justice Cory, in the dissenting opinion, privileges the nature of the right when determining the standards of review and proof to employ when applying the Oakes test. The importance of the right to vote to democracy requires, he asserts, stringent scrutiny of legislative decisions. Such stringency suggests that according a high degree of deference would be inappropriate.

**Haig v. Canada (Chief Electoral Officer) (1993)**

The second case, in which it was alleged that the right to vote had been violated, revolves around the question of whether the scope of section three of the Charter is limited to elections. Graham Haig, who cannot vote because he lives in Quebec, argues that the federal Referendum Act violates the provision. The Supreme Court of Canada, in a seven-two decision, upholds the law as constitutional. It finds that there is no violation of constitutionally-protected right to vote.

Justice L’Heureux-Dubé, writing for the majority, finds that section three of the Charter does not include the right to vote in a referendum. Its purpose is “clear and unambiguous”\(^{168}\) and its wording is “quite narrow, guaranteeing only the right to vote in

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\(^{168}\) Haig, 1033.
elections of representatives of the federal and the provincial legislative assemblies.”

Having found that no infringement occurred, there is no need to apply the Oakes test.

Even in the absence of a section one analysis, the case provides insight into the Court’s approach to deference in subsequent disputes. Justice Cory, in a concurring opinion, reinforces the foundation for the nature of the right to be privileged when establishing the context in which the government acted and in determining the appropriate degree of deference to accord to legislative choices. Voting, he declares, is “the mark of distinction of citizens of a democracy. It was a proud badge of freedom…. Every reasonable effort should be made to enfranchise citizens.” The responsibility for ensuring that this enfranchisement occurs rests with the judiciary.

Justice Cory endows the courts with the institutional competence and the democratic pedigree necessary to examine and assess legislative decisions that affect the right to vote. This competence and pedigree both predate the constitutional entrenchment of the Charter. Judicial expertise has been garnered from a century’s worth of interpreting electoral statutes. Legitimacy is rooted in democracy itself. The courts, Justice Cory holds, are compelled to act when citizens were stripped of their democratic rights by the government. The endowment of competence and legitimacy permits the Supreme Court, in subsequent cases, to claim a guardianship of the right to vote. This

169 Haig, 1031.
170 Haig, 1067; Justice Iacobucci, in his dissenting opinion, finds that the law violates freedom of expression, the secondary rights claim. He does not, however, undertake a section one analysis because the Crown, in his view, has “not introduce any evidence…."
171 Haig, 1048.
172 Haig, 1049.
173 Haig, 1048-1050.
guardianship serves to preclude the accordance of a high degree of deference to legislative decisions.

*SauvÉ v. Canada (Attorney General) and SauvÉ v. Canada (Chief Electoral Officer)* (2002)

The two SauvÉ cases, heard by the Supreme Court of Canada in 1993 and 2002, involve the issue of prisoner voting. Richard Sauvé, convicted of first degree murder and serving a life sentence in a federal penitentiary, argues that both the original and amended provision of the Canada Elections Act infringes section three of the Charter. The Court, in reviewing the constitutionality of the disenfranchisement, must evaluate the balance that the government has struck among the values of voting, political equality, civic responsibility, the rule of law, and the fairness and integrity of the democratic process.

In the first case, the Supreme Court holds that the right to vote has been violated and cannot be saved by section one. The extremely brief opinion provides little insight into the basis upon which the ruling is made. Justice Iacobucci, writing for the Court, merely states that the original provision is overly broad and, as a consequence, fails the *Oakes* test, in particular the minimal impairment stage.\(^{174}\) His statement conveys the impression that by amending the law to limit disenfranchisement to some rather than all prisoners, the government will be able to justify the infringement.

In the second case, the Supreme Court, in a five-to-four ruling, strikes down the partial ban on prisoner voting. Chief Justice McLachlin, writing for the majority, describes the right to vote as having “special importance” because of the immunity of

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section three of the Charter to legislative override. It is “core democratic right” and a “cornerstone of democracy” which does not “fall within a ‘range of acceptable alternatives’ among which Parliament may pick and choose at its discretion.” As a consequence, laws that infringe voting “require not deference, but careful examination”. The Chief Justice recognizes that the “legislatures retain to power to limit the modalities of [the right’s] exercise”, but reiterates that decisions must be justifiable. She expressly cautions that while “common sense and inferential reasoning may supplement the evidence … one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstrated required by s. 1.”

The need for stringency is also defended by the assertion that the courts, “unaffected by the shifting winds of public opinion and electoral interests, [must] … safeguard the right to vote”. This responsibility arises because they are constitutionally charged “with upholding and maintaining an inclusive, participatory framework… [W]hen legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the Charter … courts must be vigilant in fulfilling their

175 Sauvé II, paragraph 11; The importance of the right is demonstrated, Chief Justice McLachlin argues at paragraphs 11, 14 and 36, by the broad unqualified wording of section three and its immunity from section 33 of the Charter. The government can never use a notwithstanding clause to impose unreasonable restrictions on the right to vote.
176 Sauvé II, paragraph 13.
177 Sauvé II, paragraph 14.
178 Sauvé II, paragraphs 13, 14.
179 Sauvé II paragraph 9.
180 Sauvé II paragraph 62.
181 Sauvé II, paragraph 18.
182 Sauvé II, paragraph 13.
constitutional duty to protect the integrity of the system." The Chief Justice states that
the need for stringency is not diminished by the fact that this is the second time that the
Court has examined the issue of prisoner voting. She argues that “[t]he healthy and
important promotion of a dialogue between the legislature and the courts should not be
debased to a rule of ‘if at first you don’t succeed, try, try again’.”

Chief Justice McLachlin identifies the two objectives of the legislation as the
enhancement of civic responsibility and respect for the law, and the imposition of
additional punishment on penitentiary inmates. Describing them as “rhetorical”,
“vague and symbolic”, she declares that “prudence suggests we proceed to the
proportionality analysis rather than dismissing the government’s objectives outright.”

Turning to the question of rational connection, the Chief Justice holds that none
exists. The Crown identifies three links connecting the legislative measures to the objectives
being pursued. It argues that denying inmates the right to vote serves an educative purpose. It
prevents the democratic process from being demeaned. It represents a legitimate form of
punishment for criminal behaviour. Chief Justice McLachlin characterizes the first argument as
“bad pedagogy”, misrepresenting “the nature of our rights and obligations under the
law and consequently undermin[ing] them. In a democracy such as ours … the legitimacy

183 Sauvé II, paragraph 15.
184 Sauvé II, paragraph 17.
185 Sauvé II, paragraph 21.
186 Sauvé II, paragraph 24.
187 Sauvé II, paragraph 22.
188 Sauvé II, paragraph 26.
189 Sauvé II, paragraphs 29 and 53.
190 Sauvé II, paragraph 29.
191 Sauvé II, paragraph 30.
of the law and the obligation to obey the law flow directly from the right of every citizen
to vote."\textsuperscript{192} The government, in her view, reverses this flow by asserting that obedience can be
taught through deprivation.\textsuperscript{193} She holds that "[t]o deny prisoners the right to vote is to lose an
important means of teaching them democratic values and social responsibility."\textsuperscript{194} Chief Justice
McLachlin regards the claim that the democratic process as being demeaned by prisoner
participation as untenable because it treats voting as a privilege rather than a right and is
"inconsistent with the respect for the dignity of every person that lies at the heart of
Canadian democracy and the \textit{Charter}."\textsuperscript{195} The Chief Justice holds finally that the
disenfranchisement is arbitrary, bearing little relation to the severity of specific crimes and failing
to differentiate among penitentiary inmates.\textsuperscript{196} It is also at odds with the deterrent,
rehabilitative, retributive, and denunciatory purposes of punishment in the criminal
justice system.\textsuperscript{197}

Chief Justice McLachlin finds that the law fails the remaining components of the
\textit{Oakes} test. The impairment, which is absolute during incarceration,\textsuperscript{198} is "too broad,
catching many whose crimes are relatively minor and who cannot be said to have broken
their ties with society."\textsuperscript{199} The fact that the amended statutory provision narrowed the

\begin{itemize}
\item \textsuperscript{192} \textit{Sauvé II}, paragraph 31.
\item \textsuperscript{193} \textit{Sauvé II}, paragraph 32.
\item \textsuperscript{194} \textit{Sauvé II}, paragraph 38.
\item \textsuperscript{195} \textit{Sauvé II}, paragraph 44.
\item \textsuperscript{196} \textit{Sauvé II}, paragraph 48.
\item \textsuperscript{197} \textit{Sauvé II}, paragraph 49.
\item \textsuperscript{198} \textit{Sauvé II}, paragraph 56.
\item \textsuperscript{199} \textit{Sauvé II}, paragraph 54.
\end{itemize}
The scope of the disenfranchisement to include only penitentiary inmates is not sufficient grounds for finding that the right to vote is minimally impaired.\(^{200}\)

The Chief Justice holds finally that any salutatory effects of the law, which she characterizes as “tenuous” in nature,\(^{201}\) are outweighed by the deleterious ones. The law is at odds with the principle of equality which is at the heart of our democracy. It undermines the legitimacy and effectiveness of government and erodes respect for the rule of law. It negates the sentencing goals and correctional law policy. It denies citizens their fundamental democratic rights and alienates prisoners from society. Finally, it further disadvantages and marginalizes Aboriginal inmates, who are disproportionately represented among penitentiary inmates, and their communities.\(^{202}\)

The minority opinion, written by Justice Gonthier, makes an express call for deference to Parliament’s choice.\(^{203}\) In making its decision, it had to rely on:

philosophical, political and social considerations which are not capable of “scientific proof”…. In such a context, where this Court is presented with competing social or political philosophies relating to the right to vote, it is not by merely approving or preferring one that the other is necessarily disproved or shown not to survive Charter scrutiny. If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right in the context of a free and democratic society, then it ought to be upheld as constitutional.\(^{204}\)

The decision to disenfranchise penitentiary inmates is, in his view, reasonable and justifiable.

\(^{200}\) Sauvé II, paragraph 55.
\(^{201}\) Sauvé II, paragraph 57.
\(^{202}\) Sauvé II, paragraph 61.
\(^{203}\) Sauvé II, paragraph 68.
\(^{204}\) Sauvé II, paragraph 67.
Before commencing his section one analysis, Justice Gonthier queries whether of the government’s decision to concede the infringement is appropriate. Such a concession, he asserts, deprives:

the courts of the benefit of fruitful argument which most often occurs at that initial phase of the analysis, in defining the scope of the right, particularly with regard to historical and philosophical context. The development of contextual factors examined with regard to the scope of the right is of great importance since they clearly ‘animate’ the later stages of the test elaborated in *R. v. Oakes*....

He identifies, through the course of his ruling, factors that aid in establishing context. They include the nature of the evidence, the immunity of section three to override and the existence of a dialogue between the branches of government.

Justice Gonthier alleges that the nature of the evidence is relevant to establishing context because it involves comparative social science studies and consideration of “social and political philosophy that [are] … not susceptible to proof in the traditional sense.” He asserts that the section’s immunity does not preclude reasonable infringements nor does it “raise the bar for the government in attempting to justify its restrictions.” He finally argues that recognition of the existence of the dialogue does not lead to:

*... a lowering of the s. 1 justification standard. It simply suggests that when, after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the court lets*

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205 *Sauvé II*, paragraph 78.
206 *Sauvé II*, paragraph 186.
207 *Sauvé II*, paragraph 95.
Parliament have the last word and does not substitute Parliament’s reasonable choices with its own.\textsuperscript{208}

The rigor with which the judiciary applies the \textit{Oakes} test is, in other words, not diminished when a high degree of deference is accorded.\textsuperscript{209}

Justice Gonthier then undertakes his section one analysis. He finds any piece of legislation whose purpose is to enhance civic responsibility and respect for the rule of law, and to improve the criminal punishment regime is pressing and substantial.\textsuperscript{210} He holds that the rational connection between the legislative objective and means is established “through reason, logic, or simply common sense.”\textsuperscript{211} This link is supported by the available social science evidence. Justice Gonthier determines that the impairment is minimal and all possible alternatives are less effective.\textsuperscript{212} Parliament, faced with a range of possible alternatives, made a reasonable decision.\textsuperscript{213} He also observes that there is “a need for deference to Parliament in its drawing of a line, especially since this Court gave the impression that it was up to Parliament to do exactly that after the first \textit{Sauvé} case was heard in 1993.”\textsuperscript{214} In his view, in nullifying the law, the majority is doing nothing but second-guessing Parliament.\textsuperscript{215} He concludes finally that the beneficial effects of the law, while “particularly difficult to demonstrate by empirical evidence
given their largely symbolic nature”, 216 outweigh the temporary loss of the right to vote by inmates convicted of serious offences.

The second Sauvé case reveals a schism between members of the Supreme Court with respect to the question of deference. Chief Justice McLachlin, writing for the majority, argues that cases involving the right to vote require the judiciary to adopt a stringent standard of review during the section one analysis. Rather than adopting and adapting the contextual factors approach, she privileges the nature of the right to establish the context in which the government acted. This privileging precludes consideration being given to other contextual variables including the nature of the legislation, the three factors into which it can be disassembled, or the existence of a dialogue between the legislative and judicial branches of government.

To reinforce her conclusion that a high degree of deference is inappropriate, the Chief Justice lays out a judicial guardianship of the right to vote. She argues that the courts, immune from public opinion and unaffected by politics, must safeguard it from the majoritarianism and electoral expedience. They must be vigilant in protecting the integrity of participatory democracy when it is threatened by legislative choices. Her argument is constructed on two foundations. The first is the immunity of section three from the section 33 override clause. The second foundation is the reasoning of Justice Cory in Reference Saskatchewan and Haig. He finds, as discussed earlier in this chapter, that the Court has both institutional competence and democratic legitimacy to review

216 Sauvé II, paragraph 180.
electoral and referendum laws. The establishment of the judicial guardianship means that there will be a presumption of judicial vigilance and scepticism in future cases involving the right to vote.

The minority employs a modified contextual factors approach to deference. Justice Gonthier identifies a set of factors that aid in establishing the context in which the government acted. They include the nature of the legislation, the nature of the evidence, the immunity from override of section three of the Charter, and the existence of an ongoing dialogue between branches of government about prisoner voting. This list provides a counterpoint to the privileging by the majority opinion of the nature of the right. It also offers insight into the types of variables that might in future cases inform the judicial decision about deference. Justice Gonthier also responds to a general perception that the accordance of deference by the judiciary reduces the stringency with which it assesses the reasonableness of infringements. In his view, the standard of review is not, in fact, lowered when the judiciary defers to parliamentary decisions.


The Canada Elections Act required a political party to nominate candidates in at least 50 ridings in order to obtain and to retain registered party status. Miguel Figueroa, the leader of the Communist Party of Canada, argues that the law violates the right to vote. The Supreme Court, in assessing the constitutionality of the law, must evaluate whether the values of voting, political equality, informational equality, and procedural fairness have been balanced in a reasonable manner. The Justices are in agreement that the law is
unconstitutional. This unanimity occurs in spite of the fact that there is significant disagreement about how to interpret section three of the *Charter*. A lack of consensus is also revealed in the prioritization of factors that can be used to establish the context in which the government acted.

The majority opinion, written by Justice Iacobucci, emphasizes the individualistic nature of voting and the right of each citizen to effective representation and meaningful participation.217 Their involvement, he observes, has an intrinsic value to the individual citizen and an instrumental value, “enhanc[ing] the quality of our democracy.”218 Justice Iacobucci holds that, when determining whether an infringement has occurred, the judiciary should not balance the value of individual participation against other democratic values.219 He finds that the statutory provisions violate the right to vote because political parties, irrespective of their size and the likelihood of electoral success, allow citizens to participate in the democratic process in a meaningful way and to make informed choices.220 Differences in the treatment of registered and unregistered parties result in some citizens being unfairly disadvantaged and in an information imbalance.221

Before commencing his section one analysis, Justice Iacobucci states that laws infringing the right to vote “require not deference, but careful examination.…”222 He cautions that “great care must be exercised in determining whether or not the government

217 *Figueroa*, paragraphs 23, 29-33, 36 and 51.
218 *Figueroa*, paragraphs 29 and 27.
219 *Figueroa*, paragraph 31.
220 *Figueroa*, paragraphs 39 and 54.
221 *Figueroa*, paragraphs 52 -55.
222 *Figueroa*, paragraph 60.
has justified a violation of s.3.”

