INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

Bell & Howell Information and Learning
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA

UMI®
800-521-0600
Judicial Deference
and the Constitutional Protection of Human Rights

by

Guy Davidov

A thesis submitted in conformity with the requirements
for the degree of Master of Laws (LL.M.)
Faculty of Law
University of Toronto

© Copyright by Guy Davidov (1998)
The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author’s permission.

L’auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L’auteur conserve la propriété du droit d’auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.
Abstract

The thesis explores the ways judicial deference colours the constitutional protection of human rights, in Canada (the Oakes test and the deviations from it), the U.S. ("tiers of review" – from strict scrutiny to the rational relation test), and the European Court of Human Rights (the "margin of appreciation"). Different aspects of the application of deference are examined, its actual impact in different cases is evaluated, and the inconsistency of the case law is criticized.

The thesis then focuses on the normative question of whether deference is justified. Arguments dealing with the impact of deference on rights and interests, the institutional competence of the courts, and the legitimacy of judicial review are examined and refuted. The “paradox of deference” is exposed: while one of the main reasons for deference is the problem of subjectivity, deference only enhances subjective reasoning.

Lastly, alternative ways of responding to the subjectivity problem are suggested.
I would like to express my appreciation to David Beatty for his insightful comments, as well as his guidance and support, which by far exceeded what anyone can expect from a supervisor.

I would also like to thank Lorraine Weinrib for her valuable comments.
# General Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td><strong>Part I - The Practice of Judicial Deference</strong></td>
<td></td>
</tr>
<tr>
<td>1. The development of deference in Canada</td>
<td>8</td>
</tr>
<tr>
<td>1.1 The setting</td>
<td>8</td>
</tr>
<tr>
<td>1.1.1 What is deference?</td>
<td>8</td>
</tr>
<tr>
<td>1.1.2 The <em>Oakes</em> test: strict scrutiny</td>
<td>9</td>
</tr>
<tr>
<td>1.2 The emergence and development of deference: a chronological overview</td>
<td>11</td>
</tr>
<tr>
<td>1.2.1 <em>Edwards Books</em>: first signs of regression</td>
<td>11</td>
</tr>
<tr>
<td>1.2.2 <em>The Labour Trilogy</em>: a whole new level of deference</td>
<td>14</td>
</tr>
<tr>
<td>1.2.3 <em>Irwin toy</em>: a second minimal impairment test</td>
<td>17</td>
</tr>
<tr>
<td>1.2.4 <em>The criminal sphere</em>: an unexplained expansion</td>
<td>20</td>
</tr>
<tr>
<td>1.2.5 <em>McKinney</em>: intensifying the <em>Irwin toy</em> test</td>
<td>22</td>
</tr>
<tr>
<td>1.2.6 <em>RJR-MacDonald</em>: deepening the confusion</td>
<td>25</td>
</tr>
<tr>
<td>2. The development of deference in the U.S.</td>
<td>32</td>
</tr>
<tr>
<td>2.1 Due process: <em>Lochner</em> and its demise</td>
<td>32</td>
</tr>
<tr>
<td>2.2 Equal protection: more extreme deference (with more exceptions)</td>
<td>36</td>
</tr>
<tr>
<td>2.3 The first amendment: some more tiers</td>
<td>41</td>
</tr>
<tr>
<td>3. The development of deference in the European Court of Human Rights</td>
<td>44</td>
</tr>
<tr>
<td>3.1 The introduction of the “margin of appreciation”</td>
<td>44</td>
</tr>
<tr>
<td>3.2 From emergency situations to (almost) all other cases</td>
<td>46</td>
</tr>
<tr>
<td>3.3 The width of the margin</td>
<td>48</td>
</tr>
<tr>
<td>4. The application of deference</td>
<td>54</td>
</tr>
<tr>
<td>4.1 Deference to whom</td>
<td>54</td>
</tr>
<tr>
<td>4.2 Stage of application</td>
<td>55</td>
</tr>
<tr>
<td>4.3 Form of deference</td>
<td>58</td>
</tr>
<tr>
<td>4.4 Scope of application</td>
<td>63</td>
</tr>
<tr>
<td>5. The actual impact of deference</td>
<td>68</td>
</tr>
</tbody>
</table>
6. The inconsistency of the case law  
6.1 The inconsistency in Canada: an overview  
6.2 The conflicting decisions of justice McLachlin – a particular example  
6.3 The inconsistency in other jurisdictions  
6.4 Conclusions

Part II – Is Deference Justified?  
7. The impact of deference on rights and interests  
7.1 Introduction  
7.2 The impact of deference on constitutional rights  
7.2.1 How deference undercuts rights  
7.2.2 The fear of rights’ devaluation  
7.2.3 Is constitutional protection always needed?  
7.2.4 Legislation attempting to promote constitutional rights  
7.3 The impact of deference on public interests  
7.3.1 Legislation based on ambiguous evidence  
7.3.2 Ambiguity regarding the existence of less restrictive alternatives  
7.3.3 Legislation promoting a vulnerable group  
7.4 Conclusions  
8. The institutional competence of the courts  
8.1 The case overload argument  
8.2 The restriction of powers argument  
8.3 The attributes of adjudication  
8.3.1 Receiving the information  
8.3.2 Understanding and evaluating the information  
8.4 The risk of mistakes  
8.5 Conclusions
9. The legitimacy of constitutional review

9.1 Introduction

9.2 Constitutional principles and the constitutional text

9.3 From counter-majoritarian to anti-democratic accusations

9.3.1 The counter-majoritarian difficulty
9.3.2 The democratic character of constitutional review
9.3.3 Responsibility and participation in the democratic process

9.4 The argument focused: on subjectivity and indeterminacy

9.5 The Oakes test: trying to separate law from politics

9.6 The paradox of deference: subjectivity enhanced

9.6.1 Deciding when to use deference
9.6.2 Deciding the meaning of deference

9.7 Conclusions

10. Improving Oakes: some preliminary thoughts

10.1 Introduction
10.2 The legislative objective
10.3 Rational Connection
10.4 Minimal impairment
10.5 Proportionality
10.6 Conclusions
Introduction

The subject of this thesis is judicial deference to legislatures and governments in constitutional cases. As will be explained shortly, deference means a relaxation of tests, principles and constraints that usually apply in determining whether a law or some other state action is constitutional or not. It means that legislatures and governments are allowed to act in ways which otherwise are forbidden. In short, it means a different, attenuated level of constitutional scrutiny. This thesis addresses the question of whether (and when) should courts defer to legislatures and governments and apply a more modest or attenuated level of scrutiny; when (if at all) should courts relax the constitutional standards.

The importance of judicial deference and the impact of it cannot be exaggerated. The Supreme Court of Canada has applied the concept in numerous cases, and developed a jurisprudence that purports to establish rules for its application. These rules allow an extremely wide scope for deference, so we can expect a significant use of the concept in future cases as well. And when deference is applied – it has the potential of making all the difference. It is a reason to justify what otherwise would be considered unjustifiable. There are cases in which deference is the most important reason (if not the only one) to uphold a piece of legislation, or a government action, that abridges a fundamental right or freedom. The magnitude of the use of deference is further emphasized by the global reach of the phenomenon. Deference was not invented in Canada, and it is certainly not confined to the Canadian jurisprudence; courts in other constitutional democracies, all over the world, use deference (in one form or another) as well.
A recent, dramatic example of deference can be found in the case of *Egan v. Canada*¹ J. Egan and J.N. Nesbit were living together as a couple for 47 years when their case came before the Supreme Court. A few years earlier, when Nesbit became 60, he applied for a spousal allowance under the *Old Age security Act*. All the requirements were met, but one: Egan and Nesbit were both men, and the Act only recognized spouses of different sexes. It was a classic case of discrimination, pure and simple. Egan and Nesbit relied on the principle of equality entrenched in the Canadian Charter of Rights and Freedoms² and asked for justice, but a 5-4 majority of the Court dismissed their claim. Eight judges dealt with the essence of arguments; four of them maintained that the Act created an unjustified discrimination, while the other four determined that there is a relevant difference between heterosexual and homosexual couples, enough to justify the different treatment of the law³. The decision was in the hands of the ninth member of the Court, Justice Sopinka. In a short but crucial opinion, Sopinka J. based his decision almost entirely on deference to the legislature. He acknowledged that the Act infringed the principle of equality, but when faced with the question of whether this infringement was justified, he did not find it necessary to examine if there were less intrusive means to achieve the legislature’s goals. He found it sufficient to maintain that with regard to this

---

¹ [1995] 2 S.C.R. 513 (hereinafter: *Egan*).

² Hereinafter: *Charter*.

³ In doctrinal terms, according to the first four judges (L’Heureux-Dubé, Cory, Iacobucci and McLachlin JJ.), the Act infringed section 15(1) of the *Charter*, and could not be saved under section 1. According to the other four judges (Lamer C.J., La Forest, Gonthier and Major JJ.), the act did not contradict section 15 at all.
“socio-economic question”, the court should be “reluctant to second-guess the choice which parliament has made”

Egan and Nesbit probably never thought that this would be the reason for their defeat. In a constitutional democracy, people expect the constitution to protect them from the legislature. The reliance on deference to the legislature, which in this case turned the scales, seemed, at least on its face, to turn the basic ideas of constitutional law on their head.

Nonetheless, the reasons of Sopinka J. in Egan are hardly original or unusual. Judicial deference is an established doctrine in Canadian constitutional jurisprudence. In some cases – usually cases that involve social and economic issues – the Court simply decides to show deference to the legislature or the government and relaxes the constitutional standards. As in Egan, this step alone can determine the validity of the impugned legislation or government action (and naturally, the outcome of the specific dispute). The importance of understanding the concept and examining its justifications is thus obvious. It is essential that we understand the ways in which deference is used by the Court, and characterize the cases in which the Court chooses to show deference. Most importantly, it is imperative that we examine if (and when) deference is justified at all. For some reason, the amount of research and discussion of judicial deference seems to be in inverse proportion to the importance of the concept. The goal of this thesis is to fill this gap in the literature.

\footnote{Ibid., at 575-576. In doctrinal terms, Sopinka J. was in the opinion that the Act infringed section 15(1) of the Charter, but was saved under section 1. Sopinka J. based his entire section 1 analysis on deference to the legislature. In particular, when applying the minimal impairment test, an important and undisputed part of the section 1 analysis, Sopinka J. found it sufficient to refer to the need to show some deference to the legislature.}
It should be made clear at the outset: I do not purport to deal with all the deferential (as opposed to activist) moves taken by courts. Deference can be found in all areas of the law. It can take all kinds of forms. This thesis focuses on one kind of deference only: a concept invoked in constitutional cases dealing with human rights, to lower the standards used to determine the constitutionality of a law or state action.

To better explain the idea behind the thesis and what is about to follow, it would be helpful to briefly describe the structure of this paper. The thesis is developed in two parts, the first dealing with the practice of judicial deference (how the concept is applied by the courts) and the second with the theory behind it (the justifications for deference).

The first part is divided into six chapters. It begins with a description of the development of deference in Canada (chapter 1). This chapter is mostly dedicated to a chronological overview of the deference jurisprudence, as found in Charter decisions of the Supreme Court of Canada. Through the main cases in which the Court used the concept of deference, the reader will be able to get a general picture of what deference means, and how crucial it is to the outcome of cases.

The next two chapters examine the use of the concept in other parts of the world. Chapter two depicts the development of deference in the United States, and Chapter three looks into the deference jurisprudence of the European Court of Human Rights. The American judges invoke the idea of deference through the creation of different standards or “tiers of review”, while their European colleagues use the term “margin of appreciation”, but in both cases it means exactly what the Canadian concept of deference means. There are, of course, differences in the application alongside the similarities, and these will be explored in the following chapters.
Chapter 4 is an attempt to put the jurisprudence described in the previous chapters into some systematic order. Different aspects of the application of deference will be examined separately. The stage of analysis in which the concept is applied; the form deference takes; and the scope of application (in which cases deference is used) are the main issues of this chapter. The emphasis will be on the Canadian jurisprudence, but the practice of the other two courts will be examined as well. The comparative angle proves to be extremely useful to the understanding of the concept.

Following the analysis of how deference is applied is an evaluation of its effects. In Chapter 5 we take a first look "behind the scenes" and examine the actual impact of deference in different cases. I believe that five different levels of impact can be detected in the courts' decisions, from cases in which deference is the one and only reason sufficient to uphold the impugned legislation, to cases in which deference is no more than lip service to the other branches of government. Once again, a comparative examination enriches the discussion and teaches us how similar the use of the concept in different places actually is.

The first five chapters reveal a deep inconsistency in the use of deference, and this inconsistency is summarized and criticized in chapter 6. Quite often, deference is used merely as an excuse for non-interference; judges turn to deference when they choose to uphold an impugned legislation or government action. It is usually done in cases within the socio-economic sphere, but not in all these cases, and not only in these cases. The courts have taken to themselves full discretion in deciding when (and how) to use this attenuated level of scrutiny, and there seem to be no consistent way to explain the use of deference by the courts.
While the first part of the thesis assumes the existence of deference, and examines the ways it is actually used by the courts, the second part questions the concept itself. I will not deal with general arguments against judicial review, but rather assume that constitutional review is legitimate and justified. The question is whether there are good enough reasons to show deference in specific cases in the process of constitutional review; in other words, whether it is justified to apply a different level of scrutiny in certain situations. The main argument of the thesis is that deference is not justified when the constitutional protection of human rights is at stake. This argument is developed in three chapters, each of them includes a discussion (and eventually, a refutation) of a different argument in favour of deference.

Chapter 7 examines the impact of the concept on constitutional rights and public interests. It will become clear that deference seriously undercuts the values that the Charter was meant to protect. Some practical arguments in favour of deference will then be examined; most importantly, that deference is sometimes necessary to protect the most vulnerable groups of society. A close examination of the minimal impairment test, however, rebuts this claim.

Chapter 8 deals with arguments that can be classified together as "institutional competence" arguments. Some argue that deference is necessary to avoid a flood of litigation or a restriction of the courts’ powers. Much stronger arguments are ones focusing on the attributes of adjudication, or, more specifically, the judges’ lack of expertise. According to this line of thought, there are cases which courts are simply incapable, institutionally, to decide. However, as I will argue in this chapter, courts can
have all the relevant information to decide constitutional cases, and they are perfectly capable of understanding and evaluating this information.

The last and most important group of arguments is directed against the legitimacy of constitutional review. Chapter 9, which looks into these arguments, begins by focusing the argument. The argument for deference is in fact aimed at the problem of subjectivity. Since judges are not elected and do not represent the people, it is said, we do not want them to base decisions on their own political views. It is argued that, at least in some cases, the intrusion of personal views into the decision process is inescapable, and accordingly, courts lack the legitimacy to perform strict scrutiny in these cases. I will argue, however, that deference undermines its own justification. Deciding when to use deference and what impact it will have in a given case are both inherently subjective decisions. Thus, deference only enhances the problem of subjectivity and the use of deference cannot be justified.

The last chapter is somewhat independent from the previous discussion. In the first nine chapters I try to describe how the concept of deference is used and what impact it has in practice; to criticize the inconsistency in which courts use deference; and to refute different arguments in favour of it. My conclusion is that deference is never justified in the constitutional protection of human rights. I do, however, believe that the problem of subjectivity, which is probably the main reason for deference, is a genuine problem. Chapter 10 examines the "regular" test of constitutional review (the Oakes test\(^5\)) in this light, and outlines some preliminary suggestions towards solving (or at least minimizing) this problem.

Chapter 1
The Development of Deference in Canada

1.1 The setting

The purpose of this chapter is to describe the development of the concept of deference in Charter jurisprudence. The chapter begins with a brief explanation of what deference is, and a description of the regular, strict test used by the Court to perform constitutional review. Following this foreword, I will depict the Supreme Court's deference jurisprudence by describing, chronologically, the emergence and development of this doctrine.

1.1.1 What is deference?

William Shenstone, The 18th century poet, described deference as "the most complicate, the most indirect, and the most elegant of all compliments". Indeed, deference is respect, honor, reverence, complaisance. But it is also obedience, reticence, acquiescence, even submission. Joseph Vining, who unlike Shenstone writes in the contemporary legal context, described deference as "lowering the eyes, baring the covered head, laughing at jokes that are not funny". When the Court defers to the legislature, or the government, this is exactly what the Court does. By deferring, judges

---


2 J. Vining, "Authority and Responsibility: the Jurisprudence of Deference", (1991) 43 Administrative L.R. 135 (the subject of this article is deference in administrative law, but the description is appropriate and enlightening to the constitutional field as well).
actually say to the other branches things like “you’re wrong but who are we to judge that” or “you may be wrong but who are we to even check that”.

Webster’s defines deference as “a yielding of judgement or preference from respect to the wishes or opinion of another”\(^3\). In our own context, this yielding of judgement takes the form of a relaxed level of constitutional scrutiny. The legislatures, or government, are given some “leeway”, some “latitude”, some “room to manoeuvre” or a “margin of appreciation”. While the Court is perfectly capable and willing to perform a rigorous scrutiny in certain occasions, in others deference is introduced, and the inspection is much more permissive and lenient.

1.1.2 The Oakes test: strict scrutiny

The Canadian Charter of Rights and Freedoms\(^4\) was introduced in order to entrench and strengthen fundamental rights and freedoms. Yet there was never any doubt (nor could there be) that these rights and freedoms are not absolute. Difficult decisions must be made, as to the circumstances that can justify limits on constitutionally protected rights. The Charter placed this task with the courts, giving only a general and extremely open to discretion guideline: the rights and freedoms are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”\(^5\).

According to the jurisprudence developed by the Court, the review process is divided into two separate stages. First, anyone who seeks relief from the Court must prove an

---

\(^3\) Webster’s Revised Unabridged Dictionary (G & C. Merriam Co., 1913).

\(^4\) Hereinafter: Charter.
infringement of a right or freedom. At this stage, the Court interprets the specific right and decides whether the harm is within its scope. Generally speaking, the Court took a purposive approach to this task, according to which the interpretation should be based on the purpose of the right’s entrenchment. At the second stage, the burden shifts to the state, to justify the infringement according to the requirements of section 1. The state must show that the limit is “reasonable” and “demonstrably justified in a free and democratic society”\textsuperscript{6}.

The Court, well aware of the inherent difficulties in performing constitutional review, especially with regard to legislation, developed an analytic test, which gives concrete substance to those abstract terms\textsuperscript{7}. From the text of the Charter and the values of a free of democratic society, the Court inferred that both the goals and means of the state must stand up to a rigorous test in order to infringe constitutional rights and still be justified. The goal (the objective) must be of sufficient importance, namely a “pressing and substantial” one. As to the means, they must stand up to a proportionality test, which includes three components: first, the measures adopted must be “rationally connected” to the objective. Second, the means should impair the right or freedom in question “as little as possible” (the “minimal impairment” test). Third, there must be proportionality between the deleterious effects of the measures and the salutary effects of the law (proportionality in the narrow sense). In all of these stages, the burden of proof is on the

\textsuperscript{5} Charter, section 1.

\textsuperscript{6} The Court interpreted the Charter as limited in scope to the state and its agents (Legislatures, government and anyone who holds statutory authorities). For a summary of the relevant judgements see P. Hogg, Constitutional Law of Canada, 4\textsuperscript{th} ed. (Toronto: Carswell, 1997), at 34-8.3 and on. Many have criticized this approach. The question is out of the scope of this paper though, and for convenience reasons I thus refer to the state only.

state, and the standard of proof is the civil one (preponderance of probability), providing that it is applied “rigorously” and the evidence is “cogent and persuasive”.

This test, known as the Oakes test, has been used ever since as the “regular” and main test to determine if a piece of legislation, or a government action, is “reasonable” and “demonstrably justified in a free and democratic society”. Interestingly, although developed by the Court without reference to other legal systems, different constitutional democracies use extremely similar tests§.

1.2 The emergence and development of deference: a chronological overview

The Charter jurisprudence is still in the early stages of its development, and the concept of deference is no exception. A chronological overview is thus a convenient way to describe the place of the concept in Canadian constitutional law. The six main “milestones” in the development of deference, at least as I see it, provide the framework for this chapter.

1.2.1 Edwards Books: first signs of regression

It was not long after the introduction of the Oakes test (in 1986), that first cracks begun to appear in the wall built by the Court around Charter rights. In R. v. Edwards Books and Art Ltd.⁹, at issue was the Ontario Sunday-closing law that applied to retail businesses. The legislature, which recognized the problem for those who must close their business on other days, included a “Sabbatarian exemption” for small retailers (no more

§ The Constitutional Court of Germany and the European Court of Human Rights are notable examples. See D.M. Beatty, Constitutional Law in Theory and Practice (Toronto: University of Toronto, 1995), chapter 4.
than 7 employees or 5000 square feet of retail space) who observed Saturday as Sabbath. The majority acknowledged that the law infringed the freedom of religion of religious people who were *not* exempted, but concluded that it was justified under section 1. Due to neglect on the part of the state (or whatever other reason), the evidence in favour of the law was rather poor\(^9\). This is maybe the reason why Dickson C.J., who emphasized the social importance of the law, felt the need to soften his rigorous language in *Oakes*. Dickson C.J. stressed that the impugned legislation protected the interests of employees, who "do not constitute a powerful group in society"\(^11\). He noted that "in interpreting and applying the *Charter* ... the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons"\(^12\).

It is in this context that the following remarks should be understood. After reiterating the original *Oakes* test, Dickson C.J. went on to apply the minimal impairment test to the case as if the question was "whether the *Retail Business Holidays Act* abridges the freedom of religion of Saturday observers as little as is *reasonably* possible"\(^13\). The word "reasonably", which was added to the test without any explanation, might seem trivial as it forms part of section 1. But reasonableness, together with the other components of section 1, was the reason for the Court’s decision in *Oakes* to demand that rights will not


\(^{10}\) The only section 1 evidence was a 1970 report; *ibid.*, at 42. And see G.D. Creighton, "Edwards Books and Section 1: Cutting Down Oakes?" (1987), 55 Criminal reports (3rd) 269, 275 ("the section 1 analysis embarked upon by Dickson C.J.C. appears haunted from the outset by the woefully inadequate factual record before the court").


\(^{12}\) *Ibid.*, at 49.

\(^{13}\) *Ibid.*, at 44 (emphasis added).
be abridged more than necessary, that limits on rights and freedoms will be minimal. The test was designed to ensure that the state, in pursuing its legitimate objectives, take some care to respect the fundamental rights and freedoms of its citizens and choose the least intrusive means possible to achieve its objectives\(^{14}\). This is how a reasonable legislature and a reasonable government must act. The inclusion of the word "reasonably" in the minimal impairment test softens this standard. Indeed, Dickson C.J. went on to determine, that "legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the *Charter of Rights*, and the resultant legislation need not be tuned with great precision in order to withstand judicial scrutiny"\(^{15}\). He further added, that the Court should not interfere with the determination of where to draw the precise line, in this context the number of employees to be included in the Sabbatarian exemption. He did insist, however, that the legislation include some form of exemption, thus rejecting the U.S. Supreme Court precedents.