His comments evidence a privileging of the nature of the right when setting the appropriate degree of deference. Its reduced level means that the government cannot reinforce the inconclusive and incomplete social science evidence with arguments that are rooted in reason, logic and common sense.

He identifies the three legislative objectives as the enhancement of the effectiveness of the electoral process through public financing of political parties, the protection of the integrity of the electoral financing regime by limiting access to the political tax credit, and the guarantee that the electoral process delivers a viable electoral outcome – a majority government - for our form of responsible government. He accepts, albeit with some hesitation, the first two goals as pressing and substantial. While he described the third objective as problematic, he observes that it is “prudent to leave the question of whether [the viable electoral outcome of] majority building is a pressing and substantial objective unanswered…."

Justice Iacobucci holds that the statutory provisions fail the remaining components of the Oakes test. The evidence proffered by the Crown is insufficient to establish a connection between the threshold and any of the three objectives. He also finds that the impairment of the right to vote is not minimal in nature, observing twice that other legislative measures would have permitted the government to attain its

223 Figueroa, paragraph 60.
224 Figueroa, paragraph 61.
225 Figueroa, paragraphs 62 and 72.
226 Figueroa, paragraph 83.
227 Figueroa, paragraphs 64, 73, and 84-86.
objectives without infringing section three of the Charter. Justice Iacobucci concludes that the Crown has failed to provide any evidence of or reasoned argument in defence of the benefits of the statutory provisions. As a consequence, any possible salutary effects are outweighed by the deleterious ones, which include undermining “the capacity of individual citizens to introduce ideas and opinions into the public discourse that the electoral process engenders, and to exercise their right to vote in a manner that accurately reflects their preferences…. [and doing] great harm to both individual participants and the integrity of the electoral process itself.”

The minority opinion, written by Justice LeBel, argues that section three of the Charter cannot be approached from a uniquely individualistic perspective. The Canadian definition of the right to vote is multifaceted and complex. It is informed by a number of democratic values, some of which are collective, communitarian and systemic. The right to vote has never been “defined … only by fairness as between individual voters” nor diminished to a one-dimensional right that embraced the “purely individual aspects of political participation.” Justice LeBel identifies to two values that, using a proportionality “analysis that resembles the framework used in connection with s. 1”, have to be balanced against the individualistic one when defining section three of the Charter and determining whether an infringement has occurred. They are “the

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228 Figueroa, paragraphs 69 and 78.
229 Figueroa, paragraphs 70 and 89.
230 Figueroa, paragraph 88.
231 Figueroa, paragraphs 96-98, 103.
232 Figueroa, paragraph 109.
233 Figueroa, paragraph 96.
234 Figueroa, paragraph 123.
aggregation of political preferences or the promotion of cohesion over fragmentation” and regional representation. He holds that the statutory provisions violate the right to vote for two reasons. They adversely affect the ability of citizens, who support small political parties, from participating in the political process. They also interfere with the “principle of regional representation” by giving advantages to political parties whose popular support is concentrated in Ontario and Quebec, the only two provinces with more than 50 constituencies.

Justice LeBel holds that the application of the Oakes test is unnecessary because he has incorporated the Crown’s justification arguments in his infringement analysis. He argues that, in this particular case, the infringement “essentially amounts to a conclusion that it is inconsistent with the values of Canadian democracy. It is hard to see how it could nevertheless be shown to be ‘justified in a free and democratic society.’” In the absence of a section one analysis, there is no need for Justice LeBel to determine the appropriate degree of deference to accord. He suggests, however, it might, in some constitutional disputes, be high. He cautions:

against blurring the distinction between the respective roles of the Court and the legislature in dealing with a question which, while it certainly has legal dimensions, is also profoundly political. Within certain boundaries, which it is the responsibility of the judiciary to delineate, balancing competing democratic values and choosing between the various species of democratic electoral systems primarily fall within the domain of political debate and of the legislative process. Those boundaries should be viewed

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235 Figueroa, paragraphs 137-160.
236 Figueroa, paragraphs 163-172.
237 Figueroa, paragraphs 171-73.
238 Figueroa, paragraph 174.
239 Figueroa, paragraph 178.
as fairly broad. They allow for a good deal of latitude within which the people, through their elected lawmakers, may choose rules and institutions that enhance certain aspects of the democratic right to meaningful participation and diminish others.\footnote{Figueroa, paragraph 182.}

The \textit{Figueroa} ruling is significant to the study of deference for a number of reasons. It once again privileges the nature of the right when determining the context in which the government acted. In this case, it dictates that great care on the part of the judiciary is necessary when assessing the justification of the infringement. This careful examination precludes according a high degree of deference to parliamentary choices. As a consequence, the evidence and arguments proffered by the Crown are found wanting and unpersuasive. The majority opinion also reinforces the judicial claim to the guardianship of section 3 of the \textit{Charter}. Once again, it makes express reference to the fact that the provision is immune from the section 33 override. This immunity demonstrates the fundamental importance of the right to vote in a democracy and underscores the need for judicial caution. The claim to guardianship confirms that the courts have the democratic legitimacy to intercede when legislative decisions adversely affect the right to vote.

While the minority opinion does not provide a section one analysis, its substantive examination of the right to vote at the infringement stage offers insights into the sort of contextual factors that might, in future cases, inform judicial decisions about deference. It identifies the aggregation of political preferences and the cohesion of fragmentation as well as regional representation and federalism as democratic values that must be balanced.
against the individualistic rights of meaningful participation and effective representation to interpret section three of the *Charter* and to determine whether it has been violated. The opinion also expressly recognizes that there will be disputes in which the justification arguments of the Crown are persuasive to the judiciary. The privileging of the nature of the right will not, in other words, always preclude according a high degree of deference.

**The Right to Vote and the Contextualized Approach to Deference**

The Supreme Court of Canada has displayed greater consistency in its approach to deference in cases involving the right to vote than in those involving freedom of expression. It has never once accorded a sufficiently high degree of deference to find the Crown’s evidence and arguments, in defence of an infringement, persuasive. Its failure to do so stems from the fact that it privileges the nature of the right when establishing the context in which the government acted. Other variables and factors that could inform its understanding of context are not given consideration. As a result, the Crown and rights claimants know that the *Oakes* test will be applied with stringency.

A contributing factor to judicial unwillingness to accord a high degree of deference has been the decision of the Supreme Court to lay claim to a guardianship over right to vote. This guardianship evinces a self-conception of its relationship with the other branches of government and its role in our democracy. It must protect the right to vote against decisions taken by the legislative branch. It stakes this claim on two foundations. The first is the determination by Justice Cory in *Saskatchewan Reference* and *Haig* that
the judiciary has both the necessary competence and legitimacy to review electoral and referendum laws that adversely affect the right to vote. This competence has been garnered from a century’s worth of statutory interpretation. The legitimacy stems from democracy itself. The second foundation is the fact that section three of the Charter is immune from section 33 and the notwithstanding clause. This immunity, the Court holds, evidences the fundamental importance of the right to vote to a political community professing to be free and democratic. It also speaks to the need for judicial vigilance when examining legislative decisions that constrain meaningful participation and effective representation.

**Conclusion**

The Supreme Court of Canada has not developed a uniform approach to deference for use in cases involving the democratic process. This failure has occurred in spite of the fact that all of them involve questions about the institutions and practices of our democracy. Six of the nine cases deal with provisions of the same piece of legislation. Six of the nine rely on the Lortie Commission Report as the primary piece of evidence. Six of the nine are the subject of inquiries by the same parliamentary committee. While the Court employs a contextualized approach to deference, the specific elements and factors used to identify the set of circumstances in which the government acted are not constant. The lack of a standard approach means that the elements and factors have fluctuated in meaning, number and relevance.
In the absence of a standard analytical process, the Court employs two approaches to the question of deference. The first, specific to disputes involving freedom of expression as the primary rights claim, inconsistently and unpredictably privileges one of two contextual elements when identifying the context in which the government acted. They are nature of the right and the nature of the legislation, either in a holistic form or in its disassembled parts. Inconsistency and unpredictability make it impossible for the Crown and rights claimants to know which of the two will be prioritized in any given case. They have, as a consequence, no way of anticipating what standard of review and standard of proof the judiciary will employ during the section one analysis. The second approach to deference, used in cases in which the right to vote is the primary claim, privileges the nature of the right. It is used to establish the context in which the government acted and has, until now, precluded the accordance of a high degree of deference. As a result, the Crown and rights claimants know with great certainty that it will be extremely difficult to persuade the Court that the infringement of the right to vote is reasonable.
Chapter 6

The Democratic Process and the Contextualized Approach to Deference

“Courts give reasons for their decisions, we are told, and this is a token of taking seriously what is at stake, whereas legislatures do not. In fact, this is a false contrast. Legislators give reasons for their votes just as judges do. The reasons are given in what we call debate and they are published in Hansard….”

The constitutional entrenchment of the Charter transformed our political culture into one of justification. All exercises of power by the government that affect civil liberties must be justifiable. The standard used to assess their justifiability is the Charter itself. It protects rights and freedoms, but, under section one, permits infringements as long as they are reasonable and “demonstrably justified in a free and democracy society.” The Oakes test serves as the framework within which the demonstration of reasonableness takes place. It has, since its creation in 1986, become a permanent feature of all Charter challenges. The intensity with which it is applied is not, however, constant. The judiciary has discretion in deciding how stringently to review the justification arguments of the Crown in individual cases. The fluctuation in the height at which the bar is set is dependent upon the civil standard of proof in Charter adjudication employed and the degree of deference that is accorded out of concerns about judicial competence to examine and assess government decisions and/or the legitimacy of it doing so. If a high

3 Part One of the Constitution Act, 1982, being Schedule B to the Canada Act (1982), (U.K.), 1982, c. 11.
degree of deference is granted, the standards of review and proof used during the *Oakes* test are relaxed and the scope and nature of evidence and arguments used by the government to defend an infringement are broadened. If only a low degree of deference is granted, the standards become more stringent.

The Supreme Court has employed a contextualized approach to deference\(^4\) which it has over the course of more than two decades formulated and reformulated. Such an approach, as discussed more fully in chapter three of this dissertation, links the decision about deference to an understanding of the context in which the government acted. The understanding of context is garnered using a set of specific elements, factors or variables. The Court has relied on two elements, either individually or in tandem, to identify context. The first is the nature of the legislation, which in the most recent reformulation of the contextualized approach, was disassembled into three factors including the vulnerability of the group that the legislature seeks to protect, the subjective fears and apprehension of harm of the group, and the difficulty of measuring scientifically a particular harm in question or the efficaciousness of a remedy.\(^5\) The second contextual element that the Court has employed is the nature of the right.

This chapter argues that three variables should be used by the judiciary to make its decision about deference in cases involving the democratic process. They are: (1) the

\(^4\) There are, as discussed in chapter three of this dissertation, two alternative approaches to deference that are available to the courts. The first, non-doctrinism, affords the judiciary absolute freedom in making its decision. The second, formalism, establishes rigid lines of demarcation, using distinctions between policy and principle or politics and law, to dictate cases in which the courts should defer and those in which they should not.

nature of the legislation; (2) the nature of the right; and (3) the nature of the parliamentary discourse. The consideration of these variables will permit the courts to approach the decision in a more structured and coherent manner. The proposal of a new contextualized approach is prompted by the review of the jurisprudence of the Supreme Court undertaken in chapter five of this dissertation. The judicial body has not adopted a standardized approach to deference in spite of the fact that the subject-matter of all nine cases is democracy, its institutions and practices. Six of the cases involve provisions of the same piece of legislation, the *Canada Elections Act*. Six of them rely on the Final Report of the Royal Commission on Electoral Reform and Party Financing (the “Lortie Commission”), as the primary piece of evidence. Six of the impugned laws are the subject of deliberation and discussion by the same parliamentary committee, the Special Committee on Electoral Reform. These commonalities speak to the need, as first proposed in chapter three of this dissertation, to develop and apply a standard analytical process.

These cases, as the Supreme Court itself acknowledges, are “unique” and require “special treatment”. Their uniqueness stems from their subject matter and the fact that democracy is placed at the centre of the political and judicial discourses. It also stems from the fact that the government bears a positive duty to design democratic processes.

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8 Thomson Newspapers paragraph 28.
and, in particular, to hold regular elections.\textsuperscript{9} It must create structures within which democratic rights can be exercised. These creations are characterized by distinctive features. Elections and referendums have fixed life spans, lasting for a limited period of time. They involve a form of collective or communal decision-making about government and governance. They produce decisions that are, in all of the cases examined in this dissertation, binding and definitive. They cannot, in essence, be ‘undone’.

Each of the three variables in the proposed approach aids the judiciary to better understand the context in which the government acted and to determine the appropriate standards of review and proof to employ during the section one analysis. The courts would be obliged to study each of them, determining whether they favour a greater or lesser degree of deference. They would also have to examine the relationship among the three and set out criteria for assessing their relative priority. These tasks would be of particular importance in cases in which the variables do not align and the judiciary is obliged to weigh and balance them.

The nature of the legislation permits the judiciary to establish its level of competence to review government decisions and the democratic legitimacy of it doing so. The Supreme Court, as discussed in chapter four of this dissertation, has held that courts lack the capacity to review government decisions in certain areas of public policy, in particular those of a social, economic or political nature. It has drawn a distinction between laws which required the government to mediate between competing interests and

values, and those in which it acted as a singular antagonist to the individual. The judiciary, the Court states, lacks the experience and expertise to evaluate the merit of these decisions because they involve the balancing of competing rights and values. In addition, they are often based on incomplete and inconclusive social science evidence.

The nature of the right is relevant to the decision about deference because the constitutional protection which individual rights and freedoms warrant is not static and unchanging. A right or freedom has a different meaning and purpose depending on the context in which it is exercised. The courts are, as a consequence, obliged to identify “the aspect of the right which is truly at stake in the case as well as the relevant aspects of any values in competition with it.”\(^1^0\) This permits them to determine, for the purpose of the section one analysis, the specific value of the right or freedom at issue in the individual case. The more valuable the exercise of a right or freedom is in a particular context, the more difficult it is for the Crown to justify its infringement. The Supreme Court holds, in Libman, that while all political expression is at the core of the section 2(b) guarantee, not all of it warrants stringent constitutional protection. As a consequence, the judiciary must determine whether the political nature of the impugned expression favours a high or low degree of deference. The Court’s creation of a guardianship of the right to vote in the second Sauvé case suggests that a low degree may be a constant feature of cases involving section 3 of the Charter.

The nature of the parliamentary discourse that preceded the enactment or amendment of the impugned laws has bearing on the decision about deference because it contains the reasons that legislators give for their votes, just as judicial opinions contain the reasons that judges give for theirs. These discourses are contained in *Hansard*, transcripts of parliamentary committees, and government documents and reports. The contemplation of rights and freedoms and their protection begins, or should begin, long before the courts become involved in disputes about social problems and how best to remedy them. It forms, or should form, part of the discussions and debates in which parliamentarians engage before enacting or amending laws. The absence of substantive deliberation by legislators would militate against according a high degree of deference.

Janet Hiebert, one of the few constitutional scholars to study parliamentary discourses, has concentrated her attention on those that follow rather than precede rulings by the Supreme Court of Canada. She remarks that the *Charter* “embod[ies] the Canadian polity’s code of conduct, or its philosophical ethos, which expresses the normative values that should influence [all governmental] decisions…”¹¹ Murray Hunt argues that it is “one thing to accept the need for deference to an opinion that can be seen to be the product of reasoned consideration … it is quite another to accept without question an opinion” that was not.¹² Parliamentary discourses form the only official public record we have of how parliamentarians, in enacting or amending an impugned law, attempt to

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balance the resolution of societal problems with the protection of constitutionally-guaranteed rights and freedoms. Brian Slattery argues that if they were to fail to give serious consideration to the Charter and its underlying values and principles, it would represent “an abdication of their responsibilities.”

The study of the parliamentary discourses by the judiciary is not undertaken in order to assess whether elected representatives parrot the legal language of the courts or mimic their patterns of analysis. The purpose of their examination by the judiciary is not to determine whether the deliberations and debates begin with the meaning of rights and freedoms and then proceed in a linear manner to an infringement analysis before ending with a section one analysis that is structured by the requirements of the Oakes test. The practices and protocols of the legislative assembly are inherently different from those of the judiciary and fault should not be found simply because legislators do not reason as judges do. 