This might seem as an explicit and substantial relaxation of the *Oakes* test, and it is truly a step in that direction. Nevertheless, the context must be remembered: unclear evidence (due to the state's neglect); a desire to protect a vulnerable group (workers); and a fear of the *Charter* being misused to widen social gaps and extend social injustice\(^ {16}\). These practical problems (more than any reasoned theory) were probably the main reasons for the relaxation of the standard in this case. It seems that Dickson C.J. had no

---

\(^{14}\) For this description of the minimal impairment test see, for example, *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211, at 292 (Wilson J.).

\(^{15}\) *Ibid.*, at 44.

\(^{16}\) This fear is common within courts performing constitutional review. It is usually connected with the "*Lochner* era", in which the U.S. Supreme Court struck down numerous pieces of social legislation which intended to protect vulnerable groups of society. See below, at section 2.1.
intention of changing the Oakes requirements or articulating a general doctrine of deference. He simply wanted to apply the Oakes test flexibly in the specific context, in light of the difficulties he faced.

While Le Dain J. concurred with the Chief Justice, Wilson and La Forest JJ. had different views\textsuperscript{17}. Wilson J. applied the Oakes test rigorously, arriving at the conclusion that the exemption must include larger businesses as well. La Forest J., who later became the most prominent advocate of deference, laid here the foundations to his approach. He stated that the legislature must be given a “reasonable room to manoeuvre”, and came to the conclusion that a Sunday-closing law would be constitutional even without any exemption at all\textsuperscript{18}.

1.2.2 The Labour Trilogy: a whole new level of deference

Shortly after the idea of deference made its initial appearance in Charter jurisprudence, three important cases came before the Court, in which deference played a crucial role. The Court had to determine the constitutionality of legislation prohibiting strikes, legislation extending collective agreements and limiting wage increases for public sector employees, and back-to-work legislation aimed at striking workers\textsuperscript{19}. The majority

\textsuperscript{17} The other two Judges, Beetz and McIntyre JJ., interpreted freedom of religion in an extremely narrow way, and were in the opinion that the legislation did not impinge Charter rights (and thus had no need to discuss the appropriate section 1 test).

\textsuperscript{18} This deferential approach was repeated with approval by McIntyre J. in his dissenting opinion in Andrews v. Law Society of British Columbia, (1989) 56 D.L.R. (4th) 1, at 26. The foundations to justice La Forest’s deferential approach can be found in the earlier case of R. v. Jones [1986], 2 S.C.R. 284, 299.

easily dismissed all three cases, deciding that in none of them was freedom of association infringed.

While Dickson C.J. and Wilson J. spent considerable effort contemplating the interests of workers and unions, Le Dain J. (with whom Beetz and La Forest JJ. concurred) did not find it necessary to consider them at all. In a single-page, almost unexplained (but highly influential) decision, he relied heavily on deference to the legislature. He determined that in the field of labour relations, in which a principle of judicial restraint in the review of administrative actions had been affirmed, the Court should not engage in a strict review of legislative choices\(^\text{20}\). Le Dain J. went on to explain, that "the resulting necessity of applying s. 1 of the Charter to a review of particular legislation in this field demonstrates... the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted"\(^\text{21}\).

This is clearly a whole new level of deference. Deference here is not just a reason for a slightly relaxed level of the minimal impairment test, but rather a reason for a narrow and legalistic interpretation of a fundamental freedom entrenched in the Charter. It is not just a consideration that can ease the state’s section 1 justification, but a decisive reason to dismiss claims at the threshold. As far as I can tell, the Labour Trilogy is the only case in which the Court used deference this way. Rights and freedoms were interpreted narrowly in other cases as well, but deference was not used as a reason to justify those

\(^{20}\) Reference Re Public Service Employee Relations Act (Alta.), supra, note 19, at 391.

\(^{21}\) Ibid., at 392.
interpretations. The use of the concept has since been limited to the section 1 justification.

The other opinions delivered in the Labour Trilogy are noteworthy as well. McIntyre J. was also of the view that freedom of association does not include the right to strike (and thus no infringement occurred). As opposed to Le Dain J., however, he gave detailed reasons for this opinion. He also referred to deference, but only as a supporting argument to his decision, “grounded in social policy”.

He argued that in the labour field, where there is a delicate balance between two forces (organized labour and employers), the Court should not interfere by granting constitutional protection to one aspect of this “dynamic and unstable” process. The control of the process is “a legislative function into which the courts should not intrude”. McIntyre J. was thus in agreement with Le Dain J., that deference is a relevant consideration in the interpretation of Charter rights and the determination of their scope (though in practice he uses deference merely as a supporting argument, not as a decisive one).

The other two judges, Dickson C.J. and Wilson J., were of the opinion that freedom of association includes the right to strike and to bargain collectively. In their view, this was essential in order to give effective protection to the interests to which the constitutional guarantee is directed. They therefore insisted the respective governments

---


23 Reference Re Public Service Employee Relations Act (Alta.), supra, note 19, at 414.

24 Ibid.

25 Ibid., at 420.
justify their laws under section 1. Wilson J. performed the Oakes examination literally and rigorously, and came to the conclusion that all three pieces of legislation were not constitutional. Dickson C.J. would have struck down both the law that prohibited strikes by public servants and parts of the legislation that limited collective bargaining, on the basis both were over-broad\(^\text{26}\). In the context of the legislation extending agreements and limiting wage increase, Dickson J. referred to deference during his section 1 examination, basing this reference on the “difficult questions of economic policy” involved\(^\text{27}\). He noted that a high degree of deference should be accorded to the government’s choice of strategy in combating complex problems like inflation\(^\text{28}\).

1.2.3 Irwin Toy: a second minimal impairment test

It may seem that by 1987 the concept of deference was generally implemented into Charter scrutiny, but this is certainly not the case. In most cases, the Court continued to perform the usual scrutiny, without any mention or use of deference\(^\text{29}\). It was not until Irwin Toy Ltd. v. Quebec (A.G.)\(^\text{30}\) that the Court invoked deference again, and for the first time undertook a more extensive discussion of the concept. At issue was the

---

\(^{26}\) According to Dickson C.J., The strike prohibition was too broad because it unnecessarily applied to all public servants, and not just those providing essential services; The legislation extending collective agreements was too broad because it unnecessarily applied to non-compensatory issues (and not only compensatory, as required to the objective of reducing inflation). According to Wilson J., the back-to-work legislation was too broad as well.

\(^{27}\) PSAC v. Canada, supra, note 19, at 442.

\(^{28}\) Having said that, the Chief Justice went on to examine the legislation in question and have found it over-broad (and thus unconstitutional) in several points.


constitutionality of a Quebec law, which prohibited commercial advertising directed at children under 13 years of age. Once again, as in *Edwards Books*, the court was faced with a problem of unclear evidence. There were contradictory pieces of evidence regarding the effect of advertisements on children between 7 and 13 years old. There was no doubt that the legislation abridged freedom of expression, and that it was justified under section 1 regarding the children younger than seven, but the Court faced difficulties in deciding whether the law was over-broad by applying to the older children as well\(^\text{31}\).

The majority felt that there was a reasonable possibility that children between ages 7 and 13 needed the protection of the law as well. Not surprisingly, this was enough to uphold the law. Indeed, if there is a reasonable possibility that advertisements are harmful for children, the legislature can (and should) act. It should not wait for conclusive evidence if current social science evidence is unclear. Surely, social science evidence should be assessed in light of the background of existing knowledge\(^\text{32}\).

However, the Court dealt with the problem of ambiguous evidence differently. Referring to *Edwards Books*, the Court once again acknowledged the need to protect vulnerable groups, and warned against a misuse of the *Charter* by the better situated to roll back social legislation\(^\text{33}\). As in *Edwards Books*, it was determined that the Court should not second-guess the legislature’s decision as to where to draw the exact line\(^\text{34}\).

---

\(^{31}\) Surprisingly or not, Beetz and McIntyre JJ., who in earlier cases applied a narrow interpretation and took a deferential approach, were now the most strict in protecting the rights of the commercial advertisers (as opposed to vulnerable workers and people of minority religions). They maintained that it was not proved that the children were at any risk, and that there was no proportionality in a “total prohibition” on advertising directed at children below “an arbitrary fixed age”.

\(^{32}\) This issue is discussed and explained below, at chapter 7.


\(^{34}\) *Ibid.*, at 989-990.
But the Court took a huge step further: it relied on the concept of deference to develop a new – more relaxed – minimal impairment test. A distinction was made between cases in which the government can be characterized as the “singular antagonist” of the individual whose rights have been infringed, and cases in which the government was mediating between claims of competing groups. In the first group of cases – which are typically within the criminal sphere – the Court felt it could assess with some certainty the efficacy of alternative means and thus apply the Oakes test rigorously. On the other hand, the Court maintained that the second type of case will frequently require an assessment of “conflicting scientific evidence and differing justified demands on scarce resources.” In these cases, the question should be “whether the government had a reasonable basis, on the evidence tendered, for concluding that [the act] impaired [the right] as little as possible given the government’s pressing and substantial objective.”

This new version of the minimal impairment test, designed for a specific type of cases, is different than the Oakes test in two substantial ways. First, the “reasonable basis” component softens the test. It parallels the standard, previously used in Edwards Books, of asking governments to show that impairment of rights is “as little as reasonably possible”. Second, the test focuses on the subjective point of view of the legislature. Instead of examining the legislation itself directly and independently, the Court tries to look at the legislation through the legislature’s eyes. The difference may seem semantic at first, but I believe it is significant. Articulated in this way, the test puts an emphasis on the state’s state of mind. When the state shows that it acted in good faith – and this is

---

35 Ibid., at 994.

36 Ibid., at 993.
almost always the case – the legislation will almost always be approved. The Oakes minimal impairment test, on the other hand, assumes good faith, and puts all the emphasis on those whose rights have been infringed. No matter what the state thought or intended when choosing the means, if it is possible to achieve the same goals with less intrusion, the legislation will be called unconstitutional.

Although Irwin Toy suggested that deference was to be used only in a specific group of cases, it is apparent that this group is extremely wide. The language of the Court is significantly broad. Yet once again, the context must be remembered: just as in Edwards Books, the Court was faced with unclear evidence; a need to protect a vulnerable group; and a fear of the Charter being misused by the better situated. It seems that these practical problems, more than anything else, were the actual reason for the development of deference in this case. It is doubtful if the Court intended to lower the standard in different cases as well.

1.2.4 The criminal sphere: an unexplained expansion

Only one month has past since the decision in Irwin Toy, and the Court completely ignored the limits it just set up for using the doctrine of deference (as loose as they were from the beginning). In United States of America v. Cotroni38, the Court had to determine the constitutionality of Canadian citizens’ extradition to another country. Although the case was clearly within the criminal sphere, where the state can be characterized as the “singular antagonist” of the individual, La Forest J., for the majority, relied on deference

37 Ibid. at 994.
to uphold the extradition. He noted that the *Oakes* test must be applied "flexibly", and easily concluded that the right in question "is infringed as little as possible, or at the very least *as little as reasonable possible*". The very recent *Irwin Toy* case was not mentioned, either by La Forest J. or Wilson J., who dissented, noting that there is no reason "to abandon careful scrutiny of a legislative scheme which directly abridges a guaranteed right particularly in relation to an aspect of the criminal law".

The expansion of deference into the criminal sphere in *Cotroni*, though unexplained and totally inconsistent with *Irwin Toy*, was not an isolated incident. In a series of criminal cases the Court continued to use deference – with different levels of intensity and impact – in connection with the section 1 examination. It coloured the Court's examination of laws dealing with the presumption of sanity, obscenity laws, the reverse onus in natural resources transactions, and more. But in none of these cases

---

39 Ibid., at page 1490.
40 Ibid., at page 1516.
41 *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at 1340-1343. The presumption of sanity was found to be inconsistent with the presumption of innocence (section 11(d) of the *Charter*), but justified under section 1. Wilson J., in dissent, reiterated her view that deference was inappropriate in criminal cases, this time relying on *Irwin Toy* as well (at pages 1388-1390).
43 *R. v. Laba*, [1994] 3 S.C.R. 965, at 1010. The reverse onus clause was found inconsistent with section 11(d) but justified under section 1. Sopinka J., for the Court, noted the distinction developed in *Irwin Toy*, and even maintained that this is a case where the state can be characterized as the "singular antagonist" (at page 1009). But for some reason, one page later he used the deferential standard ("as little as is reasonably possible"), noting that "Parliament should be accorded some leeway and need not choose the least restrictive alternative that can be imagined".
did the Court explain its decision to expand its use of the doctrine of deference beyond the circumstances it described in *Irwin Toy*.

To be clear, the use of deference in the scrutiny of criminal laws was in no way comprehensive or consistent. In many other cases, deference was not mentioned at all and the *Oakes* test was applied literally and strictly\(^\text{45}\).

1.2.5 *McKinney*: intensifying the *Irwin toy* test

While the *Labour Trilogy* was an exceptional incident (as far as deference is concerned), and in the criminal sphere deference was invoked without much explanation or discussion, *McKinney* is in direct continuity with *Edwards Books* and *Irwin Toy*. In three cases, decided together, the Court upheld the constitutionality of mandatory retirement policies in universities\(^\text{46}\) and hospitals\(^\text{47}\), although there was no doubt that the policies were discriminatory\(^\text{48}\). A provision of the *Ontario Human Rights Code*, which confined its protection to persons between the ages of 18 and 65, was also upheld.

La Forest J., writing for himself, Dickson C.J., Gonthier and Sopinka JJ. on this issue, relied heavily on the doctrine of deference, as developed in *Irwin Toy*. In examining the


\(^{48}\) In *McKinney*, *Harrison* and *Stoffman*, supra, notes 46 and 47, the Court actually decided that the *Charter* does not apply, but it went on to discuss the cases, in length, as if the *Charter* did apply. The discussion of section 1 and the doctrine of deference was thus in *obiter dictum*, but this is meaningless for our purposes. The discussion and use of deference in *McKinney* and *Stoffman* were applied in numerous later cases.
mandatory retirement policy, he emphasized that it involved mediation between competing groups (senior and beginning professors/doctors), as well as distribution of scarce resources (university/hospital facilities). When examining the Human Rights Code, he emphasized that it involved competing socio-economic theories, and that the precise "cut-off point" was not an issue for the Court. The legislature, he said, should have some "room to manoeuvre". In both matters, the Court applied the same test it articulated in Irwin Toy, namely, whether the state had a "reasonable basis" for concluding that the policy/legislation impaired the principle of equality as little as possible.

La Forest J. went on to say that the Court should be especially deferential to the legislature with regard to the regulation and advancement of human rights in the private sector, since the Charter "was expressly framed so as not to apply to private conduct." This led La Forest J. to the conclusion that "the courts should not lightly use the Charter to second-guess legislative judgement as to just how quickly it should proceed in moving forward towards the ideal of equality." The idea of a human rights code that is itself discriminatory might seem like an oxymoron, but La Forest J. found it completely acceptable. Indeed, although the Human Rights Code discriminated older people by excluding them from its protection, the constitutionality of the Code was affirmed.

While La Forest J. reiterated and employed all the components of Irwin Toy, and even advanced a new reason for deference, Wilson J., in dissent, made every effort to limit the

---

49 McKinney, supra, note 46, at page 285; Stoffman, supra, note 47, at page 528.

50 Ibid., at page 315.

51 Ibid., at page 318.

52 Ibid.
deferential approach of Edwards Books and Irwin Toy to the facts of those cases. She asserted that a restrained minimal impairment test should be used only when “something less than a straightforward denial of a right is involved”, and providing that the legislature “has sought to promote or protect the interests of the less advantaged”\(^{53}\). She rejected the idea that deference should be invoked every time the legislature had to strike a compromise between competing claims for scarce resources, since this is a factor in almost every case\(^{54}\). She further maintained that there is a presumption that the Oakes test applies; the onus is on the state to show exceptional circumstances that can justify the use of a more relaxed test under section 1\(^{55}\). Regarding the Human Rights Code, Wilson J. strongly rejected justice La Forest’s additional reason for deference, asserting that “if anything, human rights legislation which is intended to preserve, protect and promote human dignity and individual self-worth and self-esteem should be subjected to more rigorous scrutiny than other types of legislation”\(^{56}\).

Although Wilson J. was of the view that the Oakes test should be strictly applied, she went on to explain that on her reading of Irwin Toy, when deference is appropriate the

---

\(^{53}\) *Ibid.*, at 401-403. Applying her approach to the specific case, Wilson J. concluded that younger academics do not form such a vulnerable group.

\(^{54}\) *Ibid.*, at 403. Wilson J. went on to suggest, that the Court might nonetheless be reluctant to interfere in situations where competing constitutional claims for scarce resources are at stake (at page 404). However, reading the passage as a whole, it appears that Wilson J. was not referring to a different level of scrutiny, but to the need to perform the scrutiny with sensitivity to context. On the contextual approach see below, at section 1.3.1.


\(^{56}\) *Ibid.*, at 413-414 (emphasis added).
minimal impairment test should be only attenuated to mean that there are no alternatives which are "clearly better" than the one adopted by the government\textsuperscript{57}.

L’Heureux-Dubé J., who was also in dissent, agreed with Wilson J. that the Oakes test should be applied rigorously. In Stoffman, she argued that the allocation of resources was not "a fundamental issue" in the case, and that the hospital’s board of trustees did not have the characteristics of a legislative body considering resource allocation. These two reasons led Justice L’Heureux-Dubé to hold that no deference should be given in the case\textsuperscript{58}.

1.2.6 \textit{RJR-MacDonald: deepening the confusion}

A few years passed before the concept of deference was further discussed by the Court. To be clear, the concept was not abandoned or forgotten, but neither was it applied in any consistent way. In some cases, deference was used in accordance with the guidelines of Irwin Toy and McKinney (or at least pretending to be in such accordance)\textsuperscript{59}. In other cases, deference was shown in the criminal sphere, in complete contradiction to \textit{Irwin Toy} and \textit{McKinney}\textsuperscript{60}. And sometimes it was not mentioned at all, even in cases that seem to fit perfectly the \textit{McKinney} directives for deference\textsuperscript{61}. The common characteristic

\textsuperscript{57} \textit{Ibid.}, at 401.

\textsuperscript{58} \textit{Stoffman, supra}, note 47, at 562.

\textsuperscript{59} See, e.g., Tétreault-Gadoury v. Canada (E.I.C.), [1991] 2 S.C.R. 22, at 43-47; Rodriguez v. British Columbia (A.G.) (1994), 107 D.L.R. (4th) 342 (this case, dealing with assisted suicide, is arguably within the criminal sphere, where the state can be characterized as the "singular antagonist". But the Court nonetheless held that the deferential test articulated in \emph{Irwin Toy} and \emph{McKinney} was in order); Egan v. Canada, [1995] 2 S.C.R. 513 (Sopinka J. based his decision on deference; the other members of the majority mentioned deference as an alternative argument).

\textsuperscript{60} See notes 41-44, \textit{supra}.

\textsuperscript{61} See, e.g., Lavigne, \textit{supra}, note 16 (per La Forest J.); Miron v. Trudel, \textit{supra}, note 22.
of all these cases was the lack of any serious discussion with regard to the concept of
deferece and circumstances in which it should be applied.

The next case in which deference was seriously discussed was RJR-MacDonald Inc.
v. Canada (A.G.)62. At issue was the constitutionality of an act, which prohibited (with
specified exceptions) the advertising of tobacco products and the sale of a tobacco
product unless its package included prescribed unattributed health warnings and a list of
its toxic constituents. There was no doubt that the act abridged the tobacco companies’
freedom of expression, and the discussion therefore focused on the section 1 analysis63.
The act was struck down by a 5 to 4 majority of the Court, due to over-broadness of some
of its provisions.

La Forest J., in dissent, writing also for L’Heureux-Dubé, Gonthier and Cory JJ. in
this matter, was once again the prominent promoter of deference. This time he attacked
the Oakes test itself, arguing that it should not serve as a general substitute to the
requirements found in section 1. According to La Forest J., the section 1 inquiry is a
normative, delicate balance, and the Court must avoid a “formalistic”, uniform test64. In
practice, La Forest J. did not abandon the Oakes test, but simply suggested that it should
be applied with different levels of deference in different cases. Two “contextual
elements” must be considered, in order to determine the appropriate level of section 1

63 Another main issue in this case was the division of powers (federal-provincial). This is of course
irrelevant to the present discussion.
64 Ibid., at 270.
justification required: the nature of the legislation and the nature of the right infringed. In the specific case, the legislation was characterized by La Forest as a piece of “social legislation”, “in the realm of policy-making”, thus inviting “a high degree of deference”. Regarding the right infringed, La Forest J. emphasized the harm engendered by tobacco and the profit motive underlying its promotion, and inferred that the expression in question was “as far from the ‘core’ of freedom of expression values as prostitution, hate mongering, or pornography”. Instead of taking the nature of the expression into account within the application of the Oakes test (like the Court usually does), La Forest J. concluded that it constituted another reason for a relaxed section 1 inquiry.

This new “flexible” approach suggests, in fact, that the Oakes test should be applied with different (changing) levels of deference in different cases. This approach shifts most of the discussion to the preliminary stage of deciding the proper level of review. In a way, the result is determined before all the facts and considerations are looked into; by choosing a “flexible”, changing level of review in each case, the Court in fact determines, a-priori, the result of that case.

Until the Court’s decision in the tobacco advertisements case, whenever the Court introduced deference into the section 1 examination, it was always at the minimal impairment stage (the second proportionality test in Oakes). In RJR-MacDonald, without

---

65 Ibid., at 272. The idea that these two elements are relevant to determine the appropriate section 1 test was advanced in earlier cases as well, especially by La Forest J. himself. But I believe that RJR-MacDonald was the first case in which this idea was developed in length and was directly connected to deference.

66 Ibid., at 278-279. In this context, La Forest J. referred to Irwin Toy and McKinney, and argued that all the reasons given there for deference apply in this case as well.

67 Ibid., at 282.
any explanation, La Forest J. used deference within the rational connection stage as well (the first proportionality test in Oakes). He argued that it was “unnecessary in these cases 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”68. Interestingly, in the context of the minimal impairment test, where this attenuated test was usually used69, La Forest J. chose not to use it. During his minimal impairment discussion, he mentioned deference in length, and referred especially to Irwin Toy, but for some reason refrained from using the test developed there, and just argued generally that the legislature should be given “room to manoeuvre”70. In any case, it is hardly surprising that he came to the conclusion that the act should be upheld.

Throughout his opinion, La Forest J. made considerable effort to show, that the special characteristics of Edwards Books and Irwin Toy existed in this case as well. He stressed, several times, that the legislation in question was designed to protect a vulnerable group (the younger and less educated); that the tobacco companies are better situated and should not be allowed to roll back this kind of legislation; and that the

68 RJR-MacDonald, supra, note 62, at 290. La Forest J. discussed the concept of deference in length, as described above, but he did not explain the use of the concept within the rational connection stage of the test, a step the Court never took in the cases mentioned by La Forest throughout his general discussion. In applying the concept of deference specifically within the rational connection test, La Forest J. referred (without explanation) to three precedents: Irwin Toy, supra note 30, at 994; Butler, supra note 42, at 502; and McKinney, supra note 46, at 282-285. In Irwin Toy at page 994 the discussion concerns the minimal impairment test solely. In McKinney at pages 282-285 there is a discussion of the rational connection test, without any reference to deference whatsoever. Butler is the only case which indeed mentions deference within the rational connection stage, but the Court there relied mainly on Irwin Toy, mistakenly in my opinion.

69 The test cited above fits exactly the deferential test developed in Irwin Toy regarding the minimal impairment test, as described in section 1.2.3, supra.

70 As opposed to using the subjective-reasonableness test of Irwin Toy. Ibid., at 304 and on.
evidence (regarding the connection between tobacco advertising and tobacco consuming) was unclear\textsuperscript{71}.

The broad discussion of deference taken by La Forest J. stimulated the other members of the Court to deal with the concept as well. McLachlin J., writing for Sopinka and Major JJ., “defended” the \textit{Oakes} test and maintained that there is no conflict between the words of section 1 and the jurisprudence founded upon \textit{Oakes}. The latter complements the former\textsuperscript{72}. She agreed with La Forest J. that “the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament’s choice”, but added that “care must be taken not to extend the notion of deference too far”\textsuperscript{73}. She also rejected the idea that the state can be relieved from the civil standard of proof, and maintained that although the evidence should be evaluated realistically (and not from a scientific point of view), the civil standard applies to all the stages of the proportionality analysis.

As opposed to La Forest J., McLachlin J. did not mention deference in any way during her rational connection examination. In the minimal impairment inquiry, she defined the question as whether the measures impaired freedom of expression “as little as \textit{reasonably} possible”\textsuperscript{74}, and she was ready to accord some leeway to the legislature

\textsuperscript{71} It should be noted that the state refused to disclose substantial pieces of evidence in this case, including studies that the government carried out regarding the possible alternatives to a total ban on advertising. Although the burden of proof was on the state, and although the hiding of the evidence, in itself, is extremely suspicious, La Forest J. nonetheless maintained that the state justified the freedom of expression infringement.

\textsuperscript{72} \textit{Ibid.}, at 328.

\textsuperscript{73} \textit{Ibid.}, at 332. McLachlin J. explained that too much deference would mean a diminishment of the role of the courts and a weakening of right’s protection. She also noted that the distinction between the social and the criminal spheres is extremely problematic.

\textsuperscript{74} \textit{Ibid.}, at 342 (emphasis added).
(although she did not use the Irwin Toy version of the test). At the same time, McLachlin J. disagreed with La Forest J. that the low value of the expression should lead to a more deferential examination.\(^{75}\)

Iacobucci J., writing also for Lamer C.J., agreed with McLachlin J. that the amount of deference shown to the legislature should be limited. In this context, he also expressed concerns that the attenuated minimal impairment test would undercut Charter values.\(^{76}\)

Generally speaking, it seems that the judgement in RJR-MacDonald only added to the confusion regarding the concept of deference and its place in Charter litigation. The use of deference by the Court was ambiguous and indistinct before, and it is even more so now. This impression is strengthened when one reads the recent cases, decided after RJR-MacDonald.\(^{77}\)

It should be further noted that the "flexible" approach laid out by La Forest J. in dissent was arguably approved by an unanimous Court in Ross v. New Brunswick School

---

\(^{75}\) McLachlin J. explained that the importance of the expression should be taken into account in the third stage of the proportionality test. She also noted that care must be taken not to undervalue the expression, and that motivation to profit is irrelevant to the section 1 inquiry. \textit{Ibid.}, at 347-348.

\(^{76}\) \textit{Ibid.}, at 351. Iacobucci J. agreed with La Forest J. that since the expression is directed solely for the purpose of financial profit, "the amount of legislative tailoring required to sustain minimal impairment analysis would not be very significant" (at 354). But he went on to determine, that since in this case the government chose not to do any tailoring at all, the minimal impairment requirement was not met. More importantly, I believe that Iacobucci J. did not refer to an a-priori deferential approach here, but to the appropriate considerations within the minimal impairment inquiry.

*District No. 15*⁷⁸, decided a short while afterwards. In this case La Forest J. repeated the main points of his approach regarding flexibility, this time speaking for the Court. However, the inference of deference from this flexibility was not clear in this case. It is thus too early to conclude that the new “flexible” approach will substitute the former two-tier system, especially in light of the recent changes in the membership on the Court. It seems that the voices warning against the exaggerated use of deference will now gain more support.⁷⁹.

---

⁷⁸ *Supra*, note 77.

⁷⁹ First signs of such a development can be found in *Vriend v. Alberta*, *supra*, note 77, especially par. 126.
Chapter 2
The Development of Deference in the United States

2.1 Due process: *Lochner* and its demise

A description of the American jurisprudence of deference must begin at the turn of the 20th century. The Court started the century with a rigorous conception of the due process clause\(^1\). "Liberty" and "property" were strictly (not to say fanatically) protected. Freedom of contract was especially secured at any cost, due to conservative economic theories of the "free market". The Court devoted itself to the protection of the economic status quo, preserving the existing allocation of resources (which was perceived as "natural"). The political theories of the Court were conservative as well; the role of the state was understood to be confined to a narrow "police" sphere. Redistribution of resources was seen by the Court as unacceptable, a deviation by the state from its legitimate powers\(^2\).

Under this conception, numerous pieces of legislation within the socio-economic sphere were struck down in the period between 1897 and 1937, known as the "*Lochner* era"\(^3\). Both objectives and means were examined with the strictest scrutiny. In theory, the Court required the objectives to be "appropriate and legitimate", and the means to have a

---

\(^1\) "No person shall be... deprived of life, liberty, or property, without due process of law" (5th amendment to the American Constitution); "nor shall any State deprive any person of life, liberty, or property, without due process of law" (14th amendment). The due process clause was given a "substantive" meaning alongside the "procedural" one.


\(^3\) The era actually began in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), or even before that, and lasted until *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), but it is usually associated most with *Lochner v. New York*, 198 U.S. 45 (1905) (hereinafter: *Lochner*).
“real and substantial” relation to the ends. The massive invalidation of legislation was not due to the test itself, however, but due to the way it was applied. Objectives that did not fit with the Court’s conservative theories of the market and the state were seen as unconstitutional. The only objectives that the Court approved were those perceived by the judges as promoting health, safety or some other “public interest” (narrowly understood). Regulation of entry to businesses, for example, was invalidated as an illegitimate exercise of the “police” power. Similarly, the Court refused to recognize the inferior position of workers vis-à-vis their employers, and invalidated various pieces of employment regulations. And even when an objective was accepted as legitimate, the Court treated it with extreme suspicion. Evidence submitted by the state was easily dismissed; the judges preferred to rely on personal knowledge and traditional common law assumptions.

Constitutional scrutiny was thus as strict as it can get, with both objectives and means being under the most searching review. It was only after serious threats to add new justices to the bench that the Court changed its ways. President Roosevelt, elected under the promise for substantial social and economic changes (“the New Deal”) to provide

---

4 Lochner, supra, note 3, at 57, 64.


7 In Lochner itself, supra, note 3, for instance, a limit on employing bakers more than 60 hours per week was struck down. The state was still allowed to protect (to some extent) women and minors; see, e.g., Muller v. Oregon, 208 U.S. 412 (1908).

8 Thus, working in mines was accepted as dangerous to the health (Holden v. Hardy, 169 U.S. 366 (1898)), but working in bakeries not (Lochner, supra, note 3). Accordingly, an act designed to limit working hours in bakeries to 60 hours per week was invalidated, even though substantial evidence was submitted regarding the severe risks to health in this profession; see the dissenting opinion of Harlan J. in Lochner, ibid., at 69-72.
recovery from the great depression, prepared a “court-packing” plan after his second election. In 1937, before any steps were taken, Justice Roberts changed his opinions and created a majority for reversing the previous positions of the Court.9

Needless to say, the fact that the Court used strict scrutiny was not the reason for invalidating important legislation. To put it bluntly, the judges simply abused their office, by imposing their own conservative economic ideas on the public and preventing attempts for social change. The legislation struck down in *Lochner*, for example, clearly would have been upheld today, even under the strictest scrutiny of any court in the world. It is true that with strict scrutiny in its arsenal, the Court was able to impose its own ideas. But this power is necessary to the protection of human rights, and nations all over the world (including the United States after the *Lochner* era) have chosen to take the “chance” and assign judges with the power to perform any kind of scrutiny, including the strictest.10

Nonetheless, the Court decided to abandon not only the unjustified use of strict scrutiny, but also (to a large extent) the review process itself. The reaction of the Court to the *Lochner* era was severe and extremely influenced the constitutional jurisprudence thereafter.11 Since 1937, the standard of review has been built on an exceptional level of

---

9 See Nowak and Rotunda, *supra*, note 5, at 367-8. For a fuller description of the “external assault” on *Lochner*, as well as its “internal erosion”, see Tribe, *supra*, note 2, at 574 and on.

10 To be more precise, I believe that *Lochner* involved three problems: the too-strict scrutiny of ends; the invalidation of any end which did not fit the judges personal views; and the disregard for evidence. But it is the second factor that made most of the difference. And see C. R. Sunstein, “Lochner’s legacy”, 87 Col. L.R. 873 (1987) (arguing that the received wisdom according to which *Lochner* was wrong because it involved “judicial activism” is mistaken; *Lochner* was wrong because neutrality was made a constitutional requirement).

11 See C. R. Sunstein, *supra*, note 10, at 873 (“The spectre of *Lochner* has loomed over most important constitutional decisions”); G. Gunther, “The Supreme Court 1971 term – forward: in search of evolving
deference. "The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"\textsuperscript{12}. On top of all that, the state enjoys a strong presumption of constitutionality; the burden of proof is on the complainant at all stages. In fact, the Court is (still) unwilling to look seriously into the facts; this time, instead of relying on common law assumptions (as the Court did in \textit{Lochner}), the reliance is on the state's arguments.

Under the leadership of Chief Justice Warren, in the sixties, the Court abandoned its deferential posture towards the due process clause in one important set of cases. When certain "fundamental rights" are at stake, the legislation is subject to strict scrutiny. In these cases, the Court requires the objective to be a "compelling state interest" and the means must be "narrowly drawn", in other words, the least restrictive possible\textsuperscript{13}. However, the "fundamental rights" seem to be confined to those that the Court is willing to infer directly from the constitution (and thus the due process clause is not really used)\textsuperscript{14}. And the current Court, led by Chief Justice Rehnquist, refuses to grant


\textsuperscript{14} \textit{Griswold} and \textit{Roe v. Wade}, supra, note 13, were both based on the right to privacy which was interpreted as a constitutional right.
heightened protection on any new grounds, and even narrows the scope of the above mentioned precedents.\(^{15}\)

2.2 **Equal protection: more extreme deference (with more exceptions)**

The demise of *Lochner* was not limited to the “due process” clause. The “equal protection” jurisprudence developed in a similar way, although it should be noted that during the *Lochner* era the “equal protection” requirement never had the same prominence as the “due process” clause.\(^{17}\) In fact, some of the most deferential equal protection decisions were given during the *Lochner* era.\(^{18}\) But at the same time, the Court did invalidate various pieces of legislation on the basis of the “equal protection” clause, when states tried to allocate resources or tax people progressively.\(^{19}\) The Court’s equal protection jurisprudence became more deferential (and more consistently so) after 1937; the only requirement to justify an unequal treatment is that there be a “rational relation” between the legislation and some “legitimate” objective.\(^{20}\) Here too, the state enjoys a presumption of constitutionality, thus the burden is on the complainant to prove the lack


\(^{16}\) “No state shall... deny to any person within its jurisdiction the equal protection of the laws” (14\(^{\text{th}}\) amendment).

\(^{17}\) Holmes J. once described the equal protection as “the last resort of constitutional arguments” (*Buck v. Bell*, 274 U.S. 200, 208 (1927)). Although Holmes J. was always a proponent of a most deferential approach (see, for example, his famous dissent in *Lochner, supra*, note 3), this line was said for the Court.


of a rational relation or a legitimate goal. This test, extremely lenient on its face, is even more so in practice. The Court has accepted (almost) every objective and every relation of means to ends, sometimes basing its decisions on purely theoretical ideas or facts, which were not only unproven but were not even argued by the state. It can fairly be said that for a period of time the Court almost abdicated its powers of review, at least as far as equal protection is concerned.

This extreme deference was changed, to some extent, in the sixties. Under the leadership of Chief Justice Earl Warren, the American Supreme Court was - once again - willing to review some legislation seriously. The "regular" equal protection test was not changed, but some specific situations were defined as calling for strict scrutiny. When a classification is "suspect", or when a "fundamental right" is at stake, the test becomes more rigorous; the legislation will be struck down unless it is "narrowly tailored" ("necessary"; uses the least restrictive means) to achieve a "compelling" state interest.

Just as the "regular" test has proven to be more lenient in practice than in theory, this "strict scrutiny" test is more rigorous in practice than what it might seem to suggest. On its face, it is precisely like the Canadian Oakes test: the objective must be of high

---

20 See, e.g., Schweiker v. Wilson, 450 U.S. 221 (1981); and see generally Tribe, supra, note 2, at 1439 and on.


22 See, e.g., Williamson v. Lee Optical, supra, note 12; U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980); and see the strong dissent of Brennan J. in Fritz regarding the meaningless of the deferential standard. Another good example for a case in which the "rational relation" standard meant no review at all is Bowers v. Hardwick, 106 S.Ct. 2841 (1986).


importance and the means must be the least restrictive possible (minimal impairment). In practice, however, the tests are hardly comparable. The American test has been described as "strict in theory and fatal in fact"; once the Court decides to apply the "strict scrutiny" test, the law is — almost automatically — doomed to invalidation. With this kind of application, it is hardly surprising that the Court has invoked the strict standard sparingly. The only "suspect classifications" recognized are those based on race, nationality and alienage. The only "fundamental rights" that can attract strict scrutiny are the rights to vote, access to litigation and interstate travel.

This two-tier model has reigned in the American jurisprudence for years, but it was clearly insufficient. The tests are applied by the Court as a clear cut between "all" and "nothing", with no middle ground. If one can get into the defined categories of strict scrutiny, the law will be struck down. Otherwise — if you are out of those narrow categories — there is almost no review at all and the law will be upheld. In this model, the constitutional process focuses entirely on the preliminary stage of deciding whether a fundamental right or a suspect classification is at stake; once this is done, the result is already made.

There is no sensitivity to the context; almost no attention to the facts and

---

25 G. Gunther, supra, note 11, at 8.

26 See Korematsu v. U.S., 323 U.S. 214 (1944) (this is the first case in which strict scrutiny for suspect classifications was introduced, although it was not really applied; restrictions on people of Japanese origin during the war were upheld). As for alienage, in an attempt to prevent unwanted results, but faithful to its rigid system of categories, the Court created a "political function" exception, and developed tests to determine if the circumstances fit the exception. See Bernal v. Fainter, 467 U.S. 216, 219-222 (1984).


28 Bernal v. Fainter, supra, note 26, is a good example for a case in which the Court discussed in length the proper level of review, and then went almost automatically to the result.
circumstances of each case. More generally, there is almost no role for the Court, and almost no constitutional protection for human rights. The only exceptions are the narrow “strict scrutiny” categories, which earn *too much* protection; once a classification is based on race, for example, it will (almost) never survive, even if it is an affirmative action plan\(^\text{29}\).

This highly bifurcated structure of constitutional review still prevails today, but in a slightly refined way. Since the beginning of the seventies, in an attempt to avoid the impossible results of the “all or nothing” approach, judges began to develop an “intermediate” level of review. At first it was covert; the basic “rational relation” test was simply given more substance in some particular cases\(^\text{30}\). But in later cases it was clearly defined; some classifications were identified as “quasi-suspect”, and it was said laws could only discriminate against them if there was a “substantial relation” to an “important” objective\(^\text{31}\). The burden of proof, like in the strict scrutiny cases, is on the state. This level of review seems to be the only meaningful one in the American jurisprudence. Here the results are not determined in advance, but rather the facts and the context are being examined\(^\text{32}\). Minority groups are given protection, but not to an absurd extent. Nonetheless, very few groups have managed to break out of the basic “rational

---

\(^{29}\) *Adarand Constructions v. Pena*, 115 S.Ct. 2097 (1995). In earlier cases, affirmative action plans were examined with an intermediate level of scrutiny (discussed below). But the current Court is not very sympathetic to affirmative action; Scalia J. even argued, that those plans can *never* be considered “compelling” to survive scrutiny (at 2118-9).

\(^{30}\) See the analysis of Gunther, *supra*, note 11, at 18-20, and the references therein.


\(^{32}\) “Where intermediate scrutiny governs, the outcome is no longer foreordained at the threshold. Instead of winning always or never, the government may sometimes win or sometimes lose – it all depends” (K.M. Sullivan, “Post-Liberal Judging: The Roles of Categorization and Balancing” (1992), 63 U. Colo. L. Rev. 293, 298). Much unlike myself, Professor Sullivan criticizes this situation (as being indeterminate).
relation” test into this intermediate review. Only classifications based on gender and “illegitimacy” of birth receive this heightened protection\(^{33}\). Although the higher protection was sometimes said to be given to “discrete and insular minorities”, or to groups that historically suffered from severe discrimination, distinctions based on age or sexual orientation were not included. The mentally retarded were similarly left in the meaningless “rational relation” field\(^{34}\).

Currently, then, the Court recognizes three discrete levels of review. The “rational relation” test, which is the default one and applies in most cases, is extremely deferential. In cases of social and economic legislation, the Court has especially emphasized that an extreme level of deference is appropriate\(^{35}\); economic legislation in virtually always upheld, no matter how invidious, arbitrary, under-inclusive or over-inclusive it is\(^{36}\).

---

\(^{33}\) The heightened scrutiny of gender-based classifications started in Reed v. Reed, 404 U.S. 71 (1971). The intermediate level was first explicitly defined in Craig v. Boren, supra, note 31. In a recent case, the Court, although reiterating the usual intermediate standard, added that the government must demonstrate “exceedingly persuasive justification” for gender-based classifications, and hinted that women might receive strict scrutiny protection in the future (U.S. v. Virginia, 116 S. Ct. 2264 (1996), especially footnote 6 and the accompanying passage). For “illegitimacy”, see Mills v. Habluetzel, 456 U.S. 91 (1982).

\(^{34}\) The phrase “discrete and insular minorities” is taken from the famous footnote 4 in U.S. v. Carolene Products Co., 304 U.S. 144, 152 (1938). It was often cited with regard to both strict and intermediate scrutiny. See, e.g., Graham v. Richardson, 403 U.S. 365, 372 (1971). The current Court’s general approach towards this idea can be understood from the following passage, delivered by justice (as he then was) Rehnquist, dissenting, in Sugarman v. Dougall, 413 U.S. 634 (1973): “it would hardly take extraordinary ingenuity for a lawyer to find ‘insular and discrete’ minorities at every turn of the road”. As for the importance attributed to the historic aspect of the discrimination, See, e.g., J.E.B. v. Alabama, 114 S.Ct. 1419, 1425 (1994). For the groups that were left aside see, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (age); Bowers v. Hardwick, supra, note 45; Romer v. Evans, 116 S.Ct. 1620 (1996) (sexual orientation); City of Cleburne v. Cleburne living center, supra, note 21 (mentally retarded).

\(^{35}\) This is clearly a reaction to the Lochner era. See, e.g., New Orleans v. Dukes, 427 U.S. 297, 303-4 (1976); City of Cleburne v. Cleburne living center, supra, note 21, at 440; U.S. Railroad Retirement Board v. Fritz, supra, note 22, at 174-6 (1989). See also Tussman and tenBroek, supra, note 23, at 368-372.

\(^{36}\) One rare exception is Morey v. Doud, 354 U.S. 445 (1957), in which a majority of the Court struck down a law that specifically exempted “American Express” from regulations regarding the selling of money orders. This exception was later overruled in City of New Orleans v. Dukes, supra, note 35, at 306 (1976):
in exceptional cases is the U.S. Supreme Court ready to abandon this deferential posture in favour of a more meaningful constitutional review (and sometimes with an exceptionally rigorous and fatal one).

To make the picture fuller, it should be noted that there are cases in which the “rational relation” test is given some more meaning, or that a piece of legislation survives the “strict scrutiny” test. But these are rare exceptions; isolated attempts to avoid the unacceptable results of the three-tier system. In most cases, the rigid division between the tiers is strictly maintained, and an extreme form of deference to the other branches is shown.

2.3 The first amendment: some more tiers

There is a third pivot to the American constitutional jurisprudence, in addition to the due process and equal protection clauses. This is, of course, the First Amendment, which protects the freedoms of religion, speech and assembly. On the issue of free speech, the Court has also developed over the years a three-tier approach. Political speech is given the highest level of protection; it can be limited only by laws that are “narrowly tailored” to meet some “compelling” state interest. This strict scrutiny test is applied, just like in

__________

"the reliance on the statute's potential irrationality in Morey v. Doud... was a needlessly intrusive judicial infringement on the State's legislative powers, and we have concluded that the equal protection analysis employed in that opinion should no longer be followed. Morey was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous."

37 See, e.g., Romer v. Evans, supra, note 34 (invalidating a clause of Colorado’s constitution with the rational relation test); City of Cleburne v. Cleburne living center, supra, note 21 (invalidating a refusal to grant a permission to a mentally retarded home group, on the basis of the rational relation test). And see Gunther, supra, note 11, at 18-20.

the equal protection context, in a way fatal to almost any legislation. Commercial speech is in the intermediate level; it can be limited if the means are "not more extensive than necessary" and the goal is "a substantial governmental interest." The weakest protection is given to "low level" speech, such as hate speech or obscenity; a law limiting "low level" speech need only be "rationally related" to a "legitimate" objective. Content-neutral regulations are examined under a different analysis; but some commentators have observed three levels of review with regard to content-neutral restrictions as well.

It is clear that political speech must be better protected than hate speech. I think no one would doubt that. But instead of taking the importance of the speech into account while examining the state’s justification for limiting it, the Court divides the different kinds of speech into categories, each subject to a different standard of review. It is not just that limitations on hate speech can be justified more easily (which is obvious). The legislature is also allowed – once the case is in a category of lower scrutiny – to use means that are not necessarily related to the objective; to limit speech more than necessary; or to use means out of proportion to the objective. Once the legislation does not have to be "narrowly tailored", for example, some other (legitimate) ideas can be

---


40 In the past, obscenity was seen as completely out of the First Amendment scope; see Roth v. U.S., 354 U.S. 476 (1957). Later the "rational relation" test was applied; see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60 (1973). But see Reno v. American Civil Liberties Union (case no. 96-511, decided June 26, 1997), in which the Court required a law seeking to protect minors from obscenity on the internet to be "narrowly tailored".

41 See G. R. Stone, "Content-neutral restrictions" (1987), 54 Uni. of Chi. L.R. 46, 50-54.
banned together with the hate ones. This is clearly an unjustified limitation of fundamental rights.
Chapter 3
The Development of Deference in the European Court of Human Rights

3.1 The introduction of the “margin of appreciation”

In the European Court of Human Rights jurisprudence, the principal of deference developed quite differently. When the Court was set up in 1959¹, its self-confidence was quite low. There was a natural fear that states would not comply with decisions against them, or even withdraw from the Convention altogether². While the structure of constitutional democracies is extremely hard to change, the European Court of Human Rights had no similar assurances for its meaningful continuance. Furthermore, although the Court’s powers are quite similar to the powers of national courts in performing constitutional review, this unique international court had to take into account the states’ sensitivity to their sovereignty as well³. The states’ confidence in the operation of the system also had to be retained⁴.