Hiebert argues that Parliament’s judgments about the rights and freedoms reflect “its distinct responsibilities and different vantage point [in comparison to the judiciary], relative to Charter issues.”

The examination of the discourse is also not a quest to identify parliamentary motive or find a conflict of interest. To do so, as Justice LeBel cautions in Figueroa, would “risk unduly expanding the scope of judicial review of the design of the electoral

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15 Hiebert, Charter Conflicts, 55.
system.”\textsuperscript{16} John Hart Ely argues that legislators are untrustworthy when it comes to making choices about the democratic process because of the temptation to act out of political self-interest rather than the well-being of democracy.\textsuperscript{17} Christopher Bredt and Laura Pottie, writing in a Canadian context, claim that “[e]xperience has demonstrated a clear tendency for Parliament to enact legislation that preserves the status quo by giving preferential access to resources to incumbents and or large established parties.”\textsuperscript{18} Colin Feasby also warns of the risk of partisan rule-making. He calls on the Supreme Court to “consider Parliament’s fundamental conflict of interest, in that the government is both regulating the political process and is the product of that political process.”\textsuperscript{19} To focus on motivation or an alleged conflict of interest is, however, problematic in a constitutional framework which values inter-institutional respect and courtesy, and in which the protection of rights and freedoms is the shared responsibility of all three branches of government.

The Executive Branch and the Legislative Process

Before proceeding to the examination of the parliamentary discourses of the nine cases, it must be acknowledged that they each offer an incomplete record of the reasons for the enactment of the impugned legislation. This incompleteness, stemming from the fact that

a significant portion of the governmental decision-making process occurs within the secrecy of the executive branch, does not negate the value of their examination. It must, however, be informed by the fact that ours is a parliamentary democracy in which the executive branch dominates the formulation of public policy and, in a majority government situation, dominates the legislative branch. It is the Prime Minister, with the support of the Cabinet and the assistance of the bureaucracy – most notably the Department of Justice – who sets the legislative agenda, identifies the appropriate legislative responses to social problems, and makes preliminary determinations of whether these responses are constitutional.\footnote{C.E.S. Franks, “Representation and Policy-Making in Canada,” in C.E.S. Franks, J.E. Hodgetts, O.P. Dwivedi, D. Williams, and V. Seymour Wilson, eds., Canada’s Century: Governing in a Maturing Society: Essays in Honour of John Meisel, (Montreal & Kingston: McGill-Queen’s University Press, 1995), 72-73; Donald Savoie, “The Rise of Court Government in Canada,” Canadian Journal of Political Science 32(4) (December 1999), 635-636; Janet L. Hiebert, Limiting Rights: The Dilemma of Judicial Review, (Montreal and Kingston: McGill-Queen’s University Press, 1999); James B. Kelly Governing with the Charter: Legislative and Judicial Activism and the Framers’ Intent, (Vancouver: UBC Press, 2005) 224, 245.}

The concentration of power in the executive has pushed the House of Commons and Senate to the periphery of the decision-making process.\footnote{Peter Aucoin, “Organizational Changes in the Machinery of Canadian Government: From Rational Management to Brokerage Politics,” Canadian Journal of Political Science 19 (1986), 3-27; Donald J. Savoie, Governing from the Centre, (Toronto: University of Toronto Press, 1999), 72-74; C.E.S. Franks, “Parliament Intergovernmental Relations, National Unity,” Working Paper Series, (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1999) http://www.queensu.ca/iigr/working/Archive/1999/1999-2CSFranks.pdf, 1; Hiebert, Charter Conflicts, xiii; Kelly, Governing with the Charter, 226.} Parliament, with its historical tendencies of majority governments, party discipline, and partisanship, often has little direct influence over decisions that are taken by the executive.\footnote{C.E.S. Franks, The Parliament of Canada, (Toronto: University of Toronto Press, 1987), 221-222. He cautions against the facile discounting of the importance of Parliament to the formulation of public policy. He maintains that its influence is indirect, “wield[ing] power through the deterrent effect of bad publicity. A government, to be successful, must anticipate criticism, and ensure that its policies, budgets, and
suggests that our “legislatures are probably best thought of as electoral colleges through which voters choose governments, rather than deliberative policy-making bodies.” Donald Savoie places the blame for some of this marginalization on the constitutional entrenchment of the Charter, arguing that it reduces the ability of the legislative branch to influence the choices made by the executive branch. This argument is echoed by James Kelly who attributes this reduction to the fact that “the parliamentary response to the Charter has been decidedly non-parliamentary and bureaucratic….”

Patrick Monahan and Marie Finkelstein study the response of the executive branch to the Charter in the early 1990s and find that the manner in which decisions are taken, at both the federal and provincial level, has been fundamentally altered by its constitutional entrenchment. Politicians and bureaucrats have begun to give express and substantive consideration to rights and freedoms when identifying social issues in need of remedy and setting the legislative agenda. Monahan and Finkelstein conclude that the underlying values and principles of the Charter are now “deeply and permanently integrated into the attitudes of government decision makers across the country.”

Proposals are defensible as a good balancing of special interests, and an expression of a public interest...[and] consult widely, deliberate carefully, and present well-thought-out policy proposals”

24 Savoie, Governing from the Centre, 72-74.
25 Kelly, Governing with the Charter, 248.
political processes through which policy is formulated and implemented.\textsuperscript{28} New practices and protocols were adopted to facilitate, at the earliest possible stage, the scrutiny of bills from a rights perspective.\textsuperscript{29} They were designed and structured in such a way as to identify and remedy constitutional problems before policy choices were presented to the Prime Minister and Cabinet for political consideration.\textsuperscript{30}

The effect of these practices and protocols has been to pull the Department of Justice, responsible for drafting all government bills, “into the mainstream of decisions making in government.”\textsuperscript{31} Mary Dawson argues that the ministry is involved in the policy process to a level and degree that had previously been considered both unnecessary and inappropriate.\textsuperscript{32} It reviews all government bills and regulations, regardless of their subject matter, in order to ensure that they are constitutional. James Kelly describes the Department of Justice as possessing a monopoly on legal knowledge.\textsuperscript{33} Its Human Rights Law Section has become the repository of constitutional expertise and provides advice

\textsuperscript{28} Monahan and Finkelstein, “The Charter of Rights and Public Policy,” 503-504. They also examined changes that have occurred within some provincial governments.

\textsuperscript{29} Mary Dawson, “The Impact of the Charter on the Public Policy Process and the Department of Justice,” Osgoode Hall Law Journal 30 (1992), 597-599; see also Kelly, Governing with the Charter, 229, 234.


\textsuperscript{31} Dawson, “The Impact of the Charter on the Public Policy Process,” 603; see also Kelly, Governing with the Charter, 227.


\textsuperscript{33} James B. Kelly, “Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and Its Entry into the Centre of Government,” Canadian Public Administration 42 (1999), 478-780. Kelly is of the view that the dominant institution in the executive remains the cabinet. He describes it, at 224, as “a guardian of the constitution” which retains ultimate authority over the setting of the government’s agenda and policy choices. He argues at 223-224 that the consideration of constitutional issues, while important, does not negate the significance of the political component of decision-making. Please also James B. Kelly, “Guarding the Constitution: Parliamentary and Judicial Roles under the Charter of Rights and Freedoms,” in Harvey Lazar, Peter Meekison and Hamish Telford, editors, Canada: The State of the Federation, 2002, (Montreal and Kingston: McGill-Queen’s University Press, 2004), 98-103.
and information to all government departments.\textsuperscript{34} It is responsible for drafting and reviewing all government bills in order to ensure their compatibility with the \textit{Charter}. This responsibility necessitates and legitimates the involvement of lawyers, through the establishment of Legal Service Units in all departments and ministries, in the formulation of all public policy. They serve as members of policy teams, identifying and defining \textit{Charter} issues as well as assessing risks.\textsuperscript{35} Their involvement, because of potential claims, includes the review of the substance and merit of public policy.\textsuperscript{36} Their presence means that Justice is involved in the decision-making of all other departments and ministries on a continuous and regular basis.\textsuperscript{37} This involvement creates a relationship of dependence in which others are placed at a disadvantage, but does not, in the opinion of Donald Savoie, shift power from the Prime Minister and his advisors.\textsuperscript{38}

The institutional and procedural changes that have occurred within the executive branch have not been matched by any in the legislative branch. As a consequence, members of both Houses have limited ability and opportunity to undertake, from a rights

\begin{footnotesize}
\begin{enumerate}
\item Kelly, \textit{Governing with the Charter}, 236.
\item Kelly, \textit{Governing with the Charter}, 229.
\item Monahan and Finkelstein, “The Charter of Rights and Public Policy,” 512. They conclude, at page 508, that the involvement of the Department of Justice has been fundamentally changed by the increasingly seminal nature of its role in the formulation of public policy, elevating it to the status of a central agency “with a range of power and influence rivalling on that of the Finance Department.” Agencies of this type, traditionally understood to only include the Prime Minister’s Office, the Privy Council Office, the Treasury Board and the Department of Finance, participate in furthering of the government’s agenda, managing and coordinating the business of governing, and offsetting the influence of the bureaucracy. Donald Savoie rejects the characterization of the Department of Justice as a central agency in \textit{Governing from the Centre}, 7. Please also see: Savoie, “The Rise of the Court Government in Canada,” 635-36; Dawson, “The Impact of the Charter on the Public Policy Process,” 596; Kelly, “Bureaucratic Activism and the Charter of Rights and Freedoms,” 495-498; Hiebert, \textit{Charter Conflicts}, 11.
\item Savoie, \textit{Governing from the Centre}, 7; Savoie, “The Rise of the Court Government in Canada,” 635-36.
\end{enumerate}
\end{footnotesize}
perspective, full and independent examinations of bills. Grant Huscroft argues that the most significant participation by Parliament in assessing the constitutionality is that of the Minister of Justice who rises in the House of Commons to certify that proposed legislation is compatible with the Charter. The certification is not accompanied by information about the bases for this claim of compatibility, making it difficult for opposition parties and/or individual members to challenge or question it. Hiebert suggests that parliamentarians often debate and pass bills without fully appreciating their constitutional implications.

There is no parliamentary committee in either the House of Commons or the Senate whose express mandate is the examination of legislation from a rights perspective. There are, as a consequence, no legislative institutions within which constitutional expertise has been nurtured and concentrated. There is no structured procedure through which the compatibility of all proposed bills with the Charter is assessed. Committees that have examined the constitutionality of legislation have often lacked information and time as well as legal counsel. Kelly argues that when committees undertake such evaluations, they are driven by individual members on an ad

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41 Hiebert, Charter Conflicts, 14; Kelly, Governing with the Charter, 245.
42 Hiebert, Charter Conflicts, xiii-xiv.
43 Kelly, Governing with the Charter, 245.
45 Hiebert, Charter Conflicts, 16-17.
hoc basis. Committees are also only empowered to make recommendations to the government, lacking the authority to compel adoption. As a result, committees often have difficulty persuading the executive to make changes to proposed legislation.  

Hiebert concludes that Parliament is “poorly situated” to participate in a Charter discourse. Despite this conclusion, she argues that there is value in the courts “examin[ing] the quality of the process that led to the political judgment.” They need to “be sensitive to whether the government and Parliament have consciously reflected upon Charter values and undertaken sincere measures to reconcile conflicts in a principled and sensitive manner.”

The contextualized approach to deference proposed in this chapter incorporates this sensitivity, arguing that the parliamentary discourse should aid the judiciary in determining the degree of deference that it accords and in setting the standards of review and proof that are employed when applying the Oakes test. Its use in cases involving the democratic process would bring greater structure and coherence to the decision. It might also prompt a parliamentary response to the Charter that resulted in substantive institutional reforms such as the establishment of a committee whose mandate is the examination of legislation from a rights perspective.

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46 Kelly, Governing with the Charter, 247-251.
47 Hiebert, Charter Conflicts, xiii.
48 Hiebert, Charter Conflicts, 70.
49 Hiebert, Charter Conflicts, 70-71.
Freedom of Expression

The Supreme Court, as demonstrated in chapter of five of this dissertation, has been inconsistent and unpredictable when making its decision about deference in cases involving political expression. It employs the contextual factors approach in three of the four cases, but the manner of employment fluctuates from one case to the next. The location of the decision is not static which means that its impact is, at times, broad enough to affect the whole of the section one analysis, and, at other times, narrow enough to affect only the minimal impairment component. The meaning and relevance of the four factors is fluid. As a consequence, the Crown and rights claimants cannot anticipate with any great certainty whether a high or low degree of deference will be accorded.

Libman v. Attorney General (Quebec)

The issue of third party advertising during referendums first appeared on the political landscape in 1976 when the Quebec government decided to make use of consultative procedures to increase public participation in major political decisions. At the centre of the parliamentary discourse is the provincial Charter of Human Rights and Freedoms. The provincial statute protects fundamental civil liberties including freedom of expression. This protection is not absolute, permitting the government to impose “limits to their exercise … fixed by law.”50 In imposing them, it must balance rights against “democratic values, public order and the general well-being of the citizens of Québec.”51

50Québec Charter of Human Rights and Freedoms, R.S.Q. – C12, section 9.1. The Canadian Charter of Rights and Freedoms is not entrenched in the Constitution until 1982. Libman challenges the constitutionality of the statute under both the Canadian Charter and the provincial Charter of Human Rights and Freedoms. The Supreme Court of Canada strikes down the law because it infringes the
The parliamentary discourse revolved around two issues: (1) the importance of free speech to a democracy; and (2) how best to balance it against the competing values of political equality, political participation, informational equality, and campaign fairness. It began with the publication of a *White Paper* in 1977 which recommended that the referendum law include the regulation of political funding and spending.\(^{52}\) Regulations were necessary to contain the disruptive effects that money had on campaigns. They protected voters from large manipulative advertising campaigns that undermined their ability to participate in the referendum and to make free and informed choices. They also ensured that the referendum process was fair because both sides would have an equal opportunity to persuade voters of the merit of their stance.\(^{53}\) The government proposed the creation of two national committees during referendums. They would be the only bodies authorized to receive financial contributions, public funding, and to incur significant expenses.\(^{54}\) The expenditures of all other individuals and groups would be severely restricted.

When the government introduced the bill, there was consensus among the deputies of the National Assembly that expenditures should be regulated during provincial referendums. Argument and reason rather than money should determine outcomes. This consensus reflected the fact that provincial election spending had been

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*Canadian Charter.* It declares, at paragraph 86, that its ruling would have been the same had it resolved the dispute under the provincial statute.


\(^{52}\) *Québec, Consulting the People of Québec*, (Québec: Éditeur officiel du Québec, 1977), 7.

\(^{53}\) *Québec, Consulting the People of Québec*, 6.

\(^{54}\) *Québec, Consulting the People of Québec*, 15.
regulated for more than a decade. It led to the absence of any legislative contemplation of a regime in which the flow of political information was wholly unrestricted. The deputies of the National Assembly did not debate whether money did, in fact, distort campaigns and adversely affect the ability of voters to participate in the process and to make free and informed decisions. It was, instead, taken as a given.