¹ The Court was set up to ensure the observance of the engagements undertaken by contracting states under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) (hereinafter: the Convention).


In this light, it is hardly surprising that in its first years of existence the Court adopted an extremely cautious, deferential standard of review. The doctrine of “margin of appreciation” was introduced, to grant states significant room to manoeuvre in their decisions. Although it was constantly emphasized that the margin of appreciation is not unlimited, that it “goes hand in hand with a European supervision”, and that the Court “is empowered to give the final ruling”, it was equally accentuated that the states’ decisions and actions need not be perfect.

The Court made it clear that even with the margin of appreciation, it is not enough that a state “exercised its discretion reasonably, carefully and in good faith”. The obligations of the contracting states (and accordingly, the supervision powers of the Court) go beyond that. In practice, there were cases in which these were all the requirements; cases in which the Court refused to reflect upon the necessity of the states’

---

5 The doctrine was in fact developed by the European Commission of Human Rights (which examines all cases before they are referred to the Court), in Greece v. UK (1956), 2 Yearbook of the European Convention (1958-9), 176. Its origins can be found in classical martial law and continental administrative law (see Jacobs, The European Convention of Human Rights, 2nd ed. (Oxford: Clarendon Press, 1975), 201; H. C. Yourou, The margin of appreciation doctrine in the dynamics of European human rights jurisprudence (Dordrecht: Martinus Nijhoff, 1996), 14-5). It was presented by the Commission to the Court in its very first case, Lawless v. Ireland (1961), Eur. Ct. H.R. Ser. A, No. 3, 1 E.H.R.R. 15. The Court did not refer to the doctrine in its decision, and commentators have inferred different conclusions from this silence (compare R. Wiggins, “Derogations under human rights treaties” (1978), 48 B.Y.B.I.L 281 with Merrills, supra, note 3, at 153), but there is no doubt that the decision in Lawless was highly deferential.

6 Handyside v. U.K. (1976), Eur. Ct. H.R. Ser. A, No. 24, par. 48-9. In Handyside the margin of appreciation doctrine was discussed and clearly articulated for the first time. It may seem surprising that only in 1976 the Court came to do that, but in fact, it was still one of the Court’s first decisions. Only 16 cases were decided by the Court before Handyside (25 decisions were given with respect to these cases). The Court became much more active in later years: the average number of decisions per year rose from 1.7 in the first 20 years (1959-79) to 141 at present (1996-7) (based on data from the Court’s official WWW site at http://www.echr.coe.fr).

decisions, or even to look into the facts of the case. However, in the eighties and nineties it seems that these cases became more and more rare. The Court is (almost) always willing to perform a serious examination of the facts, and even with the margin, the standard is more than a "reasonableness" one.

3.2 From emergency situations to (almost) all other cases

The margin of appreciation was first developed in the context of Article 15, which allows states to derogate from their obligations under the Convention due to circumstances of "public emergency threatening the life of the nation," and providing that the derogation is limited to the extent "strictly required". A wide margin was given with regard to both the determination of whether a state of emergency exists, and the choice of measures to deal with the situation. It is quite understandable that the Court felt reluctant to second-guess decisions and actions taken by states to protect lives or the existence of their nation. The problem the Court was facing can be characterized as one of unclear evidence (similar to the Canadian experience); it is extremely difficult for the state to submit evidence that will prove the exact dangers to the people and the strict

---


necessity of the means chosen. Indeed, as the doctrine of margin of appreciation developed, Article 15 kept attracting the most deferential analysis\(^\text{11}\).

The Court seemed satisfied with its new doctrinal tool. It enabled the Court to give the states a feeling that the Court would defer to their judgement and choices, and at the same time left the Court with wide discretionary powers and flexibility\(^\text{12}\). Accordingly, the doctrine came to be used more and more and was described as “one of the more important safeguards developed by the Commission and the Court”\(^\text{13}\). Over the years, it was applied with regard to almost every provision of the Convention\(^\text{14}\).

Most significantly, the doctrine is applied in the context of Articles 8 to 11, dealing with private and family life, freedom of religion, freedom of expression and freedom of association. These Articles allow infringements providing, \textit{inter alia}, that they are “necessary in a democratic society”. This phrase was interpreted to include three major requirements. There must be a “pressing social need”; the reasons for the interference must be “relevant and sufficient”; and the means must be “proportionate to the legitimate aim pursued”\(^\text{15}\). The tests used by the European Court and by the Canadian one are thus


\(^{12}\) See Macdonald, supra, note 3, at 122-3. Note that the Court firmly rejected attempts to limit the scope of its review powers. See, e.g., \textit{Lawless v. Ireland}, supra, note 5. The margin of appreciation doctrine left with the Court the decision of when to apply it and what width of margin to allow in each and every case.

\(^{13}\) Waldock, supra, note 3, at 9. Sir Waldock was the President of the Commission and the one who first presented the doctrine to the Court in the \textit{Lawless} Case (see note 5, supra). He later became the President of the Court as well.

\(^{14}\) For a comprehensive survey see Macdonald, supra, note 3; Yourow, supra, note 5. Some commentators compared the margin to a “spreading disease” (P. van Dijk and G.J.H. van Hoof, \textit{Theory and Practice of the European Convention on Human Rights}, 2\textsuperscript{nd} ed. (Deventer: Kluwer, 1990), 604).

quite similar. Both Courts require that the objective will be pressing, and that the interference will be relevant (i.e. rationally related) to the achievement of this objective. The other two tests used in Canada, minimal impairment and proportionality in the narrow sense, seem to be included together in the European Court’s proportionality test.

3.3 The width of the margin

The width of the margin of appreciation varies from case to case. It is usually difficult to predict the width in advance, but some guidelines have been articulated in the Court’s decisions. There are three main factors that can influence the width of the margin in a given case.

The first (and most significant) factor determining the breadth of the margin is the existence of a uniform European standard. The margin is narrow if there is such a standard (a common ground between the national laws), and wide if there isn’t. The protection of morals, for example, is one area in which the Court has maintained that there is no European standard, and the states enjoy a wide margin of discretion in limiting rights. The authority of the judiciary (contempt of court), on the other hand, is an area in which the common ground is fairly substantial, and accordingly less discretionary powers are left to the states. The Court noted that the situation might change with


17 See, e.g., *Handyside v. U.K.*, supra, note 6; *Muller v. Switzerland, supra*, note 15. One commentator justifiably noted that the phrase "protection of morals" is open to any meaning, and thus creates a danger of abuse by the states, which can try and justify almost any infringement on this basis. With this background the Court should examine any justification on this basis with an especially strict scrutiny (*Feingold, supra*, note 2, at 96).

18 *The Sunday Times Case, supra*, note 7, at par. 59.
regard to the existence of a common ground, and was ready to examine the question frequently, but at the same time showed reluctance to acknowledge changes before they became definite.\textsuperscript{19}

As a second factor determining the width of the margin, it has been said that the margin will change according to "the nature of the aim of the restriction and the nature of the right involved"\textsuperscript{20}. Over the years, there seem to be a trend towards this open-ended, contextual approach\textsuperscript{21}. This in fact means that the determination of the level of deference is totally subjective and unpredictable, changing from judge to judge and from case to case. It also means that the process of review shifts, in fact, to the preliminary stage of determining the width of the margin. Indeed, in some cases the discussion about the margin of appreciation was all the Court’s analysis; once it was decided that the state should enjoy a margin of appreciation, the acts of the state were not examined at all\textsuperscript{22}.

Some principles can be inferred from the judgements with regard to the two contextual elements mentioned. As to the "aim of the restriction", two fields attracted the greatest deference: emergency/security situations and socio-economic policies. In cases of alleged emergency, whether there was a derogation under Article 15 or not, state


\textsuperscript{20} Gillow and Others (1987), Eur. Ct. H.R. Ser. A, No. 124, par. 55. In some other cases it was articulated as if the scope of the margin "will vary according to the circumstances, the subject-matter and its background" (see, e.g., Abdulaziz, Cabales and Balkandali Case (1985), Eur. Ct. H.R. Ser. A, No. 94, par. 78.

\textsuperscript{21} See Macdonald, supra, note 3, at 86. La Forest J. advocated a similar approach in Canada in some recent cases; see pages 26-7, supra.

\textsuperscript{22} See, e.g., Rasmussen Case, supra, note 16. This reality is similar to the American one, as described in page 38, supra.
actions were always upheld quite easily, with the margin of appreciation used as the legal tool to allow that. Similarly, when it came to social and economic questions, the margin was always as wide as it can get. Thus, for example, the margin was wide when a state nationalized private properties; and so was the situation when the “difficult social and technical sphere” of aircraft noise nuisance was involved. States generally enjoy a wide margin of appreciation whenever they are asked to perform positive acts. Even when it came to limitations on freedom of expression, a wide margin was given if the matter was deemed to be commercial, and in particular if the area was “complex”. In some cases, the Court simply refused to “undertake a re-examination of the facts and all the circumstances of each case”.

---

23 For Article 15 see page 46, supra. Any security issue, even without specific emergency circumstances, warranted a wide margin; see, e.g., Klass v. Germany (1978), Eur. Ct. H.R. Ser. A, No. 28 (secret surveillance); Leander v. Sweden (1987), Eur. Ct. H.R. Ser. A, No. 116, par. 27 (personnel control system). See also the dissenting opinion of Martens J. in Brogan v. U.K. (1988), Eur. Ct. H.R. Ser. A, No. 145-B, par. 54-5, where he characterized the impugned law, directed against terrorism, as “extra-ordinary”. “Emergency” situations are not necessarily security related; a wide margin was also given when Norway forced dentists to work in its northern regions (this case did not even make it through the Commission to the Court. See Iversen v. Norway, 6 Yearbook of the European Convention (1963), 278).

24 See generally Merrills, supra, note 3, at 160.


26 Powell and Rayner Case, supra, note 8, at par. 44.


28 Markt Intern Verlag GmbH and Klaus Beermann Case, supra, note 8, at par. 33.

29 Ibid. And see the criticism in the joint dissenting opinion, at page 24 (“the Court is in fact eschewing the task, which falls to it under the Convention, of carrying out ‘European supervision’”) (footnotes omitted)).
As to the "nature of the right involved", the margin of appreciation is tightest when a state limits rights fundamental to a democratic political system. The same is true in cases involving "a most intimate aspect of private life" such as sexual relations. It has also been said that the margin is narrow when an important issue like the advancement of equality between the sexes is at stake. At times these sayings seem to totally nullify the margin of appreciation; it has been said, for example, that the supervision must be strict when freedom of expression is involved. Since all the provisions of the Convention deal with similar fundamental rights, one could doubt if any place is left for the margin at all. But the Court in fact continued to use the doctrine in a wide range of cases (including those dealing with freedom of expression).

As a third (and final) factor determining the width of the margin, some have argued that the margin is influenced by the text of the Convention, referring to the differences between the terms used in different Articles. But the terms do not seem to make any difference in the decisions. As already mentioned, the most deferential analysis is applied

---


32 Abdulaziz, Cabales and Balkandali Case, supra, note 20, at par. 78.


34 See, e.g., Handyside v. U.K. (1976), supra, note 6, par. 48-9; The Sunday Times Case, supra, note 7, at par. 59; Barthold Case, supra, note 9, at par. 55. And see O'Donnell, supra, note 30, at 489; Yourow, supra, note 5, at 182.
with regard to Article 15, which includes the strictest language in the Convention (and on its face invites the strictest scrutiny)\textsuperscript{35}.

The margin of appreciation plays an important role in the developing jurisprudence of the European Court. Some of the most important decisions of the Court were determined by the doctrine. It also attracted some major disagreements between the judges\textsuperscript{36}. But all in all, the influence of the doctrine on the results of the cases was less than what one might think. It seems that in many cases, the margin of appreciation was used merely as "lip service" to the states\textsuperscript{37}. Quite often, the Court mentioned the doctrine and immediately went on to cite (and apply) the regular, strict test\textsuperscript{38}.

An interesting development can be detected in the Court's recent decisions. It seems that the force of the margin of appreciation doctrine is slowly and silently being relaxed. In 1993, one of the Court's judges observed that "there has probably been a narrowing of the originally expensive concept of the margin of appreciation"\textsuperscript{39}. This tendency is even much stronger today, in the most recent decisions. When the doctrine is mentioned, it is

\begin{itemize}
  \item \textsuperscript{35} Indeed, one of the judges argued that the margin of appreciation in Article 15 analysis must be narrower than the margin given in Articles 8-11 analysis. But the Court thought otherwise (see Brannigan and McBride, supra, note 11, opinion of Martens J., concurring).
  \item \textsuperscript{36} See, e.g., The Sunday Times Case, supra, note 7. See also Markt Intern Verlag GmbH and Klaus Beermann Case, supra, note 8. In this case, prohibitions imposed by a German Court on a publishing firm were upheld due to the President's casting vote (the Court was split up 9-9). The margin of appreciation was in the centre of the disagreement.
  \item \textsuperscript{37} See, e.g., Johnston and Others Case, supra, note 27, at par. 75.
  \item \textsuperscript{38} See, e.g., Mathieu-Mohin and Clerfayt Case (1987), Eur. Ct. H.R. Ser. A, No. 113, par. 52. Indeed, the Court has found a violation in more than two-thirds of the cases that came before it over the years, an unusually high number (based on data from the Court's official WWW site, supra, note 6). These numbers support the view that the Court was not so deferential in practice.
  \item \textsuperscript{39} Macdonald, supra, note 3, at 84.
\end{itemize}
only half-heartedly, as nothing more than lip service\textsuperscript{40}. And in most cases, it is not mentioned (nor applied) at all, even in cases where the Court previously said that the margin should be especially wide\textsuperscript{41}. It is still too early to conclude that this is a deliberated move and not just an inconsistent application. Probably, it is a bit of both\textsuperscript{42}.

\textsuperscript{40} See, e.g., \textit{Radio ABC v. Austria}, decision of October 20, 1997 (violation of Article 10); \textit{Grigoriades v. Greece}, decision of November 25, 1997 (violation of Article 10); \textit{Bowman v. UK}, decision of February 19, 1998 (violation of Article 10). The new and yet unpublished decisions mentioned here and in the next note are available at the Court’s WWW site, supra, note 6.

\textsuperscript{41} See, e.g., \textit{Dalai v. France}, decision of February 19, 1998 (Article 8); \textit{Guerra and Others v. Italy}, decision of February 19, 1998 (violation of Article 8; margin of appreciation was not mentioned although positive rights were involved (failure to provide population with certain information)); \textit{Larissis and Others v. Greece}, decision of February 24, 1998 (violation of Article 9).

\textsuperscript{42} It should be noted that the Court is facing a huge change soon. In November 1, 1998, the Commission and the present Court will be cancelled and replaced by a new, full-time, permanent Court (see Protocol No. 11 to the Convention, Strasbourg, May 1994). It is possible that the doctrinal changes are related to this institutional change; unfortunately, though, a discussion of this possibility is out of the scope of this paper.
Chapter 4
The Application of Deference

This chapter tries to put the deference jurisprudence, described chronologically in the previous chapters, into some systematic order. To better understand the ways deference is applied, the description is divided into four different questions: to whom do the courts show deference; at what stage of the analysis do they use deference; what form do they choose to give the concept; and what is the scope of the application (that is, when do they use deference). These questions are answered here separately, one after the other. The emphasis is on the Canadian jurisprudence, but the other two courts are also examined.

4.1 Deference to whom

The Canadian Court pays deference to legislatures and to governments, both federal and provincial. In most cases it is the parliaments who enjoy deference, but the executive branch is eligible, in the Court’s view, to the same treatment. On the other hand, it has been made clear that there is no place for deference with regard to laws developed by the Court itself. Neither does the Court show deference to decisions made by private entities.

---


4.2 Stage of application

The process of examining a constitutional claim that a human right has been violated can be divided into five stages: interpretation, purpose, ends-means relation, minimal impairment and proportionality. Courts do not always differentiate between all the stages, and they do not necessarily go through all of them in each and every case. But generally speaking, this is how the analysis is built, not only in Canada but in the United States and the European Court of Human Rights as well. First, the court interprets the scope of the right and determines whether the claim falls into it. Assuming it does, the state has to justify the infringement by passing four different hurdles (or, as the case usually is in the United States, the applicant has to pass these hurdles and show that the infringement is not justified). The court examines the objective (purpose) behind the state’s legislation/action; the relation between the objective and the means chosen; whether the state could achieve the objective with lesser impairment; and whether the “good” achieved by the legislation/action is less than the harm caused by it.

In the first stage, when the court interprets the scope of the right involved, there is clearly no place for deference to the other branches, if only because no decision of the legislature or the government is under examination. At this stage none of the justifications for deference is relevant; no policy is under examination. There is no reason

---

5 In fact, there is another stage, prior to these five, in which the court decides whether the constitution applies to the case at all. In Canada, for example, the Charter was interpreted as not to include the private sphere (RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573), and in the United States, political questions were interpreted by the Court to be out if its own reach (Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)). These moves can be seen as deference in its most extreme form. But the courts do not explicitly use the concept of deference in their reasoning at this stage, and accordingly, it will not be discussed here. Recently, the Canadian Court strongly rejected an attempt to exclude legislative omissions from the scope of review, and stressed that “the notion of judicial deference to legislative choices should not... be used to completely immunize certain kinds of legislative decisions from Charter scrutiny” (Vriend v. Alberta, [1998] S.C.J. No. 29, at par. 54).
to defer to legal interpretation which is more convenient to the state. Indeed, courts do not usually invoke deference in this stage; on the contrary, in most cases all three courts gave the words of their constitutions a rich and liberal meaning, without giving any special weight to the state’s suggested interpretation. Although there have been some rare exceptions, in which the courts used deference at this stage, it seems unlikely that such moves will reoccur. Indeed, in a more recent case the Supreme Court of Canada explicitly noted that the use of deference as part of the section 1 examination, “do not advocate a deferential approach at any earlier stage of Charter analysis.”

As to the second stage, the examination of the state’s objectives, there is a sharp distinction between the American Court and the others. The Canadian and the European courts use only one level of review when it comes to ends, and although it is pretty strict on its face, they rarely strike down legislation or actions on this basis. Their approach in this stage can be described as highly deferential, although they do not tend to invoke the concept of deference explicitly. The standard stays demanding, but the courts simply uphold almost any objective. The American “tiers of review” system, on the other hand, created different levels of review in this stage. The demands for the objective vary from their having to be “compelling” to “important” to “legitimate”. In practice as well, the

---

6 In Canada, see the Labour Trilogy, section 1.2.2, supra (deference in the interpretation of freedom of association). In Europe, see Cossey Case (1990), Eur. Ct. H.R. Ser. A, No. 184 (margin of appreciation when deciding the scope of Article 8(1)); and see J.G. Merrills, The development of international law by the European Court of Human Rights (Manchester: University Press, 1993), at 166-8.

7 Symes v. Canada, [1993] 4 S.C.R. 695, at 753. Ironically, the Court referred to the Labour Trilogy itself in this context, but to the dissenting opinion of Dickson C.J., with complete avoidance of the majority decision.

scrutiny of ends (or lack of it) has played an important role in the American jurisprudence. When the “compelling” standard is applied, most ends fail to pass it.\(^9\)

The next stage, the examination of the ends-means relation, does not usually attract deference. All three courts use the simple, invariable standard, according to which there must be a “rational relation” (or “relevance”) between the objective and the means chosen. Once again, there are exceptions to the rule. In Canada, in \textit{RJR-MacDonald}\(^{10}\) four dissenting judges used deference within the rational connection examination\(^{11}\). A European exception is the margin of appreciation given in emergency situations (Article 15)\(^{12}\). One might think that in the United States the “rational relation” standard changes in the strict and intermediate levels of review, but in fact the different wording (for example, “substantial relation” in the intermediate level) refers to the other requirements\(^{13}\).

The following step, the minimal impairment test, is at the heart of deference application in all three courts. It is at this stage of the analysis that deference is usually

\(^{9}\) \textit{Lochner} is the best example of objectives’ strict scrutiny. It seems that this was one of the main reasons \textit{Lochner} was wrongly decided (see G. Gunther, “The Supreme Court, 1971 term – forward: in search of evolving doctrine of a changing Court: a model for a newer equal protection”, 86 Har. L.R. 1, 42 (1972); and see page 34, \textit{supra}). But even though \textit{Lochner} was strongly criticized and rejected by the Court, the strict scrutiny of ends, in some situations, continues. See, e.g., \textit{Shapiro v. Thompson}, 394 U.S. 618, 634 (1969).


\(^{11}\) See section 1.2.6, \textit{supra}.

\(^{12}\) In cases of alleged emergency, the margin is given not only with regard to the choice of means, but also with regard to the question of whether the emergency situation really exists. The state is thus given some control over the determination of the facts on which the decision is based (see, e.g. \textit{Ireland v. U.K.} (1976), Eur. Ct. H.R. Ser. A, No. 25, par. 207). I believe that the determination of the facts can be associated with the “rational relation” stage: the court examines whether the actions that the state took (the means) are rationally related to the objective of preserving security (i.e. based on sufficient factual basis).

\(^{13}\) In the intermediate level of review, for example, on top of the regular “rational relation” requirement, the legislation should be more narrowly tailored (comparing to the minimal deferential test).
shown. Once deference is used, the state is not required to prove that the means chosen are the least restrictive possible to achieve the desired objective. A lesser standard applies, and an infringement that is not really necessary may be permitted\textsuperscript{14}. As we have seen, in Canada and Europe when deference is applied the standard usually becomes a “reasonableness” one; in the United States, when the Court scrutinizes state action least strictly, the minimal impairment requirement completely vanishes.

In the last step of the review the Court examines the proportionality between the benefits of the law and its negative effects. For some reason, this test has not played an important part in the decisions, and accordingly deference was not specifically discussed in this context. In the European Court’s jurisprudence, however, the “necessity” requirement, where the margin is mostly applied, seems to include both the minimal impairment and the proportionality tests\textsuperscript{15}. The European Court thus applies its deferential analysis with regard to proportionality (in the narrow sense) as well.

4.3 Form of deference

Reading the judgements of the different Courts, one can detect two major forms given to the concept of deference (and it seems impossible to anticipate in which cases each of them will be used, if at all). In one the standard is explicitly relaxed, and an attenuated

\textsuperscript{14} In Canada, see, e.g., Edwards Books, supra, note 1, at 44; U.S. v. Cotroni, [1989] 1 S.C.R. 1469, at 1490; R. v. Chaulk, [1990] 3 S.C.R. 1303, at 1341; McKinney, supra, note 2, at 314. In Europe, see Tre Taktörer AB Case (1989), Eur. Ct. H.R. Ser. A, No. 159, par. 62 (state actions were upheld even though it was made clear that the state “could have taken less severe measures”). In the United States, see, e.g., the often-quoted Lindsley v. Natural Carbonic gas, 220 U.S. 61, 78 (1911) (“mathematical nicety” is not required).

\textsuperscript{15} For the minimal impairment, see, e.g., Tre Taktörer AB Case, supra, note 14, at par. 62. For the proportionality in the narrow sense, see, e.g., Barford Case (1989), Eur. Ct. H.R. Ser. A, No. 149, par. 29.
test is used instead of the regular one. In the other, the standard is not changed; the Court simply adds that some "room to manoeuvre" should be given to the other branches.

The judges in Canada use both forms, without any explanation for the different use in different cases. When the general "room to manoeuvre" is applied, the Court usually restates the *Oakes* test with approval, but with regard to the minimal impairment stage of the test, adds that the legislature\textsuperscript{16} must be given some "room to manoeuvre" (or a "margin of appreciation", leeway, latitude, etc.). Sometimes the Court simply points out that some deference must be paid to the legislature, or that legislation is not unconstitutional simply because the Court can think of means which are a little less intrusive. The test is still articulated in the original, rigorous words of *Oakes* (the impairment must be "as little as possible"), but the application is much more relaxed and permitting to the state. In practice, the state is not restricted to the least intrusive means\textsuperscript{17}.

In other cases, the Supreme Court of Canada has decided to invoke a different minimal impairment test. When this form is taken, the Court explicitly deviates from the *Oakes* test, by using an easygoing version of this test. There are a few variations to this different test. The most important one is the *Irwin Toy*\textsuperscript{18} version, according to which the

\textsuperscript{16} For convenience reasons, I refer here and later to the legislature only, but the same applies to the government and its actions as well.


question is whether the state had a reasonable basis for concluding that the act (or action) impaired the right as little as possible. This test can be titled “the subjective-reasonableness test”: the two important differences from the Oakes version are the concentration on the state’s subjective point of view, and the addition of the reasonableness factor. Both changes ease the examination and allow the possibility of impairments of rights that are not really necessary. In other variations of the relaxed test the Court does not look at the impugned legislation or action through the eyes of the state, but still requires the legislation or action to be only “reasonable”, as opposed to “perfect”, with regard to the necessity of the intrusion. In the most common variation, the minimal impairment test is articulated as requiring the impairment to be “as little as reasonably possible”. In other cases, the Court determined that it will defer to the choice of the legislature as long as there are no alternative means which are “clearly better” or “significantly less intrusive”.

The European Court usually prefers the “general room to manoeuvre” form. In most cases, the mention of deference has no articulated impact on the tests used by the European Court. It is quite common for the Court to maintain that the state enjoys a

---

19 See section 1.2.3, above.


margin of appreciation, and immediately reiterate the regular requirements\textsuperscript{23}. The margin given to the states is sometimes titled "wide" or "narrow", but there are no clear categories.

In the European Court's earlier judgements, one could also find cases in which a different test was applied. There were times, especially with regard to Article 15 (emergency situations), in which the Court explicitly settled for a subjective-reasonableness test. States were not required to show that an interference was "actually necessary", but "only that [they] had sufficient reason to believe that it was necessary"\textsuperscript{24}. This subjective standard was strongly criticized by commentators\textsuperscript{25}, and it seems that it completely vanished in later cases\textsuperscript{26}.

The loose way deference is used in Europe, without clear categories, gives the Court great flexibility. With stricter definitions and categories it wouldn't have been as easy for the Court to ignore the doctrine whenever it chose to do so. As mentioned, in recent cases the Court even seems to head towards a significant relaxation of the margin, and it does so without any explanation or discussion. This flexibility has its prices, and they are high

\begin{footnotesize}

\textsuperscript{24} Jacobs, The European Convention of Human Rights, 2\textsuperscript{nd} ed. (Oxford: Clarendon Press, 1975), 201. An example for a case in which this test was applied is Ireland v. U.K., supra, note 12, at par. 213 (the measures "could... reasonably have been considered strictly required"). See also Merrills, supra, note 6, at 154.

\textsuperscript{25} See, e.g., Jacobs, supra, note 24, at 202.

\textsuperscript{26} Indeed, in the second edition of his book, Jacobs did not mention this test anymore. See Jacobs, The European Convention of Human Rights, 2\textsuperscript{nd} ed. (Oxford: Clarendon Press, 1996), 323.
\end{footnotesize}
ones. Decisions are subjective and impossible to predict, to name just the main examples\textsuperscript{27}.

While the Courts in Canada and Europe usually try to keep their rigorous tests and add some words of deference whenever they see fit, the American Court prefers to invoke different standards of review in different categories of cases. Much like in any other part of their jurisprudence, the American judges created clear-cut distinctions between different categories, each has its own articulated tests. A distinction between races, for example, can be justified only by a "compelling state interest" and "least restrictive means", while a distinction between the rich and the poor requires only a "rational relation" to a "legitimate end"\textsuperscript{28}. In practice, the Court retains a high level of flexibility when deciding how to classify each case; and even when it's clear how the case should be classified, the tests are sometimes applied differently, without explanation or a different articulation, simply to achieve the desired results\textsuperscript{29}. Nonetheless, comparing to the other Courts, there is no doubt that the American version of deference, in theory if not practice, is less vague and much more defined.

While the American system of clear-cut categories seem to be more determinate (or at least creates such an appearance), it too has its costs, and they're at least as high as the

\textsuperscript{27} One commentator noted, that "the U.S. Supreme Court has developed a fairly clear set of standards governing the extent of the deference to be granted, but the European Court has not. It is this absence of standards that is the target of much of the criticism" (T.A. O'Donnell, "The margin of appreciation doctrine: standards in the jurisprudence of the European Court of Human Rights" (1982), 4 H.R.Q. 474, 479). See also P. Mahoney, "Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin" (1990), 11 H.R.L.J. 57, at 83 ("the time has probably come to articulate clearer criteria as to the scope of the margin of appreciation").

\textsuperscript{28} See section 2.2, supra.

\textsuperscript{29} See page 41, supra.
prices of the European flexibility. The American tiers system ignores the complexity of life and imposes rigid distinctions on the basis of crude generalizations. To put it bluntly, categories lead to bad results\textsuperscript{30}.

### 4.4 Scope of application

It is clear that deference is not appropriate in \textit{all} the cases; none of the Courts uses the doctrine in an all-encompassing way. Which are the cases that warrant deference, then? When should deference be applied?

In Canada, the most common answer is that deference should be accorded to legislation balancing between different groups of society, or (as it is sometimes articulated) to legislation allocating scarce resources\textsuperscript{31}. The Court differentiated these cases from situations in which the state acts as the "singular antagonist". According to this distinction, the group of cases in which the Court uses deference is extremely broad. The constitutional role of the Court and the scope of the \textit{Oakes} test are thus substantially reduced.

Another common opinion presented by Canadian judges is that deference should be paid whenever the legislation is based on competing socio-economic theories, or (as it is sometimes articulated) whenever there are contradicting pieces of social science

---


evidence. Generally speaking, the idea is that only the elected branches are justified, and expert, in choosing between such theories. This scope of application is best understood in light of the difficulties the Court faced regarding the problem of ambiguous evidence.

Some of the judges took the view that deference is especially appropriate to legislation attempting to promote a Charter value, noting that the legislature should be free to choose the pace of advancing towards equality; but this view has recently been rejected by the Court.

Other suggestions have been to use deference in all social and economic issues, and in a recent case the Court added “political” issues to those inviting deference as well. Occasionally, judges have expressed discomfort with this broad level of application. It has been argued, that “to accord deference merely because the issue is a ‘social’ one would be to issue a license to discriminate in favour of the status quo.” Indeed, it is not often that the Court explicitly suggests this scope for deference; but in practice, the former distinctions are usually understood as leading to the same result.

32 See, e.g., Irwin Toy, supra, note 1; McKinney, supra, note 2; RJR-MacDonald, supra, note 10, at 279 (per La Forest J., dissenting).

33 McKinney, supra, note 2, at 318 (per La Forest J.). See also Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892 (per McLachlin J.); Egan v. Canada, supra, note 20, at 574 (per Sopinka J.). And see the strong dissent of Wilson J. in this matter in McKinney, at 413-414.

34 Vriend v. Alberta, supra, note 5, at par. 122. In the U.S., on the other hand, “the legislature may select one phase of one field, and apply a remedy there, neglecting the others” (Williamson v. Lee Optical, 348 U.S. 483, 489 (1955)).


36 Libman v. Quebec (A.G.), supra, note 21, at par. 59.
Some judges have expressed objections to such a sweeping application of the doctrine, and attempted to narrow the use of deference. Wilson J., for example, disagreed the Court should defer when resource allocations were at issue, noting that it would "completely vitiate the purpose of entrenching rights and freedoms." She advocated a much narrower scope for deference, suggesting that "courts should probably not intervene where competing constitutional claims to fixed resources are at stake." Consistent with her restrictive approach to deference, Wilson J. also argued that deference is only appropriate when legislation strives to protect the interests of the less advantaged, vulnerable groups of society, and provided that "something less than a straightforward denial of a right is involved." Other attempts to narrow the Court's approach have been subtler. L'Heureux-Dubé J. has suggested that deference is in order only when the allocation of resources is "a fundamental issue." Iacobucci J. has hinted

---

37 *Egan v. Canada*, *supra*, note 20, at 570 (per L'Heureux-Dubé J., dissenting); see also the dissenting opinion of L'Heureux-Dubé J. in *Adler v. Ontario*, *supra*, note 22, at 667.

38 *McKinney*, *supra*, note 2, at 403 (dissenting opinion). It is not only that Wilson J. disagreed normatively with the majority in this case; she also understood the judgement in *Irwin Toy* (which the Court pretended to follow) differently. For her narrow interpretation of *Irwin Toy* regarding the scope of deference, see also *R. v. Chaulk*, *supra*, note 14, at 1388-1390.

39 Ibid., at 404. But, as already noted, when reading the passage as a whole, it appears that Wilson J. was not referring to a different level of scrutiny, but merely to the need to perform the scrutiny with sensitivity to context.

40 See *McKinney*, *supra*, note 2, at 401-403 (per Wilson J., dissenting); *Lavigne v. OPSEU*, *supra*, note 21, at 295 (per Wilson J., dissenting). See also *Adler v. Ontario*, *supra*, note 22, at 669 (per L'Heureux-Dubé J., dissenting).

41 Ibid., at 401. And see *Adler v. Ontario*, *supra*, note 22, at 667 (per L'Heureux-Dubé J., dissenting) (noting that deference is inappropriate where "the nature of the infringement lies at the core of the rights protected in the Charter").

42 *Stoffman*, *supra*, note 18, at 562 (dissenting opinion); *Dickason v. University of Alberta*, *supra*, note 4, at 1163 (here articulated as a "central issue") and 1165 (dissenting opinion).
that deference is not acceptable when the only competing interests are budgetary in nature\textsuperscript{43}.

While in Canada the starting point for the Court is the standard of strict scrutiny articulated in \textit{Oakes}, and the question is when to soften the standard, the situation is quite different in the United States and the European Community.

After the \textit{Lochner} era, the U.S. Supreme Court has made deference its starting point. The regular test is the most deferential one ("rational relation" to a "legitimate" purpose). This test is the one applied in most cases, and especially with regard to socio-economic legislation. The only chance one has to rise above this minimal standard is to get into the specified categories that attract "strict" or "intermediate" scrutiny. Most applicants fall far short of these categories, and consequently are doomed to failure, almost automatically. The question is not when to soften the standard, but when to intensify it.

American judges have been willing to abandon their deferential stance only for groups that were historically discriminated against in the most extreme level, or when it came to rights that the judges perceived as fundamental\textsuperscript{44}.

In the European Court's jurisprudence, the "regular" test is much stricter. It is much like the Canadian \textit{Oakes} test, except that deference is part of the starting point as well. When the Court examines an infringement of freedom of expression, for example, the judges do not ask themselves whether the margin of appreciation is at all appropriate. It is already part of the analysis; it is given to the states automatically. The only question is

\textsuperscript{43} \textit{Egan v. Canada}, \textit{supra}, note 20, at 618 (dissenting opinion).

\textsuperscript{44} See chapter 2, \textit{supra}. Both the choice of the historically disadvantaged groups, and the choice of fundamental rights, are highly subjective. The choice of fundamental rights, in particular, is sometimes
what the width of the margin should be. Sometimes the margin is narrowed to the point of non-existence, and sometimes it is so wide that there is no actual review at all. But the starting point seems to be the existence of a "certain" margin; unless reasons are given to change that, some deference is automatically granted to the states.

In the European Court’s jurisprudence, the margin is widest – and deference is most pronounced – on issues where there is no consensus or common standard; in social and economic issues; in emergency/security situations; and when fundamental rights are involved\textsuperscript{45}.

Although the basic question, with regard to the scope of application, is different in every jurisdiction, some important similarities are revealed. Social and economic issues almost always warrant a high degree of deference. Limitations on “fundamental rights”, on the other hand, are always strictly reviewed (although the rights that receive this heightened protection are different from court to court). Finally, the lack of common ground (in Europe) and the existence of competing social science theories/evidence (in Canada) both attempt to identify issues which are open to different legitimate solutions.

---

\textsuperscript{45} See section 3.3, \textit{supra}.
Chapter 5
The Actual Impact of Deference

So far the discussion focused on the jurisprudence of deference as it appears "on the surface". But this is still insufficient to fully describe the use of the concept. Reading the numerous cases in which deference was mentioned, it is clear that its impact varies substantially from case to case. This chapter is an attempt to understand the actual impact of deference in different cases. I believe that in practice there are five different levels of impact to the concept of deference, as applied by the different courts.

The first group of cases, in which deference has the strongest impact, can be titled the "end of story cases". In these cases, the mere introduction of deference is enough for the Court to make its decision, which is, automatically, to uphold the impugned legislation or action. A good example is the Labour Trilogy, a group of highly important cases decided in a one-page decision. In these cases, the Court merely stressed the need to show deference in the field of labour relations. This was enough to dismiss the complaints against the laws, which the dissenting judges showed were unnecessarily broad. Deference can be described, in such cases, as the first and last word. It is the one and only reason – or at least almost the one and only – sufficient to make the decision.

The Americans' use of deference often has this impact. Their regular deferential test usually means no review at all; the mere use of this test (in other words, of deference)

---

usually dictates the result of the cases\textsuperscript{2}. The Canadian and European courts, on the other hand, rarely use this form of deference, although one can find traces of it in their jurisprudence as well\textsuperscript{3}.

Similar in their extreme impact are cases in which the courts simply give more weight to the state’s position than to the interests of the other litigants. It is clear that sometimes this is the practical meaning of deference\textsuperscript{4}, but naturally it is impossible to evaluate the weight given by each judge to each position in a given case.

A second level of impact exists when courts apply a "reasonableness" test. Both the Canadian and the European courts sometimes use such a test, according to which the state is only required to act "reasonably"\textsuperscript{5}. Sometimes the courts further loosen the standards by adding a "subjective" element, thus turning the test into a "subjective-reasonableness" one. When this version is used, the facts are examined from the state’s point of view rather than objectively. The standard comes in fact very close to a "good faith" one. If the state acted in good faith – and states usually do – it is most unlikely that the courts will intervene. A mere indifference to someone’s rights, or negligence in the drafting of the legislation, are not enough to warrant intervention when this test is applied.

\textsuperscript{2} See, e.g., Williamson v. Lee Optical, 348 U.S. 483, 487-8 (1955). At most, when the U.S. Court uses its regular deferential review it examines if the state acted in good faith.

\textsuperscript{3} In Canada, other than the Labour Trilogy, see the opinion of Sopinka J. in Egan v. Canada, [1995] 2 S.C.R. 513. In Europe, see the cases in which the Court refused to look into the facts, at page 46 note 8, supra.


\textsuperscript{5} In Canada, see page 60, supra. In the Europe, see page 46 note 8, supra.
In Canada, the *Irwin Toy* test is such a subjective-reasonableness test. When this test is applied, the Court makes it clear that the impairment does not have to be minimal; it is enough that there be a “reasonable basis” for the state to believe so\(^6\). In the European Court advocates of such a test usually found themselves in dissent; but in practice, there are some cases in which this deferential test was the one applied by the European Court as well\(^7\).

Sometimes the standard is relaxed even further, by combining a subjective-reasonableness test with a shifting of the burden of proof. When this version is applied, the state is not even required to show that it acted reasonably; the applicant must prove that the state acted *unreasonably*. This extremely deferential variation is sometimes used – although rarely – by judges both in Canada and in Europe\(^8\). In the United States, this last test is the norm. According to the regular test used by the American Court, the facts are examined from the state’s subjective point of view; the standard required is not higher than reasonableness (probably even lower); and the burden of proof is on the applicant\(^9\).

---

\(^6\) See section 1.2.3, *supra*. For references as to the use of this test see page 59 note 18, *supra*.

\(^7\) See pages 45-6, *supra*. One commentator, referring to the earliest cases of the European Commission, suggested that when using the margin the Commission took “a middle position” between the subjective and the objective points of view, placing itself “in the position of the citizens in a democracy” (J.E.S. Fawcett, *The application of the European Convention on Human Rights* (Oxford: Clarendon Press, 1987), at 311). To myself this seems exactly like the objective examination.

\(^8\) In Canada, see the dissenting opinion of La Forest J. (writing for three other as well) in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 (the legislation was justified, with heavy reliance on deference, although the state refused to disclose substantial pieces of evidence in this case). In Europe see, e.g., *James and Others Case* (1985), Eur. Ct. H.R. Ser. A, No. 98, par. 46; and see van Dijk and van Hoof, *supra*, note 4, at 591-2. Van Dijk and van Hoof divide between three approaches to the margin: the narrow approach, the reasonableness test and the not-unreasonable test (at 590).

\(^9\) See chapter 2, *supra*. 
The shifting of the burden is not always applied in conjunction with the reasonableness test. There are cases in which the burden is not formally reversed, as part of an articulated test, but the practical meaning of deference is still a shift of the burden of proof. This is the third level of impact. In this line of cases, by introducing the concept of deference, by allowing the state a “margin of appreciation”, the courts actually shift the burden from the state to the individual harmed by its legislation or actions. Once again, this is a common practice in the United States. The regular deferential test places the burden of proof on the applicant, who must overcome a “strong presumption of constitutionality” in favour of the state. Only in cases that fit into the specified categories of “strict” or “intermediate” scrutiny does the burden shift to the state. In Canada and Europe, on the other hand, the burden is normally on the state to justify the infringement of a constitutional right or freedom. On the surface, this is the situation even when deference is shown. But in practice, by deferring to the legislature or the government, both the Canadian and the European judges have also sometimes reversed this burden. The dissenting opinion of La Forest J. in RJR-MacDonald serves as a good example. In this case, the state had to defend a law that prohibited advertisements of tobacco products; but the government refused to disclose any evidence pertaining to studies that it

---

10 See section 2.2, supra.

11 In Canada, see, e.g., the dissenting opinion of La Forest J. (writing for three other as well) in RJR-MacDonald, supra, note 8; and see Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 827. In Europe, see, e.g., Handyside v. U.K. (1976), Eur. Ct. H.R. Ser. A, No. 24; Abdulaziz, Cabales and Balkandali Case (1985), Eur. Ct. H.R. Ser. A, No. 94, par. 78; and the interpretation given to these cases by MacDonald, supra, note 66, at 87, 120. In fact, it can be argued that the margin always creates an initial presumption in favour of the state (and thus shifts the burden); see, e.g., T.A. O’Donnell, “The margin of appreciation doctrine: standards in the jurisprudence of the European Court of Human Rights” (1982), 4 H.R.Q. 474, at 475.

12 Supra, note 8.
carried out regarding possible alternatives to a total ban on advertising. The refusal to disclose this evidence, in itself, was extremely suspicious, but La Forest J. nonetheless maintained that the state had justified its infringement of the tobacco company’s freedom of expression. The burden of proof was, formally, still on the state. In practice, however, the result reached by La Forest J. cannot be explained unless it is understood that the burden actually shifted to the applicants.

In a fourth category of cases deference can be described as “post-decision-justification”. Here the impact of the concept is much weaker. In the three groups of cases described above, deference really makes all the difference. Whether it is used as the first and last word, as a significant lowering of the requirements for justification, or as reversing the burden of proof – deference has the impact of completely changing the result of the dispute and determining the validity of the impugned legislation. In the fourth group, on the other hand, the cases are already decided when deference is introduced. When judges choose – for whatever reason – to uphold a piece of legislation, they sometimes add deference as a supporting argument for their decision. In these cases, deference is used as simply another reason to justify a decision already made; to strengthen the reasoning for an existing decision. Evidence of this type of deference exists mostly in Canada; the opinion of McIntyre J. in the Labour Trilogy\textsuperscript{13} serves as a good example. Although he had already arrived at his conclusion regarding the scope of freedom of association, McIntyre J. relied on deference at the end of his opinion to support this conclusion. He referred to this argument as one “grounded in social policy”, noting that courts should refrain from interference in the labour relations field, which is

\textsuperscript{13} Supra, note 1.
“dynamic and unstable”\textsuperscript{14}. Hence, after already deciding to uphold the law, McIntyre J. used deference simply to support and strengthen his conclusion\textsuperscript{15}.

There is a fifth group of cases, in which although the rhetoric of deference is used its impact is minimal. Here deference is mentioned but not really applied; it is no more than the Court paying lip service to the legislature (or government). The rhetorical use of deference is quite common, due to the sensitivity of the courts to the line that separates their powers from the elected branches of governments. Most courts are generally quite uncomfortable striking down legislation, so judges try to soften their rulings by using (among other things) deferential language. Judges make an effort to show that they defer to choices of the other branches; that only in the most extreme situations they allow themselves to intervene. The courts’ need to show respect for others is always a part of using deference, but sometimes it is the only part. Sometimes it is the only reason to mention deference, while in fact strict scrutiny is applied. The only impact of deference in these cases is indirect: the reliance of the Court itself, and especially lower Courts, on the deferential approach in future cases. A good example is the case of Rocket, in which the Canadian Court struck down a law limiting advertising by dentists. The Court started its section 1 analysis by noting that “the fact that the provincial legislature here acted to protect a vulnerable group argues in favour of viewing its attempted compromise with some deference”\textsuperscript{16}. The Court then went on directly to strictly scrutinize the impugned

\textsuperscript{14} Reference Public Service Employee Relations Act (Alta.), \textit{supra}, note 1, at 414.

\textsuperscript{15} I believe that McKinney \textit{v. University of Guelph}, \textit{[1990]} 3 S.C.R. 229, is another example for this type of cases.

law; it needed only a single paragraph, obviously with no serious discussion and
definitely no deference, to invalidate the law as over-broad.

This level of impact is common in Canada and in Europe, and it exists in the
American jurisprudence as well.\(^\text{17}\)

Chapter 6
The Inconsistency of the Case Law

When one examines the deference jurisprudence of all three jurisdictions and looks for a common ground, the first and clearest discovery is the problem of inconsistency. This inconsistency has been apparent throughout our discussion, at each and every turn of the road. When the courts decided when to use deference (if at all); at what stage of the analysis to use it; what form it should take; or what actual impact it will have – all these questions were not answered in any consistent way.

The aim of this chapter is not to repeat all the inconsistencies mentioned in the previous chapters. The idea is to shortly summarize (with additional examples) and criticize the main points of inconsistency, with an emphasis on the Canadian jurisprudence. To better illustrate the problem, the inconsistency in Canada will also be described through the decisions of one particular justice, Beverley McLachlin.

6.1 The inconsistency in Canada: an overview

We have seen that every question concerning the application of deference has been answered by the Supreme Court of Canada inconsistently.