The government maintained that the creation of national committees and the imposition of spending restrictions would ensure that the referendum process was democratic. In defending the bill, it relied on four arguments. The first was that rights and freedoms were not absolute in nature and could be limited in a democracy. Marc-André Bédard explained that the “préambule de la Charte des droits et libertés de la personne ... stipule le droit à la préservation des libertés individuelles, mais stipule aussi que ces droits et libertés individuelles doivent s’évaluer dans un contexte général de la recherche du bien d’autrui et du bien général.” The second argument was that spending limits were a long-standing feature of democracy in Quebec. Robert Burns, Minister of State for Electoral and Parliamentary Reform, asserted that “un projet de loi qui n’aurait pas fixé une limite au chapitre des dépenses aurait ... trahi la tradition qui prévaut au

56Québec, Assemblée nationale, Journal des débats, 22 & 23 juin 1978, 2703 (Bédard); Bedard explained that the “Preamble of the Charter of Rights and Freedoms of the Person ... stipulates a right to the preservation of individual liberties, but it also stipulates that these individual rights and freedoms must be interpreted within a general context of preserving the well-being of others and the common good”; see also Québec, Commissions parlementaires, no. 130, 13 juin 1978, B-5115 (Grenier).
Québec depuis les années soixante.... The third argument was that spending limits would prevent money from distorting the campaign and hindering voters, individually and collectively, from participating in the referendum and from making free and informed choices. Burns declared that the bill established “des règles de jeu qui favorisent la participation éclairée de l’électeur....” Without spending limits, the discourse would be contaminated and individual freedom of expression would be rendered valueless by an orgy of expenditures. Unregulated spending would encourage “la liberté d’abuser. Il s’agit de libertinage. Il s’agit de la liberté de pouvoir enterrer l’électeur sous la publicité et la propagande. ... C’est la liberté de tromper l’électeur.” The fourth argument was that spending limits ensured that referendums were fair and respected the principle of equality. Burns claimed that a democratic regime required “que chaque parti ait une chance égale de se faire valoir auprès des électeurs.” Gilbert Paquette explained that the government was obliged to “concilier le droit des citoyens à

57Québec, Assemblée nationale, Journal des débats, 3ième session, 31ième législature, 1978, no.17, 5 avril 1978, 708 (Burns); Burns asserted that “a bill that did not establish spending limits would have betrayed traditions that have prevailed in Quebec since the 1960s.”; see also Québec, Assemblée nationale, Journal des débats, 3ième session, 31ième législature, no.18, 6 avril 1978, 771 (Fallu); Québec, Assemblée nationale, Commissions parlementaires, 3ième session, 31ième législature, no.126, 12 juin 1978, B-4938 (Bédard); Québec, Journal de débats, 22 & 23 juin 1978, 2705 (Bédard).
58Québec, Journal des débats, 5 avril 1978, 708 (Burns); The bill seeks to establish “rules that favour the enlightened participation of the voter....”
59Québec, Journal des débats, 22 & 23 juin 1978, 2695 (Grenier); see also Québec, Assemblée nationale, Journal des débats, 6 avril 1978, 784 (Paquette); Québec, Assemblée nationale, Commissions parlementaires, 3ième session, 31ième législature, no. 77, 16 mai 1978, B-2956 (Grenier); Québec, Commissions parlementaires, no. 130, 13 juin 1978, B-5128 (Godin).
60Québec, Journal des débats, 6 avril 1978, 771 (Fallu); It would encourage “the freedom to abuse. It is a matter of debauchery. It is a matter of the freedom to bury the voter under advertising and propaganda.... It is the freedom to deceive the voter.”
61Québec, Journal des débats, 5 avril 1978, 708 (Burns); The regime requires “that each party has an equal chance to make itself known to the electorate.”; see also Québec, Journal des débats, 6 avril 1978, 783-4 (Paquette); Québec, Commissions parlementaires, no. 77, 16 mai 1978, B-2948 (Burns).
une information équitable, concrétisée par la principe de contrôle des dépenses de façon que chaque option ait la même chance de se faire valoir et, de l’autre côté, le respect de l’expression la plus libre possible.”

The Official Opposition, while conceding that there was a need to restrict expenditures during referendums, described the bill as “une loi de bâillon, c’est un mesure du silence, c’est une loi malhonnête, sectaire et anti-démocratique. C’est un contrôle excessif.” The adverse effects of the law, in their view, exceeded any benefits because the government had struck a bad balance between freedom of expression, equality and procedural fairness. The spending restrictions were characterized as dangerous and excessive, repressive and unjustified, undemocratic, and abusive of fundamental rights and freedoms that were inherent features of Quebec democracy. The violation of freedom of expression was so egregious, according to Jean-Noël Lavoie, that “il n’existe aucun exemple au monde où on brime autant les droits de réunion, d’association et d’expression des individus.” He argued that freedom of expression was

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62Québec, Assemblée nationale, Commissions parlementaires, 3ième session, 31ième législature, no, 126, 12 juin 1978, B-4940 (Paquette); The government is obliged to “reconcile the right of citizens to informational equality, shaped by the principle of expenditure restrictions that permits each option to advance its argument, with, on the other side, the respect for expression that is as open as possible.”
63Québec, Commissions parlementaires, no. 77, 16 mai 1978, B-2955 (Lavoie); The opposition describes the bill as “a gag law, a silencing measure, a dishonest, biased, and undemocratic law. It is excessive.”
64Québec, Journal des débats, 5 avril 1978, 716 (Lavoie).
66Québec, Commissions parlementaires, no. 77, 16 mai 1978, B-2975-2976 (Ciaccia).
67Québec, Commissions parlementaires, 22 & 23 juin 1978, B-2693 (Lavoie).
68Québec, Journal des débats, 5 avril 1978, 725 (Roy); Québec, Journal des débats, 6 avril 1978, 774 (Gratton); Québec, Assemblée nationale, Journal des débats, 3ième session, 31ième législature, no.18, 11 avril 1978, 840 (Ciaccia).
69Québec, Commissions parlementaires, no. 77, 16 mai 1978, B2953 (Lavoie); According to Lavoie, “there exists no other example in the world where the individual rights of assembly, association, and expression are so persecuted.”

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“un principe non-négociable pour lequel nous refusons à suivre le gouvernement.” 70
Michel Gratton declared that given the choice “entre plus de liberté et moins de contrôles et moins de liberté avec plus de contrôles...”, 71 the Liberal party would always favour the former.

Of particular concern to the Official Opposition was the ability of third parties, which were not aligned with national committees, to participate in the political process. Liberal deputies viewed the permissible amount of expenditures, initially set at $300 but subsequently raised to $600, as too low and unreflective of actual costs. 72 They also regarded the law as too restrictive because the sum could only be used to organize public meetings. Under Bill-92, citizens would have “le droit de penser, mais pas de dépenser.” 73 Arguing that there were more effective and less impairing means available, the Liberals proposed a $3000 spending ceiling which would have permitted independent and unaffiliated groups and individuals to spend the sum as they saw fit. 74 They indicated to the government that a lower limit would be acceptable as long as it was sufficiently

70Québec, Journal des débats, 5 avril 1978 715 (Lavoie); He argued that freedom of expression was “a non-negotiable principle for which we refuse to follow the government’s lead.”; see also Québec, Commissions parlementaires, no. 130, 13 juin 1978, B-5125 (Lavoie).
71Québec, Commissions parlementaires, no. 126, 12 juin 1978, B-4959 (Gratton); Given the choice between “more freedom and less restrictions and less freedom with more restrictions”, the Liberal Party would always favour the former.
72Québec, Journal des débats, 5 avril 1978, 719 (Grenier); Québec, Journal des débats, 6 avril 1978, 786 (Blank).
73Québec, Commissions parlementaires, no. 126, 12 juin 1978, B-4938 (Grenier); Citizens would have “the right to think, but not to spend.”
74Québec, Journal des débats, 6 avril 1978, 786 (Blank); see also Québec, Journal des débats, 5 avril 1978, 716 (Lavoie); Québec, Commissions parlementaires, no. 126, 12 juin 1978, B-4938 (Lavoie) and B-4948 (Gratton).
high to allow third parties to participate in the referendum process.\textsuperscript{75} The government rejected the proposal, arguing that it would destroy the framework of national committees and undermine the principle of spending limits.\textsuperscript{76} Gilbert Paquette declared that “\textit{si c’est cela, votre démocratie, on n’en veut pas. On n’en veut pas d’une démocratie qui permet aux gens qui ont le plus d’argent dans la société de maintenir leur pouvoir en inondant les citoyens de propagande et en ne leur permettant pas de faire des choix éclairés et véritables...”}\textsuperscript{77}

Under the contextualized approach proposed by this dissertation, the Supreme Court’s decision about deference in \textit{Libman} would not have remained the same. The Court would be obliged to address the relative priority of the variables because they do not align to favour a specific degree of deference. The impugned law required the provincial government to rely on incomplete and inconclusive social science evidence. Acting in its capacity as a mediator rather than an antagonist, the National Assembly was obliged to balance competing interests and values. This variable points to the need for a high degree of deference. The political nature of the expression, on first appearances, aligns with it. The Court, however, holds that third party advertising is unworthy of

\textsuperscript{75}Québec, Assemblée nationale, \textit{Commissions parlementaires}, no. 130, 13 juin 1978, B-5124-5125 (Lavoie) and B-5142 (Lalonde).
\textsuperscript{76}Québec, \textit{Commissions parlementaires}, no. 126, 12 juin 1978, B-4953-4954 (Lavoie); Québec, \textit{Commissions parlementaires}, no. 130, 13 juin 1978, B-5117 (Bédard).
\textsuperscript{77}Québec, \textit{Commissions parlementaires}, no. 130, 13 juin 1978, B-5116 (Paquette); Gilbert Paquette declared that “if this is your democracy, we want none of it. We don’t want a democracy that allows the wealthy to maintain power by drowning citizens with propaganda and preventing them from making enlightened and genuine choices....”
stringent constitutional protection. This unworthiness suggests that a low degree of deference is preferable.

A review of the parliamentary discourse reveals that the deputies gave, with one exception, serious consideration to the principles and values at play. That exception, resulting from the shared assumption that money contaminates the campaigns, prevented inquiries into whether government should, in fact, regulate political expression. While this gap must be acknowledged, it does not negate the diligent efforts of the deputies to grapple with protecting freedom of expression while respecting the principles of political equality, meaningful participation, information equality and procedural fairness. They were cognizant of the fact that their decisions would affect the rights and freedoms used by individuals to participate in the democratic process. The substance of legislative discourse favours the accordance of a high degree of deference.

In striking down the provincial law, the Supreme Court expressly declares that “the legislature was in the best position” to make choices about referendum laws. It is, therefore, difficult to reconcile this declaration with the judicial endorsement of a legislative measure that mimics one considered but ultimately rejected by the National Assembly. The Court, in finding that the law failed the minimal impairment component of the Oakes test, expresses approval of the spending limits recommended by the Lortie Commission. This expression of approval occurs in spite of the fact that such an

78 Deliberations of this sort did not play a significant role in the Supreme Court’s own decision about the constitutionality of the law.
approach, during committee deliberations, had been characterized as contrary to the underlying tenets of Quebec’s democracy.

*Thomson Newspapers Co. v. Canada (Attorney General)*

Beginning in the late 1960s, the issue of public opinion polls and their effects on voters and elections appeared and disappeared from the political landscape. The Committee on Election Expenses (the “Barbeau Committee”) recommended that they be completely banned during election campaigns. More than 20 private member’s bills on the issue were introduced in the House of Commons over the course of the next two decades. The 1986 *White Paper on Election Law Reform* suggested that the news media be required to include methodological information when publishing or broadcasting them. The Lortie Commission recommended that: the federal government should impose a 48-hour blackout period at the end of election campaigns; news organizations which sponsor, purchase, or acquire opinion polls and are the first to publish or announce results should be required to include technical information on the methodology of polls; and a professional organization of public opinion pollsters with a code of ethics should be established in Canada.

The parliamentary discourse revolved around two issues, both of which were raised by witnesses appearing before the Special Committee on Electoral Reform which was established to examine the recommendations of the Lortie Commission and to

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80 Canada, House of Commons, Committee on Election Expenses (the ‘Barbeau Committee’), *Report of the Committee on Election Expenses*, (Ottawa: Queen’s Printer, 1966) 51.
propose changes to the *Canada Elections Act*. The two issues were: (1) the compatibility of the blackout with democracy and (2) the requirement that news organizations include methodological information in their stories. Members of the parliamentary committee accepted the findings of the Lortie Commission without question and, as a result, gave little consideration to the available social science evidence about the effects that public opinion polls on voters and/or electoral outcomes. They also failed to explore the effects that the ban had on *Charter* rights and freedoms. Their faith in the findings of the Lortie Commission was so deep-seated that committee members took exception to criticisms raised by witnesses appearing on behalf of news organizations and associations.

Michael McEwen, Senior Vice President, Radio Services of the Canadian Broadcasting Corporation, questioned the need for the law, asserting that high journalistic standards and ethics rendered it unnecessary. Gary Ennett, President of the Radio-Television News Directors Association of Canada, argued that the recommendations of the Lortie Commission were without precedent and contradicted the values and principles of a modern liberal democracy. Characterizing freedom of the press as “a cornerstone of our democracy”, he claimed that the ban marked the beginning of a slippery slope that would lead to further restrictions on the ability of journalists to report information that

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84 The purpose of the Committee is to study the recommendations in three stages, beginning with those that must be addressed before the next federal election which is expected to occur within 12 months. The Committee ultimately proves short-lived and does not survive beyond the first round of amendments.


87 Special Committee on Electoral Reform, *Proceedings*, Issue 9:16 (Ennett).
was of vital interest to the public. The witnesses were particularly concerned about the
Commission’s recommendation that required methodological information to be included
in the publication or broadcasting of public opinion poll results. Ennett argued that
“freedom of expression guarantees that governments will not be allowed to enact laws
telling journalists how to write news stories, including news stories about poll
results….” He cautioned that the recommendation amounted to “content requirements
... [which instructed] reporters how to report the results of a public opinion poll, what to
include and what to leave out, and when this can and cannot be done.” Roger Landry,
the President of the Canadian Daily Newspapers Association, and Jean Longval,
Executive Director of Hebdos du Québec, limited their comments to this specific issue.
They argued that the recommendation would be problematic for small community
newspapers. Concerns about this requirement appear to have had an effect on the
committee members because it was not included among their recommendations to
Parliament.

The issue was not raised at all during the subsequent debates in the House of
Commons. Only one elected representative ever spoke against its enactment. Deborah
Grey, a member of the Reform Party, appeared as a witness before the Senate Standing

88 Special Committee on Electoral Reform, Proceedings, Issue 9:16 (Ennett); see also Special Committee
on Electoral Reform, Proceedings, Issue 9:36 (Murphy).
89 Special Committee on Electoral Reform, Proceedings, Issue 9:16 (Ennett).
90 Special Committee on Electoral Reform, Proceedings, Issue 9:16 (Ennett).
91 Special Committee on Electoral Reform, Proceedings, Issue 9:74 (Landry); see also Special Committee
92 Special Committee on Electoral Reform, Proceedings, Issue 9:36 (Murphy); see also Special Committee
on Electoral Reform, Proceedings, 10:6 (Andre).
Committee on Legal and Constitutional Affairs. She argued that there was no evidence that polls caused any harm to voters and the electoral system. The sole purpose of the law, she claimed, was to “muzzle the media” and “to reduce the amount of information that the public is allowed to receive...” It represented, in her view, a blatant disregard for the *Charter of Rights and Freedoms*. Her concerns had little effect on Senators who ultimately passed the bill without amendment.

Under the contextualized approach proposed by this dissertation, the Supreme Court would accord the same degree of deference. Its decision would depend the prioritizing of the nature of the right and the nature of the parliamentary discourse. The nature of the legislation emphasizes the lack of judicial competence to review the merits of the decision taken by Parliament. It is based upon inconclusive social science evidence. Parliamentarians meditated among interests and values which included freedom of expression, meaningful participation, political equality, and fairness in an attempt to balance them in a reasonable manner. The first variable therefore favours a high degree of deference. The expression is political in nature and plays an important role in the decisions taken by voters, candidates and political parties. This suggests that a low degree of deference is more appropriate.

While the parliamentary discourse was lengthy in nature, the deliberations and debates that immediately preceded the enactment of the statutory provision were

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93 Senate Standing Committee on Legal and Constitutional Affairs, *Proceedings*, Issue No. 41, May 6, 1993, 41:32 (Grey). Because the Reform Party had fewer than 12 elected members, parliamentary protocol and tradition barred Grey from sitting as a member of the Special Committee on Electoral Reform and from fully participating in House of Commons debates.
superficial and narrow in scope. The findings of the Lortie Commission flattened and constrained them. The report, in many ways, became a crib sheet for the Standing Committee whose members gave only cursory consideration to Charter rights and freedoms. They did not query how the statutory provision, which was aimed at protecting fairness and ensuring meaningful participation, could be reconciled with freedom of expression and freedom of the press. The statutory provision, part of a set of amendments to the Canada Elections Act, was not itself the subject of any debate in the House of Commons. The quality of parliamentary deliberations militates against a high degree of deference being accorded.