With regard to the decision of when to use deference, the formulations articulated by the Court were hardly followed. Criminal cases, in which the state was clearly the “singular antagonist” of the applicants, attracted deference just as much as cases of resource allocation¹. At the same time, there were cases in which deference was totally

¹ See section 1.2.4, supra.
ignored, even with respect to laws which clearly balanced between different groups of society\(^2\). In none of the cases did the Court explain the deviation from its own principles.

The form of deference took and its actual impact changed similarly from case to case. Sometimes deference meant a "subjective-reasonableness test" and some other times it was just a general (unarticulated) relaxation of the standards\(^3\). There were cases in which the impact of deference was crucial and cases in which it was nothing more than lip service to the other branches\(^4\). All these changes, as important as they are to the results and to the formulation of precedent, where never discussed or explained.

As for the stage of the analysis at which deference was used, the jurisprudence is much more consistent; in most cases, it was the minimal impairment test that attracted deference. This is hardly surprising, since usually this was the only stage that attracted any serious analysis at all. Even in this matter, however, there were some important deviations from the rule\(^5\). Once again, no explanation was offered as to the shifting of deference from stage to stage.

A good illustration of the inconsistency can be found in the recent case of *Eldridge v. British Columbia (A.G.)*\(^6\), dealing with the funding of sign-language translators in hospitals. This was a quintessential example of a case in which the issue was a balance between different groups of society, an allocation of scarce resources. It was clearly a

---


3 See section 4.3, *supra*.

4 See chapter 5, *supra*.

5 See section 4.2, *supra*.

case in which a high level of deference was justified according to the Court’s precedents in *Irwin Toy*\(^7\) and *McKinney*\(^8\). It is therefore hardly surprising that Lambert J., the only justice in the British Columbia Court of Appeal to reach the section 1 stage, based his analysis on extreme deference. On issues of resource allocation, he stated following the Supreme Court’s earlier leads, courts should defer to legislative policy and administrative expertise\(^9\). On appeal to the Supreme Court, La Forest J., who usually was the most devoted supporter of deference, referred to the same precedents but turned them on their heads. He used a much subtler language comparing to previous decisions (in which he utilized the doctrine of deference to *uphold* the laws). Here the concept was, all of a sudden, a matter of open debate. He did, however, keep it alive by noting that “in the present case, the failure to provide sign language interpreters would fail the minimal impairment branch of the Oakes test under a deferential approach. It is, therefore, unnecessary to decide whether in this ‘social benefits’ context... a deferential approach should be adopted”\(^10\).

La Forest J. didn’t explain why Lambert J. erred in applying the jurisprudence of deference in this case. Indeed, no such error can be found; not in the decision to use deference nor in the way it was applied\(^11\). La Forest J. simply wanted the opposite result, and the concept of deference, as developed by the Court, is so vague and inconsistent that it created no obstacle to the achievement of this end. La Forest J. just softened the

---


language of deference a bit, and went on to conclude that even with deference the
decision of the government in this case was unconstitutional. Nothing in the judgement
explains why Lambert J. was wrong. Our only lesson is that deference is simply too
subjective and indeterminate to be capable of any consistent application.

This conclusion is strengthened when one reads other recent decisions in which the
Court referred to deference. In Vriend v. Alberta\(^{12}\), for example, the Court strongly
rejected the idea of adopting deferential posture in scrutinizing a human rights code, even
though the Court has taken an extremely deferential approach in its review of the Ontario
Human Rights Code in McKinney\(^{13}\). There was no intention to overrule or explain
McKinney; it seems that the judges simply felt that in the specific case they would rather
not use it. They made some remarks about how deference should not be overused, and
went on directly to strike down the impugned law (which did not protect people from
discrimination on the basis of sexual orientation).

A close examination might reveal some consistent patterns regarding the use of
different levels of scrutiny by the Supreme Court of Canada. Deference was particularly
used in cases related to collective bargaining and other work related issues\(^{14}\). On the other
hand, the Court has tended to disregard the concept of deference when dealing with rights
of independent professionals, such as lawyers or physicians\(^{15}\). In the latter group of cases


\(^{14}\) See, e.g., the Labour Trilogy (Reference re Public Service Employee Relations Act (Alta.), [1987] 1

\(^{15}\) See, e.g., Black v. Law Society of Alberta (1989), 58 D.L.R. (4th) 317; Rocket v. Royal College of Dental
Surgeons of Ontario, [1990] 2 S.C.R. 232. And see D.M. Beatty, Constitutional Law in Theory and
Practice (Toronto: University of Toronto, 1995), 75.
strict scrutiny is usually performed. These findings can probably be explained as part of a
general preference that judges give to businesses and an historic antipathy they have to
unions. However, I will not try to pursue such an analysis here. Examining the secret
and sub-conscious motives of judges is out of the scope of this thesis. For our own
purposes it is enough to conclude that even if one can find, under the surface, some logic
in the application of deference (which is extremely difficult and often impossible), the
logic is not one that can be coherently defended.

6.2 The opinions of Justice McLachlin – a particular example

To illustrate the depth of the Court’s inconsistency, it is helpful to examine the
different decisions of one particular judge. I have chosen Justice McLachlin for this
purpose, although any other judge can be perfect to make the point as well. To make it
“easier” on Justice McLachlin, I will not examine here opinions to which she merely
concurred, but only opinions which she wrote herself.

Since her appointment to the Supreme Court in March 30, 1989, McLachlin J. wrote
15 opinions that included an application of section 1. For our own
purposes it is enough to conclude that even if one can find, under the surface, some logic
in the application of deference (which is extremely difficult and often impossible), the
logic is not one that can be coherently defended.

16 See generally D.M. Beatty, “Labouring Outside the Charter” (1991), 29 Osgoode Hall L.J. 839, 840; M.
Mandel, The Charter of Rights and the Legalization of Politics in Canada, rev. ed. (Toronto: Thompson,
1994), chapter 5; J. Bakan, Just Words (Toronto: University of Toronto, 1997), 103 and on.

17 Based on a survey of the Canada Supreme Court Reports from 1989 to the first quarter of 1998. The
S.C.R. 906 (dissenting); R. v. Keegstra, [1990] 3 S.C.R. 697 (dissenting); Canada (Human Rights
Commission) v. Taylor, [1990] 3 S.C.R. 892 (dissenting in part); Committee for the Commonwealth of
reference to the concept of deference or otherwise used a relaxed level of scrutiny.\textsuperscript{18} Usually she refrained from using deference in criminal cases\textsuperscript{19}; but in \textit{R. v. Seaboyer} (dealing with the "rape shield" provisions of the \textit{Criminal Code}) she doubted the criminal-social distinction herself, and examined the legislation assuming that some deference was appropriate\textsuperscript{20}. Usually she adopted a very deferential posture when examining social legislation; but in \textit{Rodriguez}\textsuperscript{21}, dealing with assisted suicide (a case which clearly posed a moral-political question), she refrained from any mention of deference whatsoever.

In most cases where McLachlin J. mentioned deference it did not have any actual impact on her decision. \textit{Miron v. Trudel}\textsuperscript{22} and \textit{Thibaudeau v. Canada}\textsuperscript{23}, both equality cases, are good examples. In the former, an insurance policy gave rights to the "spouse" of the policy holder, and the question was whether the term included common law partners, and if not, whether the law setting the terms of the policy was constitutional. In the latter case, the impugned law required a parent receiving alimony for the maintenance of children to include it as taxable income, while the parent paying the alimony was allowed to deduct it from its own income. Both cases are quintessential examples of


\textsuperscript{20} \textit{Supra}, note 17, at 626, referring to \textit{Irwin Toy Ltd. v. Quebec (A.G.)}, supra, note 7.

\textsuperscript{21} \textit{Supra}, note 17.

\textsuperscript{22} \textit{Supra}, note 17.

\textsuperscript{23} \textit{Supra}, note 17.
“social” issue, and both triggered a reference to the doctrine of deference. But this reference was nothing more than lip service. McLachlin J. mentioned a relaxation of the regular standards only briefly and marginally; she did not mention any justification for deference and did not discuss the appropriate level of deference. Most importantly, in both cases she went on directly to perform strict scrutiny and concluded that the impugned laws should be invalidated.

This was not always the case, however. In Adler v. Ontario\textsuperscript{24}, dealing with funding of private religious schools, McLachlin J. not only mentioned deference but gave it full meaning as well. She specifically noted that deference is warranted whenever “social” issues are at stake (ignoring her own remark in Seaboyer\textsuperscript{25}). This led her directly – without any serious discussion – to the conclusion that the minimal impairment requirement was met and the law should be upheld.

Even more striking than the comparison between the cases is a comparison between the different questions discussed in Adler itself. Although she showed extreme deference with regard to the funding of religious education, McLachlin J. ignored her own reasoning when she discussed the second issue of the case: the funding of school health support services. Here she refrained from any mention of deference and performed strict scrutiny. It took only a few lines for her to conclude that the law should be struck down in this matter.

In none of these cases did McLachlin J. engage in any serious discussion of the concept of deference. In fact, the only time McLachlin J. engaged in such a discussion

\textsuperscript{24} Supra, note 17.
was in *RJR-MacDonald Inc. v. Canada (A.G.)*\(^{26}\), where the validity of a law restricting tobacco advertising was at stake. Although this was the 14\(^{th}\) case in which she applied section 1, and the 7\(^{th}\) case in which she included deference in the application, this was the first time she discussed at any length whether and when deference should be used. Interestingly, her opinion in this case, although recognizing the need to show some deference, is focused on “protecting” the original and strict *Oakes* test. The opinion of McLachlin J. is written as a contra to the opinion of La Forest J., who elevated his extremely deferential posture to new heights in this case. While La Forest J. used deference to conclude in favour of the impugned law, McLachlin J. argued that “care must be taken not to extend the notion of deference too far”\(^{27}\) and concluded that the law should be struck down. All this did not prevent her from showing extreme deference a year later, in *Adler*, when she voted to uphold a law that denied funding to private schools\(^{28}\).

6.3 The inconsistency in other jurisdictions

The problem of inconsistency is not unique to the Supreme Court of Canada. The European Court’s jurisprudence reveals a similar pattern. Even one of the Court’s own

---

\(^{25}\) See the text adjunct to note 20, *supra*. The remark in *Seaboyer* was reiterated by McLachlin J. in *RJR-MacDonald Inc. v. Canada (A.G.)*, *supra*, note 17, at 331-2.

\(^{26}\) *Supra*, note 17.

\(^{27}\) *Ibid.*, at 332.

\(^{28}\) *Adler v. Ontario*, *supra*, note 17, at 720-1. No reference was given in this context to *RJR-MacDonald*. 
judges has noted that it is difficult to see the common denominator in the application of deference, “and it is probable that there is indeed no common denominator”\(^{29}\).

There were cases in which the margin of appreciation was completely ignored, without any explanation (even when the margin should have been the widest according to the Court’s precedents)\(^{30}\). And when the margin was used – its impact changed dramatically from case to case; again, without any attempt by the Court to explain it\(^{31}\).

Although, as we have seen, the Court articulated some principles with regard to the width of the margin, these principles are not only extremely flexible but even on their own terms they were not systematically followed. Take, for example, the matter of the European standard, which is undoubtedly the most important factor in determining the width of the margin. Sometimes the Court refused to look into the norms of other member states at all\(^{32}\). And even when the test was applied, as much as the Court attributed importance to it, in most cases the national legislation was not actually surveyed. The Court settled for vague and inaccurate generalizations, and often ignored the obvious conclusions. Thus, for example, in the case of *Handyside v. U.K.*\(^{33}\), dealing with a decision under the British *Obscene Publications Act* to censor a book, the Court has put much emphasis on the fact that there is no European standard of morals (and


\(^{31}\) See chapter 5, *supra*.

\(^{32}\) See, e.g., *Powell and Rayner Case* (1990), Eur. Ct. H.R. Ser. A, No. 172, par. 44.

accordingly concluded in favour of the state). But in fact, the publication of the book in question was permitted all over Europe, including in other parts of the U.K itself. In *The Sunday Times Case*, on the other hand, dealing with a ban on the publication of an article concerning pending legal proceedings, the Court relied on a European standard with regard to the authority of the judiciary (and accordingly concluded in favour of the newspaper). But in fact, the laws regarding contempt of court, the question at issue in this case, were substantially different in different European states.

A similar picture of inconsistency is found in the American jurisprudence. As critical as the level of review is for the U.S. Court, it is not unusual for the Court to avoid choosing a specific level altogether. And when a choice is made, it is often inconsistent with previous precedents. One example is the distinctions on the basis of wealth. There were cases in which the Court seemed to have applied strict scrutiny in this matter. In others, it was made clear that the review will be based on the minimal "rational relation" test.

---


36 As the Court itself acknowledged in par. 60. And see Van Dijk and van Hoof, *supra*, note 34, at 593.


In some cases the “narrow tailoring” requirement of the strict scrutiny level was reduced to a reasonableness test\(^\text{39}\). In others, the “rational relation” test was applied with a scrutiny much heightened than the usual, without any explicit explanation\(^\text{40}\). Sometimes the Court seemingly abandoned the tiers analysis altogether, in favour of a more open-ended balancing approach\(^\text{41}\). There are cases in which the recognized suspect classifications or fundamental rights did not attract strict scrutiny, for some reason\(^\text{42}\). In still other cases, the Court used a covert intermediate standard of review, without acknowledging it\(^\text{43}\).

These are all just examples of the same phenomena: an inconsistency in the application of deference. It is not necessary to pursue here a comprehensive description of all the points of inconsistency. The examples are surely sufficient to show that the inconsistencies are more than isolated mistakes. The problem is not just with the way particular judges use the concept of deference; the problem is rather with the concept itself.

\(^{39}\) See \textit{Bush v. Vera}, 116 S.Ct. 1941, 1960 (1996) (“the ‘narrowly tailoring’ requirement of strict scrutiny allows the States a limited degree of leeway... if the State has a ‘strong basis in evidence’... for concluding that creation of a majority-minority district is reasonably necessary... it satisfies strict scrutiny.”)


\(^{41}\) See, e.g., \textit{Anderson v. Celebreeze}, 460 U.S. 780 (1983); and see Tribe, \textit{supra}, note 38, at 1108.

\(^{42}\) See Nowak and Rotunda, \textit{supra}, note 37, at 14.11-14.13 (alienage) and at 578 (interstate travel).

6.4 Conclusions

We have seen that all three courts use the doctrine of deference in a highly selective way. The courts have taken to themselves full discretion in deciding when (and to what extent) to use or not to use deference, and this discretion is not used in any consistent or predictable way. In some cases judges draw out the concept of deference as if it was a trump card (to justify non-interference), but in other, similar cases – when judges prefer to interfere – it is completely forgotten (or, at most, it is mentioned merely as lip service to the other branches).

There are, of course, important differences between the different jurisdictions. In the United States, the tiers of review are the most structured, while in the European Court they are the most flexible. But as we have seen, the structures do not prevent the American judges from reaching their desired result in each and every case, even if it means they have to ignore the regular tiers or change their meaning. It may be that the inconsistency has a different level in the different countries. There is no doubt, however, that it characterizes the deference jurisprudence of all three courts.

This is all hardly surprising when one comes to understand the characteristics of deference. It is usually described as giving flexibility to the other branches, but it is the courts themselves that enjoy all the flexibility. Deference is a powerful tool, and the courts use it to enhance their discretionary powers. By using different levels and formulations of deference, and by giving different impacts to deference, the courts are able to control the results of the cases, and at the same time pay lip service to the other branches and maintain the appearance of reluctance from interference. It is exactly because it is so open to subjective reasoning that judges are so attracted to deference, and
this same characteristic is the reason for its inconsistency. The inconsistency thus seems to be inherent in the concept of deference itself.
Chapter 7
The Impact of Deference on Rights and Interests

7.1 Introduction

So far we have seen what the concept of deference really means and studied the way it is applied by the courts. Now we can turn to the fundamental question of this thesis: the justifiability of deference. I will try to show that judicial deference is completely unjustified, at least when it comes to the constitutional protection of human rights. The argument is developed in three stages. First, this chapter examines the impact of deference on constitutional rights and public interests. It will become clear that deference has a negative effect on constitutional rights, and that it is not really required for the promotion of public interests. Then, in the next two chapters, the two main arguments in favour of deference will be discussed: chapter 8 deals with the institutional competence of the courts, while chapter 9 discusses arguments directed at the legitimacy of constitutional review.

For convenience reasons, this part of the thesis focuses on the Canadian jurisprudence, that is, the Charter and the Oakes test. Naturally, the normative analysis is relevant to the other jurisdictions as well. To keep the discussion within a manageable scope, we will have to set up some basic assumptions. First, judicial review, in general, is legitimate as part of the protection of human rights. I will not deal here with arguments against the Charter itself or the power of the courts to review legislation. The question is rather, assuming the existence of judicial review, is it justified to show deference as part of the examination. Second, and following the first assumption, "rights" are assumed to
be meaningful and important. It will be impossible to discuss, in this thesis, criticism regarding the use of "rights". And third, the Oakes test\(^1\) is assumed, at least generally speaking, to be a valid and acceptable test. I will take the Oakes test as a working assumption for the discussion.

One more preliminary note is in order. The discussion throughout this part of the thesis is focused on the possibility of deference at the stage of section 1 analysis. No attention is given to deference at the stage of interpreting the scope of constitutional rights. This is simply because there seem to be no serious arguments that can justify deference at this stage\(^2\).

### 7.2 The impact of deference on constitutional rights

This section examines how deference affects constitutional rights. At this stage, the discussion focuses solely on the rights protected by the constitution, without giving any attention to the interests that the infringing legislation is looking to promote. These will be discussed in the following section.

#### 7.2.1 How deference undercuts rights

As the descriptive part of this thesis made clear, deference can seriously undercut the protection of constitutional rights. Some may contest parts of the description, but this

---


\(^2\) See pages 55-6, *supra*. It is true that many argue in favour of judicial restraint in general, including at the stage of interpretation, and this may seem as arguing in favour of deference. But such views are usually found in the American jurisprudence, where there is no limitation clause and the interpretation is not systematically differentiated from the stage of justifying the limitations. Once it is accepted that these two stages should be completely separated, there seem to be no reason that can justify deference at the first stage.
simple observation cannot be doubted. There can be no gainsaying that deference means a relaxation of standards and an easing of the constraints on the state. There can be no doubt that when courts use deference the state is allowed to infringe rights more than when the concept of deference is not invoked. Indeed, both judges and scholars have noted that deference undermines constitutional rights.  

To illustrate, take the most common case – when deference is used as a factor during the minimal impairment (the least restrictive means) stage. At this point in its analysis, the court has concluded that the state has infringed some constitutional right. The question becomes whether the state can advance a sufficient justification for this infringement. Assume that the state showed that the legislation in question was designed to advance a sufficiently important objective, and that the means chosen are rationally connected to this objective. Now – and this is the most crucial part of the examination – the state has to show that it has chosen the least restrictive means to achieve the objective. That is, if there are several ways to achieve the same objective, the state must choose the one that minimally impairs constitutional rights. This seems like a pretty elementary requirement, if rights – and their constitutional entrenchment – have any meaning. Respect for people’s rights requires that – at the very least – the state would not

---

abridge those rights gratuitously. The actual requirement, according to the Oakes test, is that the state show that it is more probable than not that the means chosen are the least restrictive possible. This is the "regular" requirement. What happens when deference is shown? We have seen that the impact of deference differs from case to case. Judges can manipulate the concept as they see fit. But leaving aside the cases in which deference is used merely as lip service, in all other cases when deference is used it is easier for the state to justify the infringement. Whether deference is used as the first and last word, as a different attenuated test, as shifting the burden of proof or even just as post-decision-justification⁴, more infringements will survive. Constitutional rights will enjoy less protection.

7.2.2 The fear of rights' devaluation

It is therefore clear that in a given case, the use of deference will undercut the constitutional right involved. But one might still argue that, in the final analysis, when taking into account a vast number of cases decided over time, deference is necessary to keep a high level of rights' protection. The argument goes like this: if the same strict scrutiny is used in every case, no matter how trivial the infringement, then rights are bound to be devalued, and the protection will be weakened where it is needed the most⁵. The strongest (and most common) version of this argument is directed at the definition of the rights themselves. It has been argued, for example, that if any communicative act is

⁴ See chapter 5, supra.

protected under “freedom of expression”, including, say, commercial advertisements, pornography, defamation or even political murder, then the right is trivialized and might lose its meaning. But this has nothing to do with judicial deference to the other branches of government. It has nothing to do with different levels of scrutiny.

Taken to our own context, to the stage of justifying a right’s infringement, what does the argument really mean? There is no normative claim here that some rights (or aspects of a certain right) deserve higher protection than others. Nor is it a logical argument: there is no reason to think that an overall and equal protection of rights will logically – necessarily – cheapen the protection that rights can provide. The argument is rather a practical-empirical one: as a practical matter, so it is argued, rights will become less important if they are overly protected. The argument, then, is that if we allow more infringements, if the rights are protected less, it will eventually mean more. Practically, it is argued, less protection in lots of cases means more protection altogether. It is much more plausible, however, that the opposite situation will occur. If courts protect rights more, they will be protected more. We have seen how deference undercuts the rights in any given case. Logically, we can assume that this will be the result over time too.

At the very least, then, the argument is counter-intuitive and thus requires some supporting evidence. No such evidence exists. Our experience seems to support the intuitive, logical conclusion: the more courts protect rights in each and every case, the more rights are protected and respected.

---

6 To take an example from the American jurisprudence, there is no reason to believe, as a matter of logic, that a full protection of gays will weaken the protection of women or racial minorities.

7 See D. M. Beatty, supra, note 3, at 148.
7.2.3 Is constitutional protection always needed?

There is yet another argument in favour of deference that should be dealt with at this stage. While the previous argument suggested that deference will improve rights' protection, this one settles for neutrality. In some areas, it is argued, especially within the socio-economic sphere, the constitutional protection is simply not needed. When it comes to labour laws, for example, we can count on the state to take care of those who need protection. And since intervention is not necessary, it should be avoided. Since rights are not really in danger, deference should be given to the democratic will. This argument seems to ignore the fact that legislation always affects different groups and individuals in society. Our question is not whether a certain legal regime is good for the people or not. This is a matter for the elected branches of government. The question is rather what is the effect of the legal regime. It can be good for some workers, and even for the community at large, but still limit fundamental rights of other individuals or groups. In the labour context, for example, a piece of legislation can advance the interests of workers in general, but infringe the rights of employers, or maybe some specific workers. They are the ones who need the protection of the constitution. They are the ones who seek help from the courts, not the general public. Take Lavigne, for example. In this case an employee raised claims against the use of union dues — which he was forced to pay — for political purposes. The law under review, which permitted the collection of dues from every employee, was necessary to avoid free riding, and, more generally, for the

---


operation of unions. But what about the single employee – in this case Lavigne – who was forced to pay dues to political causes he didn’t believe in? His rights have been seriously infringed, and no attempt has been made to minimize this infringement to the extent really necessary. The question is, therefore, whether we can trust majority rule to look after minorities in some areas. There is certainly no reason to think that we can. This is why we need a bill of rights in the first place; and the area of legislation makes no difference in this regard\(^\text{10}\).