**Harper v. Canada (Attorney General)**

The issue of third parties advertising emerged on the political landscape in the late 1960s. The Barbeau Committee recommended third parties be prohibited.\(^94\) The Special Committee on Election Expenses (the “Chappell Committee”) recommended that they be banned from incurring both partisan and advocacy advertising expenditures.\(^95\) The former is directed for or against individual candidates and/or parties. The latter promotes or opposes specific issues. Amendments to the Canada Elections Act in 1974 prevented third parties from spending money on partisan advertising. In 1983, the National Citizens’ Coalition challenged the law, alleging that it violated section 2(b) of the Charter. The Alberta Court of Queen’s Bench struck it down, ruling that the government


\(^{95}\) Canada, House of Commons, Special Committee on Election Expenses (the ‘Chappell Committee’), *Special Committee on Election Expenses Proceedings, 1970-1971, 28th Parliament, 3rd Session*, June 1, 1971,13:19.
had failed to establish the existence of any actual harm caused by third party advertising.\(^\text{96}\) The federal government did not appeal the ruling and the Chief Electoral Officer of Canada did not enforce the law during the 1984 and 1988 federal elections.

The Lortie Commission revisited the issue of third party advertising, recommending that third parties be prevented from incurring any expenses in excess of $1,000 and from pooling their resources.\(^\text{97}\) The National Citizens’ Coalition once again challenged the new provisions of the *Canada Elections Act* and the Alberta Court of Appeal struck them down.\(^\text{98}\) The ruling was not appealed to the Supreme Court of Canada and the statutory provisions were suspended by the Chief Electoral Officer of Canada during the next federal election. The issue remained off the political agenda until the *Libman* ruling by the Supreme Court of Canada. While it nullified the provincial legislation, the Court voiced approval of the Lortie Commission’s recommendation of a $1,000 spending cap.\(^\text{99}\)

In the wake of the Supreme Court’s ruling, the federal government introduced amendments to the *Canada Elections Act*. The parliamentary discourse revolved around three issues. They were: (1) the relevance of the *Libman* decision to legislative decisions about federal elections; (2) the evidentiary basis for the law; and (3) the principle of freedom of expression and democracy. The federal government repeatedly characterized the amendments to the *Canada Elections Act* as the legislative response to the ruling by


\(^{99}\) *Libman*, paragraph 81.
the Supreme Court. Proponents pointed to the fact that it signalled the judicial approval of the Lortie Commission’s recommendation of spending caps. Jean-Pierre Kingsley, the Chief Electoral Officer of Canada who appeared before the Standing Committee on Procedure and House Affairs, observed that all “[t]oo often, commentators on the issue of third-party advertising in the electoral process overlook the Supreme Court decision….” The Reform Party characterized the ruling, which had addressed the issue of spending restrictions during referendums, as irrelevant to the issue of spending restrictions during federal elections. It maintained that the lower court rulings in *National Citizen’s Coalition* and *Somerville* established that electoral spending limits were unconstitutional and that the new law would ultimately be struck down.

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Critics of the spending limits also questioned the need for legislation. There was, in their view, no proof establishing that third party advertising adversely affected either individual voters or election outcomes.\(^{104}\) Appearing as a witness before the Committee, Walter Robinson of the Canadian Taxpayers Association claimed that there was “no credible academic evidence on the face of the planet … supporting the contention that big money buys elections.”\(^{105}\) Randy White, a Reform member of parliament, repeatedly attempted to discredit the recommendations of the Lortie Commission, characterizing the research as badly flawed\(^ {106}\) and claiming that the lead researcher had ultimately concluded that third party spending had no discernable effect on voting or outcomes.\(^ {107}\)

Proponents of the bill argued that restrictions on third party expenditures were necessary to protect democracy and free speech. They prevented money from distorting the electoral process and impeding citizens from participating in a meaningful way and making free and informed choices.\(^ {108}\) Don Boudria, Leader of the Government in the House of Commons, claimed that restrictions strengthened democracy by ensuring that

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\(^{106}\) House of Commons, *Edited Hansard, Number 48*, February 14, 2000 (White).


“all electoral participants have an opportunity for meaningful expression.” Money could not be used to dominate the airwaves and drown out the voices of others. The law stopped our system from degenerating into an American model of “wild, wild west election financing…“ in which wealth rather than merit determined who got to express themselves and who won the election. Miguel Figueroa, the leader of the Canadian Communist Party who appeared as witness before the parliamentary committee, maintained that without spending restrictions our elections would “be bought and paid for through the massive use of finances….” The government also claimed that restrictions on third parties preserved other components of our electoral system. The Chief Electoral Officer of Canada cautioned that without them, “the whole regime of limits on candidates and parties will fall apart completely….” The fact that candidates and parties were subject to spending limits was the basis for claims that restrictions on third parties protected the fairness of the electoral process. The law levelled the playing field for all

109Standing Committee on Procedure and House Affairs, Evidence, October 26, 1999 (Boudria); see also Standing Committee on Procedure and House Affairs, Evidence, March 12, 1998 (Milliken and Brown).
112Standing Committee on Procedure and House Affairs, Evidence, November 2, 1999 (Julian); see also Standing Committee on Procedure and House Affairs, Evidence, October 19, 1999 (Parrish); Standing Committee on Procedure and House Affairs, Evidence, November 15, 1999 (Riche and Kerwin) http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1039790&Language=E&Mode=1&Parl=36&Ses=2; Standing Committee on Procedure and House Affairs, Evidence, December 7, 1999 (Bonwick and Wasylcyia-Leis).
113Standing Committee on Procedure and House Affairs, Evidence, November 3, 1999 (Figueroa); see also Standing Committee on Procedure and House Affairs, Evidence, October 19, 1999 (Solomon).
114Standing Committee on Procedure and House Affairs, Evidence, October 28, 1999 (Kingsley).
participants and it would be unfair if some were subject to spending limits while others were not.\textsuperscript{116}

Opponents rejected the government’s claim that democracy was either protected or improved. Rob Anders, a Reform Party member of the Standing Committee, argued that elections were “the crucible of democratic deliberations in a society such as ours … [and] if freedom of expression means anything, it means the right to speak freely, especially on public matters, political matters of concern to our democratic polity.”\textsuperscript{117}

Describing the bill as a gag law\textsuperscript{118} and government censorship,\textsuperscript{119} opponents claimed that it stifled free speech\textsuperscript{120} and muzzled private citizens.\textsuperscript{121} Its purpose was “to prevent other smaller political voices from engaging heavily in an election campaign”\textsuperscript{122} and to “essentially … shut them out of the process….”\textsuperscript{123} Critics of the law also claimed that


\textsuperscript{117} House of Commons, \textit{Edited Hansard, Number 36}, December 7, 1999 (Anders).

\textsuperscript{118} Standing Committee on Procedure and House Affairs, \textit{Evidence}, March 12, 1998 (White); Canada, House of Commons, Standing Committee on Procedure and House Affairs, \textit{Evidence}, 36\textsuperscript{th} Parliament, 2\textsuperscript{nd} Session November 15, 1999 (Hart); House of Commons, \textit{Edited Hansard, Number 36}, December 7, 1999 (Obhrai); Canada, House of Commons, \textit{Edited Hansard, Number 48}, 36\textsuperscript{th} Parliament, 2\textsuperscript{nd} Session, February 14, 2000 (White, Lunn and Grewal) \url{http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=36&Ses=2&DocId=2332172}.

\textsuperscript{119} Standing Committee on Procedure and House Affairs, \textit{Evidence}, November, 15, 1999 (Robinson).


\textsuperscript{121} House of Commons, \textit{Edited Hansard, Number 54}, February 22, 2000 (Breitkreuz and Casson).

\textsuperscript{122} House of Commons, \textit{Edited Hansard, Number 48}, February 14, 2000 (Grewal).

\textsuperscript{123} Standing Committee on Procedure and House Affairs, \textit{Evidence}, November 2, 1999 (Yost).

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unlimited advertising would improve democracy.\textsuperscript{124} Walter Robinson of the Canadian Taxpayers Association argued that:

\begin{quote}
[ele]ctions that engage the nation in vibrant and compelling public policy debates are surely a sign of a healthy democracy... Yet the changes advocated in this bill with respect to citizen and citizen advocacy group advertising ... run contrary to this democratic ethos and serve to weaken the body politic, not strengthen it.\textsuperscript{125}
\end{quote}

Opponents of spending limits also disputed the government’s claims of fairness. They described the law as “frankly evil”\textsuperscript{126} and undemocratic because it prevented people from participating in the electoral process.\textsuperscript{127} Rather than levelling the playing field, the law would lead to greater disparity among participants in the electoral process by “plac[ing] very tight restrictions on the ability of people to have freedom of speech during elections … [and] giv[ing] them mere pennies on the dollar for what registered parties can say during elections.”\textsuperscript{128}

Under the proposed contextualized approach, the Supreme Court would accord the same level of deference. In this case, the three variables all align. The nature of the legislation suggests that the judiciary lacks the competence to review the decisions taken by Parliament. It relied on inconclusive social science evidence and normative theories of democracy. It engaged in an exercise of mediating among and balancing competing

\textsuperscript{125}Standing Committee on Procedure and House Affairs Proceedings, \textit{Evidence}, November, 15, 1999 (Robinson).
\textsuperscript{126}Standing Committee on Procedure and House Affairs, \textit{Evidence}, October 19, 1999 (Anders).
interests and values that included freedom of expression, meaningful participation, fairness, and political equality. The first variable suggests, therefore, that a high degree of deference is appropriate. The nature of the expression is political and, on first impression, would seem to point toward a low degree of deference. The Court holds, however, that third party advertising does not warrant stringent constitutional protection because it is potentially manipulative and oppressive. The nature of the expression, therefore, favours a high degree of deference.

The legislative discourse, which stretched over several decades, also favours a high degree of deference. In the deliberations that immediately preceded the enactment of the impugned legislative provisions, elected representatives identified and debated key philosophical and pragmatic considerations. They made normative choices. They delved into the meaning of free speech, political equality, free and informed decision-making, meaningful participation and procedural fairness. They argued about whether restrictions on the free flow of political information could be reconciled with the tenets of liberal democratic theory. Both proponents and opponents of the proposed legislation rooted their positions in the underlying values and principles of the Charter. They were all fully cognizant that their decision would have repercussions for constitutionally-guaranteed rights and freedoms as well as democracy itself.

_Bryan v. Canada (Chief Electoral Officer)_

Concerns about the public transmission of federal election results date back to the 1930s when radio and telegraphs allowed news to travel fast. A review of the parliamentary
discourse suggests that the survival of this decades-old provision into the 21st century was more accidental than intentional. The Lortie Commission, without expressly calling for its repeal, argued that the provision “has been rendered obsolete by developments in broadcasting and telecommunications technology.”¹²⁹ The Commission recommended that polling hours across the country be staggered in order to shorten the amount of time between the polls closing in the east and those closing in the west.¹³⁰

The issue of the blackout and the staggering of voting hours disappeared from the political landscape until 1996 when Anne Terrana introduced a private member’s bill which proposed that all polling stations close at the same time.¹³¹ Her bill, which came in the wake of the federal government’s decision to effect other changes to the Canada Elections Act, was referred to the Standing Committee on Procedure and House Affairs for further examination. The parliamentary discourse revolved around two issues. They were: (1) the effectiveness of the blackout; and (2) the need for the blackout. The discourse was informed by the assumption, on the part of parliamentarians and most of the witnesses who appeared before the Standing Committee, that the statutory provision would be repealed when staggered voting hours were adopted. Anna Terrana asked rhetorically “how we can believe in blackouts nowadays with the technology we have in place?”¹³² This assumption led to little consideration being given to the question of whether the violation of freedom of expression was justifiable. The blackout was treated

¹²⁹ Lortie Commission, Reforming Electoral Democracy, 84.
¹³⁰ Lortie Commission, Reforming Electoral Democracy, 84-85.
¹³² House of Commons, Debates, November 26, 1996, 6727 (Terrana).
as tangential to a broader discussion about polling hours, time zones and Western Alienation.

The blackout had, in the view of all parliamentarians, outlived its effectiveness. Modern computer technology had rendered it obsolete\(^\text{133}\) because in:

just a few minutes after polling stations close ... the results are available to Canadians via foreign countries, even though they cannot be announced in Canada under the Canada Elections Act. ... Instantaneous communications have rendered the provisions of the Canada Elections Act obsolete and they have to be revised. ... The magic of modern communications has made it easy to obtain results, even though the law technically prohibits it.\(^\text{134}\)

The only person to defend the blackout was Jean-Pierre Kingsley, Chief Electoral Officer of Canada who appeared as a witness before the Standing Committee. He suggested that it be retained and combined with staggered voting hours to prevent an information imbalance. His defence of the law was, however, half-hearted. He recognized that “enforcement will become more and more difficult as time goes by, quite frankly, because of the fact that ... we’re beyond the broadcasting mechanisms and technology that have existed so far. We are entering the Internet world.”\(^\text{135}\)

In addition to concerns about the effectiveness of the blackout, members of the committee were doubtful about whether the release of election results from Atlantic Canada did, in fact, “cause … people not to vote or … to vote differently than they would


\(^{134}\) House of Commons, *Debates*, October 28, 1996, 5711 (Langlois).

vote otherwise.” The evidence establishing an information imbalance was based on anecdotes, American research and “a commonplace acceptance by political scientists and others that there is an effect.” The lack of proof prompted Stephen Harper, a committee member, to ask:

why are we doing this? What are the studies or evidence that indicate that the closing of polls down east is generally known? What evidence do we have that people out west generally know the poll results? What percentage of the population would tend to know the results when they go to vote? What evidence is there that this knowledge influences whether the vote, and how they vote? And if it influences how they vote, in what way does it influence how they vote?

His questions remained unexplored and unanswered because the government amended its own bill to include staggered voting hours. The government’s bill was introduced for third reading three weeks after the first committee meeting was held. The government invoked closure, thereby limiting the time for debate. Demands by members of the opposition to set aside the issue and return it to committee for more discussion and further consultation examination were ignored.

Under the proposed contextualized approach to deference, the Supreme Court might not adopt the same degree of deference. Its decision would require it to examine the relationship between the three contextual variables and prioritize them. It would have to explain the relative privileging of each because they do not align in favour of a

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136 House of Commons, Debates, 6723 (Harper); see also Standing Committee on Procedure and House Affairs, Evidence, November 5, 1996, 1125 (Terrana, McWhinney and Kingsley).
137 Standing Committee on Procedure and House Affairs, Evidence, November 5, 1996, 1125 (McWhinney).
139 House of Commons, Debates, November 26, 1996, 6720 (Langlois) and 6721-23 (Harper).
particular level of deference. The nature of the legislation would seem to favour a high degree. The statutory provision falls within the realm of political policy, an area in which concerns about the competence of the judiciary to review government decisions is questioned. It would, in principle, have required the government to balance competing values such as freedom of expression, political and informational equality, meaningful participation and fairness. Whether this requirement was actually met is questionable given the age of the legislation.\textsuperscript{140} The expression at the centre of the dispute is political in nature, suggesting a low degree of deference. The Court finds, however, that timing affects how stringent the constitutional protection of election results should be. They warrant less protection before the closing of all polling stations than after. This finding suggests that the second contextual variable favours a high degree of deference.

The parliamentary discourse, the third variable, does not align with the other two and it favours a reduced level of judicial deference. A review of the deliberations and debates that occurred prior to the enactment of staggered voting hours shows that the statutory provision and its potential effects on constitutionally-guaranteed rights and freedoms were not explored by elected representatives. Discussions about the blackout were peripheral to the more central deliberations about Western Alienation and polling hours. Parliamentarians did not attempt to reconcile it with the underlying values and

\textsuperscript{140} Research conducted by Patrick Monahan and Marie Finkelstein leads them to conclude that federal legislation enacted before 1991 was not Charter-vetted. It is only after year that proposed government bills benefitted from new procedures whose purpose was to ensure that public policy decisions complied with the requirements of the Charter. Please see: Monahan and Finkelstein, “The Charter of Rights and Public Policy in Canada,” 501; see also Dawson, “The Impact of the Charter on the Public Policy Process and the Department of Justice,” 595; James B. Kelly, Governing with the Charter, 222-38.
principles of the *Charter* because they all assumed that the statutory provision would be repealed.

**The Right to Vote**

The Supreme Court of Canada has displayed greater consistency in its decisions about deference in cases involving the right to vote. It refuses to accord it in the three cases that revolve around the issue of reasonableness. It, as a consequence, adopts a stringent standard of review and rejects the Crown’s justification arguments under section one of the *Charter*. The nature of the right is the primary factor that the Court employs to identify the context in which the government acted and to determine how high to set the bar during the application of the *Oakes* test. In two disputes, *Saskatchewan Reference* and *Haig*, the Court is not obliged to make a decision about deference because it finds that the impugned laws do not violate the right to vote. For the purposes of this chapter, it is assumed that the nature of the right in both of these cases would have been privileged had a violation been found. This privileging would have precluded a high degree of deference.

**Reference re Provincial Electoral Boundaries (Saskatchewan)**

The *Representation Act, 1989*, based on the work of the Electoral Boundaries Commission, divided the province into ridings with disparate population densities. The *Electoral Boundaries Commission Act* did not require the Commission to attempt to create districts with equal population densities. The province’s 64 southern ridings were statutorily permitted to deviate from the provincial norm or quotient by plus or minus 25
per cent. Under previous legislation, the permissible deviation was limited to 15 per cent. The deviation was necessary, according to the government, in order to accommodate disparate rates of population growth, geographic features, communities of interest and other similar factors.

The parliamentary discourse revolved around three issues. They were: (1) the meaning of the constitutionally-guaranteed right to vote; (2) the balancing the principle of equality with other democratic values; and (3) comparative population densities of electoral ridings. There was consensus among the members of the provincial legislative assembly that the *Charter* protected more than the right of the individual to an equal vote. They all agreed that the interpretation of the right, as understood within a Canadian context, was comprised not only of individualistic components but also communitarian and collective ones. They also accepted that the ridings did not have to be exactly the same size.

The government defended its decision by emphasizing the need to interpret the right to vote in a way that respected the principles of equality of representation and quality of representation. They were, it argued, two longstanding features of Canadian democracy and informed our understanding of the right. The first principle was the expectation that all votes should, within reason, be of equal weight. It encapsulated the notion of ‘one-person-one-vote’ or representation by population and was the ideal to

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which Canadian democracy aspired. The second principle was the expectation that constituents would have access to their elected representatives. The presence of the second reflected the commonly-held belief, arising from the complex realities of democratic governance in a large and sparsely populated province, that it was more difficult for constituents in rural ridings to contact their elected representatives and make use of government services.

Eric Berntson, the Deputy Premier, defended the law by arguing that “[s]omethiing else other than straight numeral factors [is] at work here ... and that something is common sense and fair play in allowing a region’s voice to be heard rather than allowing it to be swamped.” Consideration, he argued, had to be given to such factors as population growth, communities of interest, and regional and geographic characteristics. The government was adamant that the legislation and the resulting electoral boundaries map did not infringe right to vote. It pointed to the fact that the federal government and most other provinces permitted variations in population density of plus or minus 25 per cent, indicating that the law and the decisions of the Electoral Boundaries Committee represented ‘reasonable’ efforts to protect fairness in the electoral

142 Saskatchewan, Debates and Proceedings (1986-87), November 5, 1987 (Berntson).
143 Saskatchewan, Debates and Proceedings (1986-87), November 5, 1987 (Berntson).
144 Saskatchewan, Debates and Proceedings (1986-87), October 27, 1987 (Berntson).
146 Saskatchewan, Debates and Proceedings (1986-87), November 5, 1987 (Berntson).
system. The government also referred to a recent ruling by the British Columbia Court of Appeal which held that section 3 of the Charter did not guarantee absolute voter equality.

The Official Opposition emphasized the principle of equality when arguing against the law. The principle had to be given primacy when electoral boundaries were being drawn. While variances in the population density of ridings were permissible, they had to be kept as small as possible. The permissible deviation of 25 per cent was, in

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150 Saskatchewan, Debates and Proceedings (1989), April 19, 1989 (Lane); Saskatchewan, Legislative Assembly, Debates and Proceedings (1990-91), 21st Legislature, 2nd Session, June 15, 1990 (Lane) http://www.legassembly.sk.ca/hansard/21L4S/900615.PDF. Please see: Dixon v. British Columbia (Attorney General), [1989] B.C.L.R. (2nd), 273 (B.C.S.C.). Justice McLachlin, subsequently appointed to the Supreme Court of Canada, strikes down legislation that permits a variance of 25 % in population density. She holds, however, that deviations from absolute parity are permissible under the Charter when they result in 'effective representation'.


the view of the Opposition, unreasonably and unnecessarily wide.\textsuperscript{153} It argued that the 15 per cent variance, which had been mandated by earlier legislation, demonstrated that the principles of equality of representation and quality of representation could be more effectively and more reasonably reconciled.\textsuperscript{154} In its view, the increase was nothing more than a crude attempt at gerrymandering.\textsuperscript{155} Constituents in rural constituencies were being privileged because support for the Conservative Party was lower in urban ones.\textsuperscript{156}

If a decision about deference had been necessary, the proposed contextualized approach would have favoured according a high degree of deference. The decision would have obliged the Supreme Court to examine the relationship among the three variables and to prioritize them. This necessity arises because they do not align to favour a specific level of deference. If the Court were to privilege the nature of the right, the only one favouring a low degree of deference, it would have to explain why. The nature of the law required the government to balance the competing values of political equality, effective

representation and meaningful participation. It had to make normative choices about the meaning and purpose of section three of the *Charter*. The first variable favours a high degree of deference because the judiciary has comparatively less capacity than Parliament to mediate among the competing interests. The right itself points to the need for a low degree of deference. Synonymous with democracy itself, the right to vote is inherently and fundamentally important to the individual citizen and to electoral process. Its infringement warrants stringency.

The substance of parliamentary discourse favours a high degree of deference. The debates reveal that elected representatives explored the impugned law from a rights perspective. Their decision about permissible deviations in population density was in line with that of the federal government and many of the provinces. While they failed to consider whether the section 3 of the *Charter* could be understood as embracing the notion of ‘one-person-one-vote’, this failure reflected their embrace of the Canadian conceptualization of the right. Our understanding of rights of meaningful participation and effective representation incorporate both individualistic and communal features. They deliberated the meaning of the right, identifying two the key features of equality and quality of representation. What is revealed when the legislative debates are studied is that the disagreement among members of the provincial legislative assembly revolved around how to balance these features should be weighted and balanced against each other. This exercise in balancing is one for which the Court has argued it lacks relative expertise and experience.
Sauvé v. Canada (Attorney General) (Sauvé I)

The disenfranchisement of prisoner predated Confederation, with roots in the Constitution Act, 1791 and The Union Act of 1840. In the wake of the Charter being adopted in 1982, Elections Canada recommended that the Canada Elections Act be examined by Parliament in order to determine whether any of its provisions violated constitutionally-guaranteed rights and freedoms. 157 The matter was referred by the government to the Standing Committee on Privileges and Elections in 1984. Richard Sauvé had, by this point, written to all Members of Parliament advising them of his intention to appeal the law all the way to the Supreme Court of Canada. 158 John Evans, Parliamentary Secretary to the President of the Queen’s Privy Council for Canada, appearing before the Committee, explained that “it would be very useful [to the government] to have the insights of the committee on … various and sundry classifications of individuals as to whether or not in a free and democratic society those restrictions were seen to be reasonable and fair…” 159

The parliamentary discourse centred on three issues. They were: (1) public reaction to changes in the law; (2) whether voting was a right or privilege; and (3) whether disenfranchisement was a legitimate form of punishment. Members of the Standing Committee displayed a consensus in their view of the law and a reticence to

159 Standing Committee on Privileges and Elections, Proceedings, March 27, 1984, 1:10 (Evans).
change it. This consensus flattened their deliberations. They feared public reaction to amending the legislation, believing that Canadians were opposed to allowing prisoners to vote. They conceptualized voting as a privilege of citizenship that should be stripped from those who were convicted of crimes. Inmates had demonstrated that they were incapable of obeying the law and were, as a result, unworthy of participating in the political process. Stripping prisoners of the right to vote was “honoured by time… [and was] part of the framework of a democratic society; at least the one we are familiar with, and that is Canada.” Committee members also characterized disenfranchisement as a legitimate form of punishment for criminal behaviour.

The consensus shared by politicians about the law and the need for changes was challenged by the only two witnesses who appeared before the Committee. Gary Dickson of the John Howard Society of Canada characterized voting as a right rather than a forfeitable privilege. Disenfranchising an inmate on the basis of unworthiness was “an anachronism” in a society professing to be a modern liberal democracy. It could not, in his view, be justified under the Charter by harkening back to our democratic traditions and electoral practices. Dickson also disputed the claim that disenfranchisement was a legitimate form of criminal punishment, arguing that it was at odds with the principle of

160 Standing Committee on Privileges and Elections, Proceedings, April 10, 1984, 2:23 (Crosby); Standing Committee on Privileges and Elections, Proceedings, April 18, 1984, 3:19 (Taylor).
161 Standing Committee on Privileges and Elections, Proceedings, April 18, 1984, 3:20 (Vankoughnet).
162 Standing Committee on Privileges and Elections, Proceedings, April 18, 1984, 3:20 (Vankoughnet).
163 Standing Committee on Privileges and Elections, Proceedings, March 27, 1984, 1:13 (Crosby).
165 Standing Committee on Privileges and Elections, Proceedings, April 18, 1984, 3:5 (Dickson).
rehabilitation. He claimed that “[a] responsible corrections system has to encourage prisoners to recognize certain obligations, certain responsibilities to the community at large, and we think a very effective means of at least symbolically reinforcing that sense of responsibility is giving them the right to vote.”

James MacLatchie, the Executive Director of the Society, maintained that prisoner voting was an effective means of re-integrating individuals into Canadian society, before their release, and ensuring that they became responsible members of society.167

In the end, the Standing Committee on Privileges and Elections did not make any recommendations to the government. The issue of prisoner voting largely disappeared from the legislative agenda until the federal government released the White Paper on Election Reform in 1986. It recommended that only prisoners “who are in custody on remand and who, by definition, have not been convicted of a crime and sentenced to imprisonment, should be given the right to vote by proxy….“168 Inmates who had been convicted of crimes would continue not to be permitted to vote. The government did not act on the recommendation and the issue disappeared from view until raised by the Lortie Commission.

Under the proposed contextualized approach, the Supreme Court would have not have accorded a same degree of deference to the parliamentary decision. The decision would necessitate that the contextual variables be prioritized because they do not all

166 Standing Committee on Privileges and Elections, Proceedings, April 18, 1984, 3:5 (Dickson).
167 Standing Committee on Privileges and Elections, Proceedings, April 18, 1984, 3:21 (MacLatchie).
favour either a high or low degree of deference. The Court would have to explore the nature of the relationship among the three variables. The first variable, the nature of the legislation, suggests that a high degree of deference is appropriate. The legislative decision was based on incomplete social science evidence and normative choices among competing philosophical and political theories. This law falls within an area of public policy which the Court views as beyond the pale of judiciary. The nature of the right, once again, suggests a low degree of deference. Voting is fundamental to democracy and should only be limited in the most exceptional of circumstances. It is the mechanism through which citizens participate in the political process and through which they give consent to be governed.

The substance of the parliamentary discourse points to the need for a low degree of deference. The deliberations of the parliamentary committee were characterized by reticence and an unwillingness to examine the issue in a substantive fashion. Members of the committee did not regard prisoner disenfranchisement as a problem that needed to be remedied. The initial decision to strip prisoners of the right to vote, predating Confederation, would not have included due consideration of civil liberties. Members of the parliamentary committee, charged with reviewing the matter after the constitutional entrenchment of the Charter, did not delve into the effects that the constitutional entrenchment of the right might have on the Canadian conceptualization of voting. They continued to characterize it as a privilege rather than a right of citizenship. This meant that they were able to readily characterize its forfeiture as reasonable. It also permitted
them to discount the principles and values of political equality, meaningful participation and fairness raised by witnesses who attempted to challenge the longstanding bases for the disenfranchisement of prisoners.

*Haig v. Canada*

In anticipation of a round of negotiations with the provinces about amendments to the Constitution, the federal government enacted the *Referendum Act* in the spring of 1992. Under the law, the federal government could hold national, provincial, or regional referendums in order to consult with Canadians on social, political and constitutional issues. There was no statutory requirement that all citizens be included in the consultative exercise. In October of that year, the federal government held a referendum on the Charlottetown Accord in all provinces but one. Quebec held its own referendum on the same day as the federal one, using the same question.

The parliamentary discourse revolved around the issues of direct democracy and the value of public involvement in the amendment of the Canadian Constitution. The House of Commons established a legislative committee whose sole purpose was the examination of the proposed law. While the legislation did not limit the use of referendums to constitutional matters, the deliberations were shaped, guided and constrained by the shared expectation that one would be held once the federal and provincial governments reached an agreement on the constitutional reform. The

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169 Time was of the essence because a new round of constitutional negotiations with the provinces was scheduled to begin during the summer. In addition, the provincial government of Quebec had enacted legislation that required a provincial referendum on either sovereignty or reformed federalism to be held on or before October of 1992.
parliamentary discourse emphasized the democratic nature of referendums and the value of public participation in constitutional reform.

The consultative processes were characterized as the means of: “provid[ing] the best possible sense of direction for the first ministers”\textsuperscript{170}; “legitimat[ing] constitutional reform”\textsuperscript{171}; “giv[ing] everyone an opportunity to express their opinion”\textsuperscript{172}; “giv[ing] Canadians a chance to have the last word on any proposal for constitutional reform”\textsuperscript{173}; and “gaining the consensus or the approval of the Canadian people on a new constitutional proposal.”\textsuperscript{174} Ordinary Canadians were described as being the rightful owners of the Constitution and partners in the process of constitutional change.\textsuperscript{175} These declarations show that parliamentarians assumed and expected that the consultative process would be inclusive and would permit all Canadians to participate.

Committee members only referred to section 3 of the Charter in relation to the question of whether inmates, the disabled and non-resident Canadians should be permitted to participate.\textsuperscript{176} The absence of serious contemplation of citizens living in provinces in which a federal referendum would not be held was not surprising given the fact that the provision only guarantees the right to vote in federal and provincial

\textsuperscript{170} House of Commons, \textit{House of Commons Debates}, May 20, 1992, 10942 (Dobbie).
\textsuperscript{171} House of Commons, \textit{House of Commons Debates}, May 19, 1992, 10867 (Machi).
\textsuperscript{172} House of Commons, \textit{House of Commons Debates}, May 19, 1992, 10889 (Edwards); see also House of Commons, \textit{House of Commons Debates}, May 20, 1992, 10901 (Ouellet), 10942 (Dobbie) and 10960 (Duhamel).
\textsuperscript{173} House of Commons, \textit{House of Commons Debates}, May 20, 1992, 10952 (Maheu).
\textsuperscript{174} House of Commons, \textit{House of Commons Debates}, May 19, 1992, 10857 (Allmand).
\textsuperscript{175} House of Commons, \textit{House of Commons Debates}, May 20, 1992, 10952 (Maheu).
\textsuperscript{176} House of Commons, Legislative Committee on Bill C-81, “Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-81: An Act to Provide for Referendums on the Constitution of Canada”, \textit{Legislative Committee Proceedings Bills, 3\textsuperscript{rd} Session 34\textsuperscript{th} Parliament, Issue no. 2, May 25, 1992 and May 26, 1992.
elections. Its wording discouraged legislative contemplation of the possibility that the constitutionally-guaranteed right could be stretched to include voting in other forms of democratic processes. No one broached the possibility that a federal referendum which was held in some but not all provinces might violate the rights of citizens who were excluded from voting.

If a decision about deference had been necessary in this case, the proposed contextualized approach would have resulted in a low degree of deference being accorded. The nature of the legislation required parliamentarians to contemplate philosophical and political theories about deliberative democracy and individual self-government. The judiciary, at least on first appearance, has little experience with and expertise in examining and evaluating exercises in direct democracy. This suggests that a high degree of deference is appropriate. Justice Cory, in his concurring opinion, finds, however, that the courts are possessed of the necessary experience and expertise to review decisions about voting rights. They have been garnered from more than a century of courts interpreting electoral laws that affect the ability of citizens to participate in the political process. This finding suggests that a high degree of deference might, in fact, not be appropriate. The nature of the right favours a low degree. The purpose of referendums is to permit citizens to directly participate in the important decisions of the political community and to make collective decisions.