7.2.4 Legislation attempting to promote constitutional rights

Lastly, it is appropriate to mention here the view that deference is warranted whenever courts examine legislation attempting to promote Charter values\(^\text{11}\). Take human rights legislation, for example. One can argue that since the goal is to advance constitutional rights, it is important enough to justify – more easily – limitations on constitutional rights. The idea behind this view is that “the legislature may select one phase of one field and apply a remedy there, neglecting the others”\(^\text{12}\). Buy why? If there’s a justified reason to neglect the others, then there is really no problem. But if there is no

\(^{10}\) For a refutation of this argument using social choice theory, see W.H. Riker and B.R. Weingast, “Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures” (1988), 74 Virginia L. Rev. 373. The Authors, professors of political science and economics (respectively), show that majority choice is not a proper balancing of all relevant interests, and that it affords no protection against arbitrary actions or against actions directed at benefiting the temporary majority at some minority’s expense. See also E.R. Elhauge, “Does Interest Group Theory Justify More Intrusive Judicial Review?” (1991), 101 Yale L.J. 31.

\(^{11}\) See section 4.4, supra.

such justification, there is no reason to accept means out of proportion to the goal. On the contrary; as Wilson J. noted, this kind of legislation, in particular, deserves close scrutiny\textsuperscript{13}. It makes no sense to limit constitutional rights gratuitously, just because the goal is the promotion of other constitutional rights. A good example is Alberta’s \textit{Individual’s Rights Protection Act}, recently examined in \textit{Vriend}. The issue was whether the failure to protect people against discrimination on the basis of sexual orientation violated section 15 of the \textit{Charter}. Surely, the fact that the law was designed to promote constitutional rights cannot justify a lower standard when examining this discrimination. Why should it be more justified to infringe the right to equality when the goal is to promote equality? The legislature should treat everyone equally, especially when designing legislation to promote equality. Indeed, the Court in \textit{Vriend} awarded no deference to the legislature\textsuperscript{14}.

It was further argued, though, that courts should avoid interference with human rights legislation so that legislatures would not be discouraged from advances in this field\textsuperscript{15}. There are two aspects to this argument. One is the general fear that too much protection will lead to rights’ devaluation, a practical-empirical assessment that has no supporting evidence and no basis in our constitutional experience\textsuperscript{16}. The other aspect is even more infuriating. It can be termed an “intimidation” argument. It is asserted that courts should not protect human rights in a certain field only because this might cause undesired

\textsuperscript{13} \textit{McKinney, supra}, note 9, at 413-414 (dissenting opinion).

\textsuperscript{14} See \textit{Vriend, supra}, note 12, especially par. 122.

\textsuperscript{15} \textit{McKinney, supra}, note 9, at 318 (per La Forest J.).

\textsuperscript{16} See section 7.2.2, \textit{supra}.
reactions from legislatures. This is completely unacceptable. Not only that these fears are unfounded; courts should not – and they are not allowed to – consider them. They are obliged by the constitution to enforce the Charter, and they are certainly not allowed to consider threats regarding the reaction of the other branches to a specific result. In any case, this would clearly undercut the protection of constitutional rights.

We can conclude, then, that even in cases of human rights legislation deference would not help in promoting constitutional rights. On the contrary, it would only allow unnecessary infringements of such rights.

7.3 The impact of deference on public interests

So deference undercuts constitutional rights. Still, this does not mean that deference has a negative influence if we look at the bigger picture. One can argue that although deference undercuts constitutional rights, it does so in the interest of other, not less important, public interests; and in the final analysis, we are better off when courts show deference to the elected branches. It is clear that every time the courts strike down legislation they can frustrate – to some extent – the achievement of the legislative goal. However, the mere possibility that a legislative goal will be frustrated will not be discussed here. Section 1, and the Oakes test, are designed to create the balance between the protection of rights and the limitations on these rights for the achievement of other interests, and this is not the place to examine this balance in general. Our assumption is that the Oakes test generally brings the best result, that is, allows for the best possible protection of rights together with the best possible achievement of other interests. The problem addressed here is more specific: are there situations in which the Oakes test will
bring "bad" results, that can be avoided by using deference\textsuperscript{17}. There are two situations that should be discussed here. The first is legislation based on ambiguous evidence (and, to make the picture fuller, cases of ambiguous evidence as to the existence of alternative means). The second is legislation directed at promoting the interests of vulnerable groups. In both cases it has been argued that the \textit{Oakes} test can cause the invalidation of good and justified programs. Both arguments were among the main reasons for the development of deference in Canada, as described in the first chapter. We can now evaluate the merits of these arguments, and it will be convenient to do so using the example of \textit{Irwin Toy}\textsuperscript{18}, a case which most clearly presents both of the problems.

7.3.1 Legislation based on ambiguous evidence

The legislation under review in \textit{Irwin Toy} included a prohibition on all T.V advertisements directed at children under 13 years of age. It was based on the belief that these advertisements are harmful to the children. There were sound empirical studies that showed the harms suffered by children under 6. The problem was regarding the older children, between the ages of 7 and 13. Here the evidence was ambiguous. Some of the evidence showed that these children could be harmed other evidence suggested otherwise. The Court felt that the state would not be able to justify the legislation under the \textit{Oakes} requirements, and so inserted deference into its analysis. But what exactly was the problem? If the Court had been convinced that the chance the older children would be

\textsuperscript{17} By using the term "bad" to describe judicial decisions, I do not mean to suggest that there is a "right" objective answer to each legal question. This simplistic adjective is nonetheless convenient for current purposes.

\textsuperscript{18} \textit{Irwin Toy Ltd. v. Quebec (A.G.)}, [1989] 1 S.C.R. 927 (hereinafter: \textit{Irwin Toy}).
harmed was greater than 50% there wouldn’t have been any problem. We can assume, then, that the risk regarding the older children was less than 50%. Let’s say it was 40%\(^{19}\). Surely, this is a high enough risk in order to justify action. We wouldn’t want the state to wait until the harm is done. Still, there is no reason to think that the Oakes test does not allow action in this situation. The state does not have to prove the existence of a harm, but to justify the action.

To illustrate, take the rational connection test first. At this stage, the demand is merely a logical relation between the objective and the means. If the objective is seen as “protecting children”, then at the rational connection stage the state must show that the ban on advertisements is rationally related to this objective, in other words, that there is a risk that justifies action. If, on the other hand, the objective is defined as “protecting children from advertisements”, then there is not much meaning to the rational connection test. But the same question arises, in this case, at the stage of examining the objective. To prove that protecting children from advertisements is a “pressing and substantial objective”, the state will have to show that the advertisements create a risk for children.

Whatever the case is, a risk of 40% is enough for these purposes. The state does not have to prove that the harm will occur (that there is a chance of more than 50% for that). It simply has to prove that there is a risk for children, serious enough to justify action. Surely a 40% chance for a harm can be serious enough. It can be proved – with more than 50% as required – that there is a pressing and substantial objective, and that there is a

\(^{19}\) This can mean two things. Either there’s a 40% risk, in a given case, that an advertisement will cause harm, or the chance that the fears of harm are true is valued at 40%. There is of course a huge difference, but not for our own purposes.
rational connection to the ban on advertisements. Of course, the risk can be more remote, and the question can accordingly become more difficult. But whether the chance for the harm is 40% or just 5% – the question remains the same: does the risk justify action in the circumstances? Reason and logic are appropriate parts of the analysis at this stage, and the examination is based on what is currently known, not on a scientific standard.\(^{20}\)

To be clear, this has nothing to do with deference. The Court can decide, using reason and logic, and basing its decision on a risk lower than 50%, that a rational connection exists. It is certainly within the Court’s discretion to do so. This should not be done, however, out of deference. The decision does not have do be based, in any way, on the judgement or choices of the other branches. Nor is it a relaxation of the regular standards. It is simply a correct application of the \textit{Oakes} test.

What about the minimal impairment stage? This is the stage most associated with deference, and indeed, this is where the Court in \textit{Irwin Toy} invoked deference. It is already accepted, at this stage, that we need to protect those between the ages of 7 and 13, but the question is whether less restrictive means will suffice. The fact that the legislation was based on ambiguous evidence does not create any problem here. It is of course possible, while examining the alternatives, to come to the conclusion that the older children require less drastic solutions than the younger ones. If this is the case, these are

\(^{20}\) See \textit{R. v. Butler} (1992), 89 D.L.R. (4th) 449, 484; \textit{RJR-MacDonald, supra}, note 3, at par. 137, 154. In \textit{Butler}, dealing with limitations on pornography, the Court noted that Parliament was entitled to have a “reasoned apprehension of harm”, and accordingly concluded that there was a sufficient rational link between the objective and the means. This was a correct application of the \textit{Oakes} requirement, in my opinion. In a recent case the Court even referred to this line from \textit{Butler} as an independent “test”. But the Court confused several times the “reasoned” with a “reasonable” apprehension of harm. And the test was mentioned as part of the minimal impairment stage, instead of the rational connection stage (where it was used in \textit{Butler} and where it should be used). See \textit{Thomson Newspapers Co. v. Canada (A.G.)}, [1998] S.C.J. No. 44, at par. 113-5.
the means that the legislature must choose. If it is possible to infringe the freedom of expression less and still fully achieve the goal, by using different means to different age groups, this is what a reasonable legislature must do. But the ambiguous evidence regarding the existence of the problem is irrelevant at this stage.

By using deference in the minimal impairment stage in cases of ambiguous evidence regarding the risk the Court created a paradox. If the harm is absolutely clear – there is no doubt whatsoever about it – the legislation is examined much more closely than if the harm is in doubt. Take hate propaganda, for example. The danger of hate propaganda is clear. There is no problem of ambiguous evidence here. And the Court examines legislation limiting such speech with a very strict scrutiny21. The state is not allowed to impair the freedom of expression of those who create the danger more than what is absolutely necessary. On the other hand, when the evidence is unclear, when we’re not really sure if the state should act or not (like in *Irwin Toy*), the state can limit fundamental rights much more freely.

7.3.2 Ambiguity regarding the existence of less restrictive alternatives

It is of course possible that the evidence regarding the *adequacy of alternative means* will be ambiguous. The Court might feel, for example, that it cannot determine whether an alternative regime will achieve the objective. Assume that there is no conclusive answer to the question of whether the state used the least restrictive means. As far as the evidence can be assessed, it is an evenly balanced case. To be clear, here the problem is different than the one discussed in the previous section. It is not a matter of legislation

---

based on ambiguous evidence, but rather a case of uncertainty as to the proper result. The doubt here is a general doubt regarding the evenly balanced situations, in other words, regarding the burden of proof. The question is who should prevail in cases of such uncertainty, the constitutional right or the legislative interest. According to the Oakes test, constitutional rights are preferred. At first, this may seem problematic for some situations. Sometimes the harm is too serious to take risks, and it seems that since the burden is on the state, ambiguity always plays against it. But the state is not required to prove that the alternatives are not sufficient. In order to prove that it used the least restrictive means, the state has to show that there are no less restrictive alternatives sufficient to achieve the goal. When examining an alternative, if the court comes to the conclusion that it cannot determine whether it is sufficient or not, then the state has managed to show that the alternative cannot be said to be sufficient\textsuperscript{22}.

To illustrate, take the Lawless Case\textsuperscript{23} for example. The Irish law under examination gave Ministers of the State the power to order the detention of persons without trial. The legislation was necessary to protect lives in a period of terrorist attacks. However, it also seriously infringed the detainees' constitutional rights. Mr. Lawless himself was held in jail, without a trial, for five months. In order to pass the minimal impairment requirement, the state had to prove that other measures would have been insufficient in the

\textsuperscript{22} As already mentioned, the standard of proof according to Oakes is the civil standard (preponderance of probability). The state has to prove, then, that it is more probable than not that the means chosen are the least restrictive to achieve the desired objective. If the state can show, as noted above, that there are no alternatives that can be said to be sufficient, then the burden is met.

circumstances\textsuperscript{24}. But can we really expect the state to \textit{prove} that a four-months detention (instead of five), or other less restrictive means, wouldn’t have been enough? It may be that such measures would have been enough, and it may well be the other way around. Surely, we wouldn’t want to take the chance of a terrorist attack. The infringement of rights should be justified in the circumstances. Indeed, when the \textit{Oakes} test is applied, the state should not be required to prove that the alternative is not sufficient. Rather, the state should prove only that there is no other alternative that can be said to be sufficient. In this case, if it cannot be proved that the four-months detention (or other alternatives) will achieve the desired level of security, the government action should be upheld. To be clear, the burden of proof is still on the state. It is the state that has to show that there are no better alternatives. In practical terms, the state would have to show that it considered the alternatives, and show why they cannot be sufficient to the achievement of the objective\textsuperscript{25}.

Once again, we have seen that if the \textit{Oakes} test is applied correctly, a justified and reasonable legislation would not be struck down in vain. Deference is thus not needed in this context to prevent problematic results.

\textsuperscript{24} Article 15, which allows the derogation in emergency situations, allows only actions that are “strictly required by the exigencies of the situation”.

\textsuperscript{25} The use of an emergency situation as an example is not coincidental; in the European Court’s jurisprudence the margin of appreciation was developed as an answer to these situations (see section 3.2, \textit{supra}). The use of deference in these cases is particularly dangerous. Especially in times of emergency, states tend to disregard human rights more than what is really necessary, and it is in these times that the people need the protection of the constitution most. The courts must take into account, though, when assessing the evidence, the fact that in emergency situations the state must act rapidly; the situation must be examined in light of the existing knowledge, and in emergency situations it is relatively limited. For this reason, it is understandable that only in rare cases can the Court intervene in emergency decisions. But the examination must still be meaningful. The need to act rapidly can be taken into account when examining if the act was reasonable and justified; there is no reason to defer to the states’ decisions.
7.3.3 **Legislation promoting a vulnerable group**

The next question that needs to be explored concerns the progressive possibilities of the *Oakes* test. A major concern raised by both judges and scholars is whether the *Charter*, and the *Oakes* test in particular, allows enough room for legislation promoting the interests of the less advantaged. The *Charter*, it is argued, should not be turned into a tool by the hands of the more powerful, to roll back legislation protecting the vulnerable. In *Irwin Toy*, for example, the Court noted its discomfort with the idea that the *Charter* will be used by the powerful advertisers to invalidate important legislation that protects vulnerable children.

This concern was a major reason for the development of deference in Canada, although the concept was articulated from the beginning in much broader terms. The Court has repeatedly noted the position of vulnerable groups as a reason for deference. Some of the judges have even suggested that deference is appropriate only to legislation striving to protect the interests of the less advantaged.

The reasons behind this concern are most eloquently explained by critics from the left. "Outside the realm of criminal law", it is argued, "rights seekers will tend to be those who represent economically privileged interests. It is they who have a sufficient economic stake and sufficient economic capacity to make a Charter claim. Moreover, it is

---

26 See *Edwards Books*, *supra*, note 12, at 49; *Irwin Toy*, *supra*, note 18, at 993; *RJR-MacDonald*, *supra*, note 3 (per La Forest J., dissenting).

27 See note 26, *supra*, and see most recently *Thomson Newspapers*, *supra*, note 20 (in examining legislation designed to protect the Canadian voters from misinformation, the majority noted that voters are not vulnerable as a reason not to show deference (at par. 117). The dissenting judges concluded that "everyone is vulnerable to misinformation" (at par. 56) and called for deference).

28 See section 4.4, *supra*. Of course, this view was not accepted by the Court.
they who feel most threatened by the regulatory and redistributive policies of modern government. If rights claims are dealt with in a totally abstract way, then there is a real danger that these powerful interests will be allowed to run roughshod over the interests of those in society who depend upon government action39.

In its most extreme version this argument is directed against the whole enterprise. It is argued that constitutional review in itself will bring more harm than good, especially with regard to the more vulnerable groups in society. But remember that the existence of constitutional review is a working assumption of this paper. It is beyond the scope of this thesis to justify constitutional review in general. We are interested, then, in a more refined version of the argument. In some areas, it is argued, the socio-economic area in particular, legislation is often designed to promote the interests of the less advantaged. Such legislation will usually involve some infringement of individuals’ rights, usually the more powerful members of society. From this point the argument can take two directions. One is simply to say that the infringement is justified, since the goal is much more important. But what if the same goal can be achieved with less restrictive means? Surely, the powerful have rights too. We may want to infringe their rights more to achieve social goals, but at the very least we must not do so more than necessary. And with regard to the last stage of the proportionality test – proportionality in the narrow sense – the importance of protecting the vulnerable will be taken into account anyway30.

---


30 When the salutary effects of the law are evaluated, to confront with its deleterious effects, the vulnerability of the protected group plays an important part. The more the law is necessary to the protection
This brings us to the second avenue of the argument. Granted, it is said, one is not justified infringing rights gratuitously. But in most cases, it is extremely difficult to say whether the infringement is necessary or not. Judges can strike down important legislation thinking the means are too harsh, while in fact they are necessary. Some argue that judges, being who they are (elderly-elite-conservative-lawyers), have inherent preference to the more powerful. Others will simply acknowledge the fact that judges are human, and mistakes can be made. It can be because they have their own world-view and political preferences, which are bound to influence their decision at some level. Or just because they misunderstood or misinterpreted something. Either way, it is clear that there may be cases in which judges will strike down legislation which is perfectly reasonable and justified. Why should we take this risk? After all, the legislation is important to the achievement of social goals, and the invalidation comes to protect the rich and powerful, who can probably protect themselves. They will probably hardly feel the infringement anyway since they can compensate themselves with their own resources.

This is indeed a strong argument. But it is important to understand it correctly. It is not that deference is necessary to the advancement of vulnerable groups. It is only that there might be cases in which judges will make mistakes, and consequently jeopardize the best achievement of this goal. Only the risk of mistakes is at issue here. This risk is discussed in the next chapter.

---

of a vulnerable group — and the more this group is vulnerable and in need of the law’s protection — the higher the salutary effects of the law are.

31 See, e.g., M. Mandel, supra, note 29, at chapter 5; Bakan, supra, note 29, at chapter 7.
7.4 Conclusions

Let me summarize the steps we have taken in this chapter. We have seen that deference has a negative influence on the protection of constitutional rights. This is true not only in a given case, but also in the long run. Also, we can never count on the elected representatives to take care of minorities' rights, thus there are no areas in which constitutional protection is not needed. And even in cases of legislation attempting to promote Charter rights deference will only undercut those rights.

The more problematic question is whether deference, although harmful to constitutional rights, is necessary to the best achievement of social goals. In this context, we have looked into three problematic situations: legislation based on ambiguous evidence, ambiguity regarding the existence of less restrictive alternatives, and legislation advancing the interests of vulnerable groups. We have seen that when the Oakes test is applied correctly, it forms no obstacle to the achievement of social goals in any of these cases. The one question that we left open, at this stage, is whether we should take the risk of mistakes made by the courts. This question is discussed in the next chapter.

In the bottom line, then, we can safely conclude that deference has a negative impact on constitutional rights, and that it is not necessary to the best achievement of public interests. Of course, this does not mean that deference is not justified. Although deference undercuts rights, it is still possible to argue — indeed, many have argued — that it is justified for other reasons. These reasons can be classified under two general headings: "the institutional competence of the courts" and "the legitimacy of constitutional review". These are the subjects of the next two chapters, respectively.
Chapter 8
The Institutional Competence of the Courts

There are several different arguments in favour of deference that can be classified as "institutional competence" arguments. The fear of case overload (the "floodgates" argument) and the fear of losing political power are dealt with at the beginning of this chapter. Subsequently, we will look into the argument that deference is warranted because of the limited nature of adjudication. This includes the common idea according to which judges lack the expertise to decide constitutional cases (or some of them). The chapter concludes with an analysis regarding the possibility of judicial mistakes.

8.1 The case overload argument

The more courts show deference to the other branches – in other words, the less courts are willing to protect human rights – the less will people turn to the courts. There is no doubt about that. The question is what can we infer from this proposition.

Posner has argued that the issue of caseloads should be considered when courts decide whether to show self-restraint or not, in other words, that the caseload can sometimes justify deference. The idea seems to be that courts need their resources to deal adequately with the most important cases – the most severe violations of human

---

1 For empirical support, referring to the current deferential American Court, see E. Chemerinsky, "The Shrinking Docket" (May 1996), 32 Trial 71.

rights. But as Posner himself acknowledged, one can answer that "it is not the business of the judiciary to worry about the infrastructure of rights enforcement". Every new law adds to the caseload that courts must handle, and the entrenchment of a constitution adds a vast amount of cases. But laws — and a constitution — are enacted for a reason. They are means towards the achievement of the society’s goals. Courts have a part to play here. They were established to enforce the laws. It seems absurd that they will be able to ignore their part (to some extent) because they think the caseload is too high. This will simply be an abdication of their duties.

The idea that courts should make substantive decisions on the basis of caseload is especially absurd when it comes to constitutional litigation. The state is usually the defendant in these cases. It is, of course, in the state’s own interest that courts will show deference. If the threat of large caseloads leads to deference, then by withholding resources – or by litigating every case – the state will be able to force the courts into a deferential stance. This is surely unacceptable. A constitution is designed to set the framework for the state’s actions. The state should not be able to break loose of the constitutional order by forcing the courts into a regime of deference.

Clearly, then, the mere fact that the Charter leads to more litigation cannot justify deference. For the caseload argument to have any meaning, it must be built on the premise that without deference the courts will be flooded with litigation to such an

---

3 Justice La Forest has put it nicely, referring to his colleagues’ narrow interpretation of equality in *Andrews v. Law Society of British Columbia*, (1989) 56 D.L.R. (4th) 1: “As a salmon fisherman, I know that deep waters afford better fishing grounds than broad but shallow waters. I suspect they wanted to ensure that there was sufficient water – court resources – to make sure we got the big ones.” (G. La Forest, “The Balancing of Interests under the Charter” (1992) 2 N.J.C.L. 133, 142).

extreme extent, that it will become difficult to function, *even with additional resources*. The argument must be that as a result of this overload courts will lose their ability to protect human rights. As Posner puts it, "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".

This practical-empirical concern is extremely exaggerated on its face. In fact, it finds no support in real-life experience. Even the most activist courts in the world, such as the Constitutional Court of Germany, were never so overwhelmed by floods of litigation that they could protect human rights. This can be attributed, to some extent, to the high costs of pressing a constitutional challenge. But even more important, it is a direct outcome of the principles of constitutional review. When courts apply the *Oakes* test rigorously, it doesn't mean that every infringement of rights will be struck down. If the objective is important, the means are rationally related to it, the impairment is limited to what is necessary and proportionate to the good of the law, then the law will be upheld. Deference allows more infringements, and it makes an important difference to the individuals whose rights have been infringed. But quantitatively, the difference between a deferential and a non-deferential court at the justification stage is not that substantial. It is not a difference that can cause such an unbearable flood as described above.

Moreover, there is no reason to believe, even in theory, that there is a point at which courts – *with sufficient resources* – will not be able to function effectively. And even if

---


this was the case, deference would not be the best solution. It simply gives preference to one side to the dispute (the state), or, more generally, to majority rule. Surely such a substantive preference is not a suitable solution to practical caseload problems.