The substance of the legislative discourse shows that elected representatives did not fully explore the law from a rights perspective. Their failure to consider whether
section 3 of the *Charter* can be interpreted to include the right to vote in a referendum is, given its wording, not surprising. The provision only protects the right to vote in federal and provincial elections. The constrained nature of the constitutional guarantee did not, however, preclude deliberation on the part of parliamentarians about statutorily-created rights to participate in the democratic process. The legislative discourse reveals a clear expectation on their part that all Canadians would participate in the Charlottetown Accord Referendum. They wanted the consultative process to be as open and as inclusive as possible. There should, as a result, have been some contemplation of democratic principles and values including the right to vote, meaningful participation, political equality, and fairness. Its absence suggests that the third contextual variable would favour a low degree of deference.

**Sauvé v. Canada (Chief Electoral Officer) (Sauvé II)**

The Lortie Commission, acting prior to the first *Sauvé* ruling by the Supreme Court of Canada, described the disenfranchisement of all prisoners as incompatible with the *Charter*. It was a legacy of the past and at odds with the democratic rights and freedoms of individuals who, while incarcerated, remained Canadian citizens. The Commission recommended that only inmates “convicted of an offence punishable by a maximum of life imprisonment and sentenced for 10 years or more” be denied the right to vote in federal elections. It identified and assessed three rationales for stripping prisoners of the right. The first was the administrative difficulties of voting in prisons and possible threats

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to security. The rationale was refuted, the Commission concluded, by the fact that prisoners participated in the Charlottetown Accord Referendum and in provincial elections. The second rationale was the inability of prisoners to make informed choices. This was also rejected because they had access to news and were capable of making informed choices about issues, political parties, and candidates. The third rationale was that prisoners had demonstrated an unwillingness to meet the minimal requirements of responsible democratic citizenship and had, therefore, forfeited their right to vote. The Commission accepted its merit but concluded that it could not justify all prisoners being banned from voting. It recommended that only those incarcerated for offences that “constitute … the most serious violations against the country or against the basic rights of citizens to life, liberty, and security of person, including murder, kidnapping, hostage taking, treason, and certain sexual assaults” should be denied the right to vote.

The parliamentary discourse revolved around three issues. They were: (1) whether voting was a right or a privilege; (2) where to draw the line of demarcation between prisoners who should vote and those who should not; and (3) whether disenfranchisement was a legitimate form of punishment. The discourse proceeded on the basis of two assumptions. The first was that the Supreme Court, when it ultimately released the first

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179 Lortie Commission, Reforming Electoral Democracy, 42.
180 Lortie Commission, Reforming Electoral Democracy, 42.
181 Lortie Commission, Reforming Electoral Democracy, 42.
182 Lortie Commission, Reforming Electoral Democracy, 45.
Sauvé ruling, would strike down the law that banned all prisoners from voting.\textsuperscript{183} The choices available to Parliament, therefore, precluded its retention. The second assumption was that the decision would itself be the subject of a Charter challenge. As a consequence, it had to be made as immune from judicial nullification as possible.\textsuperscript{184} A number of elected representatives continued to believe that all inmates should be denied the right to vote.\textsuperscript{185} They also maintained that Parliament was being forced to act because the courts had overstepped their authority. Harvie Andre, Minister of State and Leader of the Government in the House of Commons, appeared before the parliamentary committee and argued that the lower courts, in striking down the original statutory provision, had made rather than interpreted the law.\textsuperscript{186} Louis Massicotte, appearing as an expert witness, claimed that “over the past ten years or so, initiative has tended to slip away from the hands of Parliament and into those of the courts.”\textsuperscript{187}

The Special Committee initially recommended to Parliament that prisoners who had been convicted of an offence punishable by a maximum term of life should be

\textsuperscript{183} The Supreme Court of Canada released its opinion three weeks after the amendments to section 51(e) of the \textit{Canada Elections Act} were given Royal Assent.
\textsuperscript{184} Special Committee on Electoral Reform, \textit{Proceedings}, Issue 3:30 (Crosby); Special Committee on Electoral Reform, \textit{Proceedings}, Issue 12:22 (Champagne); Special Committee on Electoral Reform, \textit{Proceedings}, Issue 16:12-13 (Murphy); Special Committee on Electoral Reform, \textit{Proceedings}, Issue 16:12 (Andre); Special Committee on Electoral Reform, \textit{Proceedings}, Issue 16:22 (Champagne).
\textsuperscript{186} Special Committee on Electoral Reform, \textit{Proceedings}, Issue 10:23 (Andre).
\textsuperscript{187} Special Committee on Electoral Reform, \textit{Proceedings}, Issue 8:75 (Massicotte).
stripped of the right to vote. Such a ban would have included those who, while convicted of such offences, had been sentenced to shorter terms of incarceration. The government rejected this recommendation, arguing that it would not survive a Charter challenge. Andre explained that “the severity of the crime and the severity of the punishment are not perfectly correlated in our Criminal Code.” He and Margaret Bloodworth, Assistant Secretary to Cabinet, Legislation and House Planning, argued for the adoption of the pre-existing distinction that the criminal justice system draws between serious and minor offences. Individuals, who are sentenced to more than two years, are incarcerated in federal penitentiaries. Individuals who are sentenced to less than two years are incarcerated in provincial institutions. Under the amended statutory provision, only the former would be denied the right to vote in federal elections.

Peter Milliken, a member of the Committee, claimed that the government’s position was unreasonably restrictive. He maintained that “the more people we allow to vote under this, the safer it is from a Charter challenge. By denying the vote to every federal inmate, you are running a greater risk of a successful Charter challenge than if you extended the period and put more people in a position where they can vote.” His concerns were echoed by Rod Murphy, also a committee member, who argued that the

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188 Special Committee on Electoral Reform, Proceedings, Issue, 7:18.
189 Special Committee on Electoral Reform, Proceedings, Issue 10:14 (Andre); Please see Special Committee on Electoral Reform, Proceedings, Issue 16:12 (Andre); and Special Committee on Electoral Reform, Proceedings, Issue 12:20 (Bloodworth).
190 Special Committee on Electoral Reform, Proceedings, Issue 10:14 and 10:23 (Andre); Special Committee on Electoral Reform, Proceedings, Issue 16:11 and 16:13 (Andre); see also Special Committee on Electoral Reform, Proceedings, Issue 12:20 (Bloodworth).
191 Special Committee on Electoral Reform, Proceedings, Issue 12:23 (Milliken).
192 Special Committee on Electoral Reform, Proceedings, Issue 16:13 (Milliken).
“courts will throw it [the penitentiary/prison distinction] out....”\(^\text{193}\) They and a number of their colleagues proposed alternatives to the two year line of demarcation, ranging from permitting all prisoners to vote\(^\text{194}\) to allowing only those serving less than five years,\(^\text{195}\) seven years,\(^\text{196}\) nine years,\(^\text{197}\) ten years,\(^\text{198}\) and 14 years\(^\text{199}\) to vote.

The decision of the government to disenfranchise penitentiary inmates was based on a characterization of voting as a privilege of citizenship rather than a constitutionally-entrenched right.\(^\text{200}\) Andre maintained that inmates in federal institutions had forfeited this privilege by failing to be responsible citizens,\(^\text{201}\) by violating our code of conduct\(^\text{202}\) and by “commit[ing] an injury to the state.”\(^\text{203}\) Critics construed voting as “a free right given in a democratic society”\(^\text{204}\) that could not “be violated if we are truly seeking to extend it to all Canadian men and women.”\(^\text{205}\) Louis Plamondon asserted that “to live in a democracy one has to be able to elect members of Parliament by voting for the candidate

\(^{193}\) Special Committee on Electoral Reform, *Proceedings*, Issue 16:12 (Murphy).
\(^{194}\) Special Committee on Electoral Reform, *Proceedings*, Issue 12:20 (Prud’homme) and 12:23 (Milliken).
\(^{195}\) Special Committee on Electoral Reform, *Proceedings*, Issue 12:18 (Milliken); 12:19 (Sobeski) and 12:21 (Murphy).
\(^{196}\) Special Committee on Electoral Reform, *Proceedings*, Issue 12:18-19 (Milliken) and 12:18 (Prud’homme).
\(^{199}\) Special Committee on Electoral Reform, *Proceedings*, Issue 12:22 (Champagne).
\(^{201}\) Special Committee on Electoral Reform, *Proceedings*, Issue 16:13 (Andre).
of his or her choice.\textsuperscript{206} Prisoners did not cease to be citizens when they were sent to federal penitentiaries\textsuperscript{207} and they should, therefore, not be stripped of the right to vote “as though they were perpetual outcasts from society and did not deserve consideration because they had made a mistake.”\textsuperscript{208} Proponents of the law finally emphasized the link between crime and punishment, downplaying principles of rehabilitation and reintegration.\textsuperscript{209} Critics focused on the rehabilitative purpose of imprisonment.\textsuperscript{210} Milliken claimed that “while it may satisfy some innate sense of justice in some of us to think that prisoners ought to be deprived of the right to vote, it serves no useful purpose either in punishing the inmate or in the rehabilitation of the inmate.”\textsuperscript{211} Others argued that disenfranchisement represented a lost opportunity to foster a sense of belonging to the Canadian polity, nurture a respect for its values and principles, and more effectively reintegrate prisoners into society.\textsuperscript{212}

Under the proposed contextualized approach, the Supreme Court could adopt a different degree of deference. In making its decision, it would have delve into the relationship between the variables and prioritize them. This is necessary because they do not all align to favour either a greater or lesser level of judicial restraint. The continued privileging of the nature of the right by the Court would require explanation. The nature

\textsuperscript{206} House of Commons, \textit{House of Commons Debates}, April 2, 1993, 18018 (Plamondon).
\textsuperscript{207} House of Commons, \textit{House of Commons Debates}, April 2, 1993, 18012 (Milliken).
\textsuperscript{208} House of Commons, \textit{House of Commons Debates}, April 2, 1993, 18018 (Plamondon).
\textsuperscript{210} Special Committee on Electoral Reform, \textit{Proceedings}, Issue 12:20 (Prud’homme); House of Commons, \textit{House of Commons Debates}, April 2, 1993, 18012 (Milliken); 18013 (Rocheleau); and 18020 (Leblanc).
\textsuperscript{211} House of Commons, \textit{House of Commons Debates}, April 2, 1993, 18013 (Milliken).
\textsuperscript{212} House of Commons, \textit{House of Commons Debates}, April 2, 1993, 18013 (Rocheleau) and 18020 (Leblanc).
of the legislation necessitated reliance on social science evidence that subject to more than one interpretation. Parliamentarians had to mediate among competing democratic values that included the right to vote, political equality, political participation, representation, and procedural fairness and integrity. They had to balance the divergent purposes of criminal punishment which included deterrence, rehabilitation, retribution and denunciation as it sought to draw a line between prisoners who should vote and those who should not. The mediation and balancing in which legislators engaged would point to the need for a high degree of deference. The Court regards the judiciary as being less capable than Parliament of engaging in such exercises. The nature of the right suggests a low degree of deference. Voting, the Court holds, underlies the legitimacy of government and the rule of law. It evidences the political equality of all citizens and is the primary means used by most to participate in the democratic process a meaningful way and to ensure effective representation.

The substance of the parliamentary discourse favours a high degree of deference. Members of Parliament engaged in substantive discussions and deliberations about voting, its meaning and its purpose. They grappled with questions about how to reconcile prisoner disenfranchisement with the tenets of a modern liberal democracy including equality, meaningful participation, effective representation, legitimacy, and fairness. They debated the legitimacy of disenfranchisement as a form of criminal punishment. They considered a number of different alternatives for distinguishing between prisoners who should be permitted to vote and those who should not. Parliament ultimately
employed a pre-existing criminal justice distinction in order to draw the line of demarcation. Politicians understood fully that their decision had to comply with the requirements of the Charter and knew that, in all likelihood, it would trigger a constitutional challenge.

**Figueroa v. Canada (Attorney General)**

The issue of registering political parties emerged on the political landscape in the late 1960s. The Barbeau Committee saw the absence of regulations as a threat to the proper functioning of our democracy. Without them, political corruption and the abandonment of public interest or the common good by politicians and political parties was, it argued, more likely.\(^{213}\) The Chappell Committee reiterated the need to register political parties in 1970, recommending a threshold of 27 candidates.\(^{214}\) The use of a threshold as a legislative means of distinguishing between registered and non-registered parties was controversial when the government amended the Canada Elections Act in 1970. The amendment initially included a 75-candidate threshold which was reduced to 50 in response to concerns raised by the Opposition.

The lower number was still characterized as too high,\(^{215}\) arbitrary\(^{216}\) and an impediment to new parties and social change.\(^{217}\) Critics argued that the threshold privileged parties, whose support was geographically-concentrated in Ontario or Quebec.

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\(^{213}\) House of Commons, Committee on Election Expenses (the ‘Barbeau Committee’), *Report of the Committee on Election Expenses*, (Ottawa: Queen’s Printer, 1966), 39.


They are the only provinces with more than 50 ridings.\textsuperscript{218} Parties whose support base was limited to other provinces or regions would never be able to reach the threshold and would, as a consequence, never acquire the benefits that come with registration. Ed Broadbent also argued that the use of a threshold undermined the principle that in a democracy, it was “the right of any man or small group of individuals to start a new political party and present a program to the electorate ... and that, in the fundamental interests of a parliamentary democracy, our electoral laws should recognize a man or a few men as constituting a political party.”\textsuperscript{219}

The Lortie Commission examined the issue of registration, making a series of recommendations about the sorts of benefits accruing to registered parties. It, however, left the threshold in place.\textsuperscript{220} Elections Canada maintained that it allowed a distinction to be drawn between political dilettantes and professionals. Those parties that met the requirement “demonstrate serious intent to engage in the rigours of electoral competition at a level that indicates relatively broad appeal for its program and ideas.”\textsuperscript{221} While changes in benefits were included among the first set of recommendations considered by the Special Committee on Electoral Reform, the only parliamentarian to speak against the issue of the threshold itself was Deborah Grey, the lone member of the newly-formed and regionally-concentrated Reform Party. Appearing before the Senate Committee on Legal and Constitutional Affairs, she argued that it “promote[d] and protect[ed] the three

\textsuperscript{218}House of Commons, \textit{House of Commons Debates}, June 23, 1970, 8507 (Deachman).
\textsuperscript{219} House of Commons, \textit{House of Commons Debates}, 22\textsuperscript{nd} Parliament, 2\textsuperscript{nd} Session, vol. VIII, June 23, 1970, 8507-8509 (Broadbent).
\textsuperscript{221} Lortie Commission, \textit{Reforming Electoral Democracy}, 249.
established parties currently sitting in the House of Commons, while reducing political
competition by making it more difficult for new parties to emerge and challenge the
status quo.\textsuperscript{222} Her argument had no effect on Senators who ultimately passed the bill
without amendment.

Under the proposed contextualized approach, the Supreme Court would not adopt
a different degree of deference. In making its decision, it would have to consider how the
three variables should be prioritized because they do not align to favour either a greater
or lesser level of judicial restraint. The statutory provision required, at least in principle,
Parliament to balance competing values such as freedom of expression, the right to vote,
political and informational equality, meaningful participation and fairness. This exercise
in balancing and the use of social science evidence about political parties suggests, on
first appearances, that a high degree of deference is appropriate. The age of the legislation
raises questions about whether the exercise in balancing, the consideration of available
proof, and contemplation of the tenets of liberal democracy were actually substantive in
nature. This might point to the need for a lower degree of deference. The nature of the
right suggests that a low degree is appropriate. The law affects ability of individuals to
participate meaningfully in the electoral process and to be effectively represented in
government.

The substance of the parliamentary discourse also points to the need for a low
degree of deference. The adoption of the threshold dates back to the early 1970s, long

\textsuperscript{222} Senate Standing Committee on Legal and Constitutional Affairs, \textit{Proceedings}, May 6, 1993, 41:30 (Grey).
before the constitutional entrenchment of the Charter. While some members of parliament did query what effects registration might have on civil liberties, their discussions were cursory in nature. They did not engage in a substantive balancing of freedom of expression, the right to vote, meaningful participation, equality, and effective representation. The recommendations of the Lortie Commission about benefits accruing to registered parties did not trigger a re-examination of either the 50-candidate threshold or its compatibility with the values underlying our constitution. The near invisibility with which proposed changes to the benefits arising from registration made their way through the legislative process raises doubts about whether parliamentarians sought to reconcile the statutory provision with the principles of liberal democracy.

**Conclusion**

This chapter proposed a contextualized approach to deference for use in cases involving democratic processes. The government bears a positive duty to construct elections and referendums. They are the distinct and structured frameworks within which citizens exercise democratic rights and engage in collective decision-making. The proposed approach ties the decision about the appropriate degree of deference to accord to an examination of the context in which the government acted. This decision, in turn, aids the judiciary in setting the appropriate standards of review and proof to employ during the application of the Oakes test.

The study of the Court’s democratic process jurisprudence, undertaken in chapter five, established that it did not use a standard analytical process in these disputes despite the fact that they share a number of common features. The proposed approach was
applied to the nine disputes involving legislation that allegedly violated freedom of expression and/or the right to vote in order to demonstrate that the analytical process, employed by the Court to determine the context in which the government acted, could be given greater structure and coherence.

The proposed contextualized approach requires the judiciary to examine the nature of the legislation, the nature of the right and the nature of the parliamentary discourse when determining the context in which the government acted. The first variable allows the courts to ascertain their competence to review decisions taken by the legislative branch. Some types of decisions, according to the Supreme Court, are better left to Parliament and the provincial legislative assemblies. The second variable aids the judiciary in determining the appropriate level of constitutional protection that the right or freedom warrants. The specific meaning and value of a right or freedom is dependent upon the context in which it is exercised. The third variable enables the courts to ascertain whether the legislative decisions were based on the reasoned consideration of the issues, principles and values at play. The protection of Charter rights and freedoms begins long before the judiciary becomes involved in disputes involving social problems. Parliament and the provincial legislative assemblies, in enacting laws, share in the responsibility for protecting Charter rights and freedoms.
Chapter 7

Conclusion

This dissertation has its roots in a declaration by the Supreme Court of Canada that the ‘natural’ attitude of the judiciary towards Parliament when dealing with election laws should be one of deference.\footnote{R. v. Bryan, [2007] 1 S.C.R. 527, paragraph 9.} Deference, as commonly-understood, is simply equated with government success in the courts. It is usually measured by tallying up victories and defeats. The judiciary is described as being deferential when it upholds a law and is regarded as activist when it strikes it down. Implicit in the declaration of a ‘natural’ attitude is the suggestion that the statutory provisions should be upheld as constitutional. The record of the Supreme Court suggests that there is, in fact, an ‘unnatural’ quality to its attitude of deference in cases involving the democratic process and the alleged violation of freedom of expression and the right to vote. It has struck down or suspended laws in a majority of cases that it has heard.

The commonly-held understanding of deference emphasizes outcomes and ignores the effect that the concept has on judicial reasoning. The fixed presence of the \textit{Oakes} test in all \textit{Charter} adjudication obscures from view the fact that the standards of review and proof employed by the judiciary during the section one analysis are not constant, fluctuating up and down from one case to the next. The court’s decision about deference directly affects the success or failure of the government to defend the
constitutionality of legislation. Granting a high degree of deference relaxes the intensity with which the justification arguments are scrutinized. It alters evidentiary requirements, allowing the Crown to rely on arguments based on common sense, logic and reason when “traditions forms of evidence (or ideas about their sufficiency) may be unavailable … and … to require such evidence … would be inappropriate.” Reducing the degree of deference makes the scrutiny of the justification arguments more stringent and renders the evidentiary burden borne by the Crown more onerous.

The effect that deference has on the Court’s application of the Oakes test points to a need to dispense with the commonly-held understanding of the concept and to adopt a definition that more accurately reflects and reveals its complex nature. In setting the level of deference to accord, the judiciary acts on its concerns about its competence to examine a decision taken by the executive or legislative branch of government and/or the democratic legitimacy of it doing so. The first concern is related to a lack of ability and expertise to identify and understand some types of issues and to evaluate legislative remedies. The second concern reflects the distinctions in the roles and responsibilities of the three branches of government and the possible intrusion by the courts in the making of laws. The formulation of public policy falls within the purview of the other branches of government whose legitimacy stems from the fact that they are elected by and accountable to the people. The decision about deference does not signal judicial

2 Bryan, paragraph 28.
agreement with the impugned decision, but instead signifies a finding of reasonableness and justifiability.

The effect that deference has on judicial reasoning under section one of the Charter also speaks to the need to develop a theoretical framework within which to more fully explore the concept, the rationales for its use, and the analytical processes that are employed by the courts when they make discretionary decisions about how high or low to set the bar for the Oakes test. Deference theory has garnered relatively little attention from scholars who study the Charter. They have observed the use of deference by the courts and have commented on the inconsistency and unpredictability of judicial decisions, but have often employed the concept as it is commonly understood.

Chapter three began an exploration of the theoretical underpinnings of the concept within the Canadian context. It examined competing definitions of deference, expressing approval for one which incorporated a notion of respect and courtesy towards the other branches of government. The two rationales for its accordance, competence and democratic legitimacy, were presented and placed within the confines of our constitutional construct. The three principal analytical processes used by courts were investigated in order to assess their compatibility with the Charter. Non-doctrinism was criticized for leaving unbridled the discretionary power of the courts to set the standard of review and standard of proof used during the Oakes test. Formalism was found lacking for its reliance on artificial and antiquated distinctions between politics and law and between policy and principle. Contextualism, which requires the judiciary to employ a set
of pre-ordained elements, factors or variables to examine the set of circumstances in which the government acted in order to determine the appropriate degree of deference to accord, was shown to be compatible with Charter adjudication. The chapter concluded by proposing a contextualized approach to deference that rested upon the examination of the nature of the legislation, the nature of the right and the nature of the parliamentary discourse.

The exploration of the theoretical underpinnings of deference served as a stepping stone to examine, in chapter four, the Oakes test and its evolution in the wake of deference being integrated in the judiciary’s section one analysis. The concept was not part of the test in its original form. It was grafted on the analytical process only after it became apparent to the Supreme Court that the stringency and rigor of Oakes Classic, particularly its minimal impairment component, rendered it extremely difficult, if not impossible, for the Crown to defend the reasonableness of infringements. This difficulty stemmed from the political realities of public policy often being developed based on normative preferences, incomplete social science evidence, and the balancing of competing rights and values rather than cogent and conclusive proof about social problems in need of remedy. The integration of deference was prompted by the concerns of the Supreme Court about the competence of the judiciary to assess the constitutionality of governmental decisions and the democratic legitimacy of it doing so.

Using four cases, chapter four traced the Court’s efforts, over the course of more than two decades, to formulate and reformulate an analytical process for determining the
appropriate degree of deference to accord in individual cases. The Court’s process, which
fits within the stream of contextualism, ties its decision about the appropriate standards of
review and proof to employ during the section one analysis to the understanding of the
context in which the government acted. The need for repeated reformulations of the
analytical process was triggered by its failure to structure and give coherence to the
judicial decision about deference. Changes in the approach involved the number, nature
and relevance of contextual elements and factors as well as the point in the ruling at
which the decision was taken. The most recent formulation – the contextual factors
approach – has not led to more structure and coherence. It, as a result, remains impossible
for the Crown and rights claimants to know, in most cases, whether a high or low
deferece will be accorded. This means that they cannot know, with any great certainty,
what standards of review and proof will be employed during the section one analysis.

The examination of the Supreme Court’s travails with the integration of deference
in the section one analysis and the formulation of an analytical process through which to
make its decisions served as a backdrop against which to study the use of the concept in
cases involving the election and referendum law. The Court has repeatedly stated that
decisions about the democratic process are better left to legislators\(^3\) and yet it has ruled
against the government in a majority of the cases that it heard. The shared features and
common themes of these disputes suggest the need for uniformity in the manner in which

\(^3\) Libman v. Attorney General (Quebec), [1997] 3 S.C.R. 569, paragraphs 59 and 62; Thomson Newspapers
the decision about deference is made. The subject matter of all of them is the institutions and practices of democracy. Six of the nine cases review sections of the *Canada Elections Act*. Six of the nine *Charter* challenges involve statutory provisions that were examined by the same parliamentary committee. Six of the nine rely on the findings of the Lortie Commission as the primary piece of evidence.

The examination of the opinions of the Justices of the Supreme Court undertaken, in chapter five, revealed that despite commonalities, a standard approach to deference has not been developed and employed. The elements and factors used to identify the context in which the government acted fluctuated in number and relevance. As a consequence, there was neither a ‘normal’ level of scrutiny used by the Court nor a ‘standard’ evidentiary burden borne by the Crown. These absences make it difficult for claimants and the government to anticipate the sort of proof needed to substantiate the merit of their positions and the kinds of arguments that will prove persuasive.

The study of the opinions showed that the Court applied two different analytical processes. The first, for use in disputes involving freedom of expression as the primary claim, involved the consideration of two elements – the nature of the right and the nature of the legislation – to establish context. The nature of the legislation appeared either as one singular element or was disassembled into the three contextual factors of the difficulty of measuring harm, the vulnerability of the targeted group and the subjective apprehensions and fears of this group. Repeated reliance on the same set of factors conveyed the impression that the Court’s discretionary decision about deference was
structured and coherent in both form and exercise. The study of the judicial opinions revealed this impression to be misleading. The meanings of the individual factors were flexible. The relevance of the individual factors fluctuated, increasing or decreasing the breadth and depth of judicial understanding of context. Finally, the point in the judicial opinion at which the decision about deference was taken shifted from one case to the next. The fluidity of its placement influenced whether deference affected the whole of the Oakes test or merely the minimal impairment component.

The second analytical process, for use in cases in which the right to vote was the primary claim, privileged the nature of the right to the exclusion of all other elements or factors. The Supreme Court has never once accepted the justification arguments advanced by Crown to demonstrate the reasonableness of an infringement. A review of its rulings revealed the staking of a judicial guardianship of the right to vote whose creation was prompted by democracy, the common law and the immunity of section three of the Charter from legislative override. This guardianship endowed the judiciary with the competence and democratic legitimacy to stringently assess the justification arguments of the Crown.

The proposed contextualized approach to deference, first laid out in chapter three, was used in chapter six to re-examine the Court’s decisions in the nine democratic process cases. It requires that consideration be give to the nature of the legislation, the nature of the right, and the nature of the political discourse. The first variable permits the judiciary to determine whether it has the competence and democratic legitimacy to
review legislative decisions. The second one establishes the level of constitutional protection that the right or freedom warrants in the specific set of circumstances. The third one permits the courts to ascertain whether an impugned law reflects and results from a substantive exploration by legislators of the pertinent values and interests, potentially affected rights and freedoms, and the reasonableness and justifiability of possible infringements. The application of the proposed contextualized approach was not intended to demonstrate that the Supreme Court had erred in its rulings. In a number of cases, the outcome would remain the same. The purpose was to show how the analytical process, employed by the Court to determine the context in which the government had acted, could be given greater structure and coherence. The chapter placed particular emphasis on the study of the parliamentary discourses that preceded the enactment or amendment of the impugned laws.

Limitations of the Work

The decision to use only cases involving electoral/referendum laws and the alleged infringements of the right to vote and freedom of expression to examine deference narrows the scope of research undertaken in this dissertation. This narrowness prompts questions about the value of only looking at the Court’s behaviour in this specific area of public policy. This decision is defended by the fact that these cases, because of their subject matter and the positive duty imposed on the government, are unique. There are also a handful of noteworthy lower court rulings that could have been included in the project. The importance, in particular, of the Alberta Queen’s Bench ruling in National
Citizens’ Coalition, the Alberta Court of Appeal ruling in Somerville, and the British Columbia Court of Appeal ruling in Dixon cannot be overstated.\textsuperscript{4} They each directly influenced the choices made by governments at both the federal and provincial level. Their addition to the cases that were examined would have provided a more detailed impression of judicial behaviour towards legislative decisions about the electoral and referendum processes. The focus of this dissertation was, however, the Supreme Court of Canada and its behaviour in cases involving the democratic process and the alleged violation of freedom of expression and/or the right to vote.

The study of the parliamentary discourses that preceded the enactment or amendment of pieces of legislation raises another concern. Focusing on the deliberations and debates of the legislative branch is problematic in a parliamentary government that is dominated by the executive branch. It is the executive that sets the legislative agenda and, particularly in a majority government situation, controls the substance of parliamentary debates and committee deliberations. An exploration of the discussions of bureaucrats and politicians in the executive branch could provide insight into why specific choices. This could, perhaps, be done by interviewing those individuals who were involved in legislative decisions that were subsequently challenged as unconstitutional. The contextualized approach to deference that was proposed by this dissertation, however, links its accordance to the public discourse in which parliament engages. This discourse

is contained in the deliberations, discussions and debates that occur in the House of Commons, the Senate, and parliamentary committees.

One final limitation of the research is the failure to link the examination of deference to democratic dialogue theory which has dominated the study of the Charter for almost 15 years. The failure to do so reflects the fact that the purpose of this dissertation was to examine the use of deference by the Court and to better understand how and why it chose to initiate or refrain from initiating a dialogue about the democratic process with Parliament. The legislative responses that followed adverse rulings provided little assistance, with the exception of the first Sauvé case and Libman, to the analysis of judicial decisions about deference. These two discourses were of interest only because the parliamentary responses to these rulings led to the second Sauvé case and Harper. A preliminary examination of the dialogues that resulted from the Court’s decision about deference suggested that legislative responses usually mimicked the findings and holdings reached by the Supreme Court. The legislative branch made changes to the laws that incorporated key components of the judicial rulings. The second Sauvé case was the one instance in which there has been no legislative response. The nullified provision of the Elections Act was neither repealed nor amended. The cursory examination of the dialogues also revealed how multi-faceted and multi-dimensional they can be. Court rulings were found to have ‘spill-over’ effects for other pieces of legislation and other levels of governments. In the wake of the Libman ruling, for example, the Quebec government made changes to both the Referendum Act and the Elections Act. The federal
government, which had not been a party to the dispute, amended the federal electoral law to impose limits on third party spending. The second Sauvé case provided another example of the ‘spill-over’ effect. The striking down of the federal law prompted amendments to provincial legislation. Only Alberta now bars some prisoners from voting.

**Implications and Further Research**

The concept of deference and the analytical process used by the courts to make their decisions have not garnered much attention from Canadian political scientists and legal scholars. There is a need to more closely examine its use in *Charter* adjudication. Such an examination would enrich our understanding of how the Court views itself, the scope of its responsibilities and powers, its relationship with the other branches of government, and its role in our political community. The Court, in setting the appropriate degree of deference in individual cases, acknowledges that its competence is not absolute and that its legitimacy to intervene and overturn the legislative and executive decisions is not without limit. This acknowledgment must be more fully explored.

The lack of Canadian literature about deference theory reveals an area of research that warrants more attention. There is a need to develop a theoretical framework within which to advance our understanding of the use of deference in *Charter* adjudication. Scholars must begin to develop a stream of Canadian deference theory. They must also formulate and defend alternative analytical processes for the courts to use when making its decision about deference. The development of a Canadian stream of theory would facilitate the undertaking of comparative studies with other Westminster parliamentary
democracies. The value of such studies is two-fold. First, the academic literature reveals that judges and academics in other Commonwealth countries, which value both the principles of parliamentary sovereignty and judicial review, have struggled with the issue of deference. Their debates would assist scholars to better understand how and why deference is used in Charter adjudication. Second, the struggles of judges and academics in these countries have been informed by the jurisprudence of the Supreme Court of Canada. They cite and make reference to its comments and observations.

The dissertation also confirms the value of examining parliamentary discourses. There is now a rich literature about the effects that the Charter has on the institutions and practices of the executive branch. Its entrenchment and rulings by the courts led to significant changes in the manner in which the legislative agenda was set and public policy was developed. The focus on the executive resulted in the legislative branch being marginalized in the study of the Charter. The deliberations and debates of members of the House of Commons and the Senate are worthy of examination because they are the discourses of our democracy. It must be remembered that consideration of the Charter is not triggered by a challenge in court to the constitutionality of a piece of legislation. It informs, or should inform, the discussions in which our political representatives engage. We need, as a result, to understand how they conceptualize the underlying values and principles of our Constitution as they make choices that may adversely affect our rights and freedoms.
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