8.2 The restriction of powers argument

If the fear of case overload is not very convincing, the fear of courts loosing their powers is not only unconvincing but infuriating. Indeed, courts have refrained from using this argument to justify deference. But it seems that it had some influence, at least behind the scenes. The argument goes like this: since courts are the weakest branch – they lack the powers of both purse and sword – there is a constant risk that their powers will be restricted (or that their judgements will be ignored). Courts must show deference to the other branches to avoid this risk. “Frequent judicial intervention in the political process”, we are told, “would generate such widespread political reaction that the Court would be destroyed in its wake”. In a way, the argument points to the risk of loosing legitimacy – not in the normative sense (discussed in the next chapter) but as a matter of empirical fact.

---

7 Ibid., at 95; R.F. Devlin, “Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson” (1996), 22 Queen’s L.J. 81, 88.
Experience shows that these fears are completely unfounded. Activist courts around the world have not only survived with full powers, but usually have enjoyed extraordinary public support. With regard to the American Court, Ely notes that "the warnings probably reached their peak during the Warren years; they were not notably heeded; yet nothing resembling destruction materialized. In fact the Court's power continued to grow"\textsuperscript{11}. Even in the case of the European Court of Human Rights, where the fears were most noticeable\textsuperscript{12}, they turned out to be baseless. The only situation in which a court faced a serious threat was at the end of the \textit{Lochner} era, and this was only after more than 30 years of abusing power, invalidating laws because of judges' personal economic views and preventing important socio-economic programs desperately needed to overcome the depression\textsuperscript{13}. Even then, President Roosevelt's "Court packing" plan received little support and was rejected by the Senate Judiciary Committee\textsuperscript{14}. In any case, the extremity and rarity of this situation serves to show how meager the actual risk is.

But this is not the main answer to the restriction of powers argument. Much more important, this is not an argument that courts should even consider. It amounts to nothing more than intimidation\textsuperscript{15}. It goes without saying that courts should not uphold unconstitutional laws just because they fear for their powers. Threats regarding the

\begin{itemize}
  \item \textsuperscript{11} J.H. Ely, \textit{Democracy and Distrust: A Theory of Judicial Review} (Cambridge: Harvard, 1980), 48. See also E.V. Rostow, "The Democratic Character of Judicial Review" (1952), 66 Harv. L. Rev. 193, 206 ("the possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience").
  \item \textsuperscript{12} See section 3.1, supra.
  \item \textsuperscript{13} See section 2.1, supra.
  \item \textsuperscript{14} See Chemerinsky, supra, note 10, at 135; Rostow, supra, note 11, at 206.
  \item \textsuperscript{15} See Posner, supra, note 2, at 319.
\end{itemize}
reaction of the other branches to a specific result cannot be a reason, in a democracy, for changing the result. In short, and as was already noted in a different context, this kind of argument is completely unacceptable\(^\text{16}\).

8.3 The attributes of adjudication

The most powerful and frequently heard argument regarding the courts’ institutional competence concerns the attributes of adjudication. The characteristics of the judicial process, it is argued, make it a bad arena for deciding questions of policy. “The judicial process is too principle-prone and principle bound… [It deals] with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem… For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy”\(^\text{17}\). Other attributes of adjudication have been signaled as problematic in this context as well. Courts speak the language of rights; the judicial process is designed to ascertain historical/adjudicative facts rather than social/legislative ones; the adjudicative arena inhibits the comprehensiveness necessary to reach adequate conclusions; and courts tend to neglect consequentialist facts, that is, information relevant to the impact of a decision on behavior\(^\text{18}\).

\(^{16}\) See section 7.2.4, *supra*.


Probably the most common way of putting the argument is to say that judges lack the expertise (or abilities or experience, as it is sometimes articulated) to decide complex questions of policy. This argument is usually used to justify deference in the socio-economic sphere, which is described as more complex than others and as one which requires special expertise and experience. "Decisions on such matters", it is argued, "must inevitably be 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 evident advantages over members of the judicial branch"19.

I have no intention of quarreling with the above-mentioned characterizations of the judicial process. Most of them are undoubtedly true, and even though some may be contested, it is not necessary for our purposes. We can assume – for the sake of argument – that many cases about constitutional rights do involve the courts in difficult questions of policy, and that all the above-mentioned characteristics are true. Still, none of this can justify deference. To best explain this point, it would be convenient to look separately at two different stages of the judicial process in constitutional cases: first, gathering the information, and second, understanding and evaluating it. At each of these stages, there are those who argue that courts – or judges – are not capable of performing the task in

---


constitutional cases, or at least in some constitutional cases (usually those involving socio-economic policies).

8.3.1 Receiving the information

There is no doubt that because of the adversarial structure of the review process, courts have much less information than the political branches concerning an impugned law. But this is not necessarily a drawback. The adversarial structure is necessary to keep the courts neutral and impartial, and this is what makes them capable of enforcing the constitution as objectively as possible. For example, courts do not have all the information regarding the political compromises which led to a piece of legislation. Then again, we don’t want them to have this kind of information. We don’t want them to get into the political arena and examine what each side gets. We want them to review the legislation independently, to examine if the legislation is constitutional in itself. The fact that courts have less information than the other branches is thus not necessarily a problem. The question is, rather, whether courts have the information necessary to decide whether someone’s constitutional rights have been violated.

It seems to me that the question before the court, even in constitutional cases, is quite focused. By and large, there is a “yes” or “no” answer: either the law conforms to the Charter or not. Each side to the dispute represents one of these clearly-divided answers.

---

How comprehensive is the information received from each side? As for those contesting the validity of the law, they may not bring all the arguments against it. There may be various different reasons to invalidate the law which the specific litigants do not know about. Interventions may help, but the information against the law can still be deficient. It is important to remember, however, that the decision does not prevent others to pursue a constitutional claim against the same law in the future, if they think there are other grounds for invalidation. The law does not receive immunity once a decision is made in favour of it in the specific litigation. The important thing is that the court will have all the relevant information to rule on the arguments raised by the specific claimants, and there is no reason to believe otherwise. In any case, we face no risk if the information provided against the law is deficient. The creation of the elected branches will simply be upheld. The potential problem is rather from the other side: will the court have all the relevant information in favour of the law? This is much more important as far as the subject of this chapter is concerned. We don’t want the laws enacted by our representatives to be struck down just because courts did not, due to the attributes of adjudication, receive all the relevant information.

It seems to me, however, that all the relevant information on the part of the state can easily be submitted to the courts. We expect legislatures and governments to respect constitutional rights. Before limiting rights, we expect them to make sure that the objective is sufficiently important, that the means are rationally related to it and restrict the rights as little as possible and that the deleterious and salutary effects of the law are proportionate. If all this is examined in advance, as it should, then all the relevant information is already prepared, even if no constitutional challenge is made. There
shouldn’t be any problem to submit all this information – and this is, in fact, all the relevant information to support the impugned law – to the court. And if this preparatory work was not done in advance (or was not done fully enough) – then we should only be glad that the legal proceedings are forcing the state to do it. Indeed, this is one of the most important achievements of the Charter – it forces legislatures and governments to think about the consequences of their actions and consider the effect on fundamental rights.\(^{21}\)

To support the argument that courts decide constitutional cases based on insufficient information, commentators tend to give a detailed account of the “broader context”. Paul Weiler, for example, acknowledged the fact that for some constitutional cases the judicial forum is perfectly suitable\(^{22}\), but he argues that in other cases courts are unable to appreciate the “real-world context”. He brings the Labour Trilogy as an example for cases in which courts should refrain from interference because they do not have all the relevant information. With regard to Reference Re Public Service Employee Relations Act (Alta.)\(^{23}\), for example, where the legislature prohibited public employees from engaging in strikes (creating instead a regime of binding arbitration), Weiler praises the deferential approach of the Court because he sees the issue as one which requires a “delicate balancing”.\(^{24}\) But the problem was exactly that the legislature avoided any kind of


\(^{23}\) 1987] 1 S.C.R 313 (this is the first case of the Labour Trilogy).

\(^{24}\) Weiler, supra, note 22, at 182.
“delicate balancing”. Instead of limiting the infringement of rights to the minimum necessary (prohibition of strikes in essential services only), the legislature opted for a crude, harsh generalization and applied the limitation on all public employees. Chief Justice Dickson and Justice Wilson, who thought (in dissent) that the law was overbroad, did not reach that conclusion because a lack of information. On the contrary, it seems that they considered more information than the legislature. While the legislature ignored the subtleties of the situation and the interests of the non-essential employees, the dissenting judges examined the differences between different groups of employees and opted for a solution that allows for the full achievement of the objective with lesser infringement of workers’ rights. There can be, of course, arguments in favour of forcing a regime of binding arbitration on all public employees. Weiler points out to some of those arguments. But there is no reason why these arguments cannot be laid out before the courts. There is no reason why the courts cannot have all the relevant information to support a piece of legislation, including arguments which concern the “broader context”.

8.3.2 Understanding and evaluating the information

So courts can have all the relevant information to decide constitutional cases. It can still be argued that they lack the abilities to understand and to evaluate this information. Generally speaking, the argument is that it is more difficult – and requires different

25 Ibid., at 182-3.
expertise — to deal with legislative/social facts, as opposed to historical/adjudicative ones.  

Once again, the claim is usually focused on the review of socio-economic policies. But judges can surely understand social and economic arguments, just like any other arguments. There is no reason to suspect that they can’t understand the social background and objectives of a law or arguments about the effectiveness of alternative means. A case about a piece of economic legislation would not be more difficult, in this respect, than a civil case concerning medical malpractice or a major business contractual relationship. Courts do not have to define goals, choose means or come up with ideas. They do not have to create social policies; just to understand what the other branches have created. No special expertise is required for such an understanding.

The point is best understood when one considers the work of legislatures. Those who make the decisions are not experts in all areas of legislation. It is inevitable that they have no expertise or experience in most — if not all — of the areas in which they legislate. We do not choose our representatives because they are experts in a certain field, but because we want them to make the decisions. Democracy is built on the idea that the people (through their representatives) make the decisions, not the experts. As far as professional matters are concerned, we expect the legislatures to rely on experts and make the final decisions. We assume that they are capable of understanding the information submitted by experts, information which is of course necessary to take the best legislative decisions.

26 "Adjudicative facts are facts about the immediate parties to the litigation... Legislative facts are the facts of the social sciences, concerned with the causes and effects of social and economic phenomena." (P.W. Hogg, Constitutional Law of Canada (Toronto: Carswell, loose-leaf ed.), 57-10). The terms were coined by Professor K. C. Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942), 55 Harv. L. Rev. 364, 402.
Surely judges can understand the information just as well. The legislatures were elected to make decisions in matters of policy; the courts were nominated by the constitution to make sure these decisions conform to the Charter. None of the branches is expected to have expertise or experience in all the fields; both branches are equally capable of understanding the information collected from those who have the expertise and experience.

To a large extent the lack of expertise argument is based on the common distinction between the socio-economic and the criminal spheres. But is there really a reason to believe that the former is more complex, or that the judiciary has more expertise with the latter? A comparison of laws might serve to refute these claims. Compare section 2 of the Old Age Security Act discussed in Egan, which left same-sex couples out of its scope27, with section 179(1)(b) of the Criminal Code discussed in Heywood, which prohibited loitering near playgrounds for people who have been convicted of sexual assault involving children28. The former is a classic example of socio-economic legislation, but as far as the question before the court is concerned no complex information is involved, not even in the background. It is a simple matter of discrimination and no complexity is found in the arguments used to justify it. The latter, a classic example of criminal law, is based on information which is much more complicated, including ideas from the fields of criminology, sociology and psychology.

---

As for the claim that judges are more expert when it comes to criminal laws, it seems to be based merely on the fact that judges have are part of the criminal justice system.\(^{29}\) This is, of course, a logical flaw. Courts may perform criminal trials on a daily basis, but it doesn’t follow that they know anything about the reasons behind the criminal laws or the justifications for criminal laws that infringe human rights. Their task in criminal trials has nothing to do with their task in constitutional cases concerning criminal laws. During a criminal trial the court rarely (if ever) pays any attention or hears any argument with regard to the sociological and criminological ideas behind the law, or the infringement of rights caused by the law and whether it is justified. There is simply no reason to believe that judges have any special expertise in reviewing criminal laws, more than their regular capability to review any other law.

The claim is sometimes made that in constitutional cases, courts have to decide \textit{what will happen}, as opposed to \textit{what happened}, and courts are only equipped for (and expert in) the latter. This argument is misleading. First, it is simply not true that in non-constitutional cases courts never deal with assessments about the future. Whenever someone asks for an injunction against future acts, the court has to assess the future harms with and without an injunction. To decide the amount of compensation in a case of torts the court must make decisions as to the future losses of the plaintiff; questions like the future earnings or future medical expenses of the plaintiff are discussed. In an anti-trust case dealing with a merger, the court will have to hear arguments about the impact of the merger on the market in the future. In a criminal case, when deciding the

---

\(^{29}\) "The application of the criminal law is something with which lawyers and judges are quite familiar. We know how it works, and we have a real understanding of the interests at stake" (La Forest, \textit{supra}, note 3, at 139).
punishment, the court takes into account (to some extent) an assessment of how the accused is likely to act in the future. Other examples can surely be found. The point is that courts have always dealt – to some extent – with factual assessments regarding the future. Constitutional cases are not so exceptional in this respect.

At the same time, it is also not true that constitutional cases deal only with the future. A major part of the constitutional litigation concerns factual determinations of present and past. The objective, for example, is examined in light of past problems and the present situation. In the minimal impairment stage, the court has to decide how alternative means worked in the past – and work today – in other places. In the proportionality stage it is crucial to assess how drastic is the infringement of rights in light of its actual consequences – in the past and in the present.

It is true that the ratio is different. Evaluating facts regarding the future is a much more dominant factor in constitutional cases. But the previous examples serve to show that there is no difference in principle. It is not that courts have to do things they have never done before, it is just a matter of degree. In any case, the task of the courts in determining facts of the past and facts regarding the future is not that different. A determination of what happened in the past is based on a hearing of witnesses and an evaluation of other kinds of evidence. An assessment regarding the future is quite the same. The witnesses are usually experts, and sometimes they explain their normative opinions rather than tell what they did or saw. But the court is still required to choose between conflicting testimonies and other kinds of conflicting evidence. And this is surely within the court’s field of expertise.
It should be noted that the discussion so far is not intended to argue that the regular structure of adjudication is perfect, or that no changes are necessary to deal with constitutional cases. There is no doubt that constitutional cases are – to some extent – different, and the differences require adjustments. Indeed, some adjustments have been made (especially with regard to evidence and intervention) and some others have been suggested. This is not the place to discuss these changes. My point is simply that there is no reason to suspect that courts are not capable of receiving, understanding and evaluating all the necessary information in constitutional cases, within the general framework of the adjudicative system.

8.4 The risk of mistakes

We have seen that courts are perfectly capable of performing their task – reviewing legislation – even in cases that involve complex and professional information. There still is one last argument that must be examined in this context. According to this argument, even if judges are capable of deciding constitutional cases with complex information, there is a higher possibility that they will make mistakes – take bad decisions – in such cases. This is not to suggest that there are “right answers” or objective solutions to each legal question; but clearly there are better and worse decisions. Judges can always make mistakes. The emphasis here is on the fear that courts will invalidate a reasonable and justified piece of legislation. The argument is that in cases that involve complex

information it is more likely that this kind of mistakes will be made, and accordingly deference is warranted.

There are three answers to this suggestion. First, it should be remembered that the state is not required to prove beyond any reasonable doubt that the legislation is justified. The burden of proof is only a "preponderance of probability" one. Thus, at the minimal impairment stage for example, the state has to prove only that it is more probable than not – in other words, that there is a 51% chance – that the means chosen are the least restrictive possible to achieve the objective. This should considerably limit the risk of judicial mistakes.

Second, we must carefully examine what is at stake. If the court believes that a piece of legislation is not justified, there are different remedies in its arsenal. But even if we assume that the most extreme measure is taken – that the impugned legislation (or section) is completely invalidated – it does not mean that the whole legislative project is doomed. The legislature can quickly re-legislate using the less restrictive means or a more proportionate law (depending on the reason for the invalidation). If the law was struck down at the minimal impairment stage – and this is usually the case – then if the court ruled correctly, the same objective can be achieved with those other means. What if the court made a mistake? What if it is in fact impossible to fully achieve the objective with the other means? In this case, we (the society) loose the ability to enjoy the full objective. But we do not loose it altogether. It is most likely that most of the objective

---


123
will still be achieved. The risk of mistake, then, is not a risk of loosing the whole legislative goal. It is only the difference between the full goal and its partial achievement, caused by the use of less effective means. And since the court’s decision itself must be based on some evidence, as to the preference of the other alternatives, we can assume that mistakes will not be dramatic. The difference at risk is bound to be pretty narrow.

The last answer to the problem of judicial mistakes concerns the possibility of singling out the cases that involve especially complex information. As explained in the previous section, the socio-economic sphere is not necessarily more complex than others. Nor is there any other classification that can identify all the cases that involve complex information and leave all other cases aside. The only possibilities, then, are either to use deference in all the cases, or allow the courts to decide on a case-by-case basis when the complexity justifies deference. None of these options is appealing. Deference in all the cases would effectively mean the end of constitutional rights\(^{32}\), only because of the very small risk of judicial mistakes in a small number of cases. This is surely unjustified. As for judicial discretion regarding the use of deference on a case-by-case basis, this invites a huge measure of indeterminacy and subjectivity. Judges will always be able to say that the information is complex when they prefer to use deference, and treat the information as not-too-complex when they want to interfere\(^{33}\). The question of complexity is simply too vague and indeterminate to use as a yardstick for using a lower level of scrutiny.

31 A recent empirical research has shown that most Charter judgements have legislative sequels, and that the sequels are generally prompt. See P.W. Hogg and A.A. Bushell, “The Charter Dialogue Between Courts and Legislatures” (1997), 35 Osgoode Hall L.J. 75, 96-9.

32 See chapter 7, supra.

33 For patterns of manipulative uses of deference see chapter 6, supra.
One last possibility should be addressed here. One can argue that although we cannot single out the issues which are too complex, we can single out the cases in which the risk of mistakes is most troubling. According to this view, the risk is not worth taking when an important social goal is at stake, a law that advances the vulnerable groups of society, against some individual rights of the rich and powerful. At least in these cases, it can be argued, deference is warranted.

We have to consider the general impact of this kind of deference on rights’ protection. I do not mean to advance here a theory of rights. But if rights mean something, if we find any merit in their constitutional protection, then we must consider the suggestion discussed here in this light. At stake here is a regime which will require judges to use deference whenever they review legislation designed to advance the less advantaged, on the back of the more powerful. The argument is, in fact, for creating different classes of constitutional protection. The poor (vulnerable) deserve a high level of protection; the rich (powerful) deserve a lesser level. But do we really want to create classes of rights’ holders? And is there any reason to believe that such classes are permitted by the Charter? Not only that these distinctions have no indication in the Charter; they also completely contradict its spirit and general purpose. Equality is the most basic theme of democracy. We should not correct social injustice by granting the more powerful less constitutional protection. This is not to say that context is irrelevant. On the contrary, context should play an important role in the analysis. The American history of racial discrimination, for example, should not be ignored in the process of constitutional analysis in the States. But there is no reason to infer from this history “classes” of rights or rights’ holders. The discrimination of blacks in the past cannot, as
of course, justify a discrimination of women or gays in the present and future. We are all entitled to the same rights and the same protection. Constitutional rights are too fundamental – too important – to be an asset of only part of us. Every human being in a constitutional democracy must be able to know that there are some rights he or she holds, which can not be taken away unless the constitution itself allows it.

8.5 Conclusions

It turns out that none of the “institutional competence” arguments can justify deference. We have seen that the case overload argument is simply a baseless practical-empirical argument. We have quickly dismissed the restriction of powers argument as nothing more than an attempt at intimidation. The main part of this chapter was dedicated to the attributes (and limits) of adjudication. We have seen that courts are perfectly capable of receiving, understanding and evaluating the information, even in the most complicated cases (and there is no reason to believe that socio-economic cases are more complex than others). We have therefore refuted the argument that courts lack the expertise to make constitutional decisions in some areas.

We have noted, however, that there is always a risk that courts will err in their judgements, and arguably this risk is higher when the matter is more complex. The last section focused on this risk, showing that the risk is less serious than what it might seem and that there is no reasonable way to single out the cases in which it is higher. The risk of judicial mistakes, therefore, cannot justify deference as well.

---

34 Unfortunately, this is exactly the situation in the United States; see section 2.2, supra.
Chapter 9
The Legitimacy of Constitutional Review

9.1 Introduction

All the arguments discussed so far are clearly of secondary importance comparing to the one which follows. The question of legitimacy is the main issue to be discussed when it comes to justifying deference. It is the most common argument advanced by both courts and scholars, the most influential argument within the judgements (in Canada and all over the world), and unambiguously the most powerful argument in favour of deference.

One preliminary note is in order. Throughout the thesis, I have not differentiated between constitutional review of legislation and the review of government rules and actions. This is not to deny that there is a difference, a difference that can be relevant to the use of deference\(^1\). Especially with regard to the legitimacy of constitutional review, it is clear that arguments against the power of review are much less powerful when courts invalidate an action of some bureaucrat, as opposed to a law enacted by the legislature. This chapter focuses, in most cases, on the review of legislation only. If deference is not justified with regard to legislation, as I intend to show, then \textit{a fortiori} the same is true with regard to government actions.

The chapter begins with an attempt to clarify the argument in favour of deference. I will shortly discuss the counter-majoritarian difficulty, which is the main argument against the legitimacy of constitutional review in general, and show that this difficulty

---

\(^1\) See M.D. Adler, "Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty" (1997), 145 U. Penn. L. Rev. 759.
cannot justify deference once constitutional review is accepted. It will become clear that
the argument for deference is based, in fact, on the fear of subjective decisions by judges.
The rest of the chapter is devoted to showing how deference only adds subjectivity and
indeterminacy to the analysis.

9.2 Constitutional principles and the constitutional text

In a constitutional democracy, the constitution is the supreme law of the land, and the
courts are assigned the task of securing the rights entrenched in it\(^2\). These are the two
most basic constitutional principles, on which the power of the courts to review
legislation is based. Over the years, critics have expressed deep objections to these basic
principles. Judges are not elected by the people, are not responsive of the people and are
not accountable to the people, and the idea of their having the power to invalidate
legislation seems unacceptable to some. Constitutional review has been described as
counter-majoritarian and anti-democratic. When the Charter became an accomplished
fact, the same criticism was used to advance a relaxed level of scrutiny. To limit the
extent of anti-democratic decisions, it is argued, courts must show deference to the other
branches.

One can provide a simple answer to this argument. Looking at the constitutional text,
it is clear that neither the Charter nor the constitution include any reference to the

\(^2\) In Canada, see section 52(1) of the Constitution Act, 1982 ("The Constitution of Canada is the supreme
law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of
the inconsistency, of no force or effect"), and section 24(1) of the Charter ("Anyone whose rights or
freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent
jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances...")
concept of deference, not explicitly and not even implicitly. On the contrary, the text unequivocally states the supremacy of the constitution and the duty of the courts to perform constitutional review. Thus, there is no reason to claim that courts should (or that they are allowed to) defer to the other branches when performing their tasks. A constitutional democracy is built on a system of checks and balances, on a separation of powers. Just like the two other branches, the court was given powers and duties in this system, and the court must perform its duties and use its powers accordingly. Any situation, in which certain laws or actions receive some form of immunity from judicial review, is completely inconsistent with constitutional principles.

This is all very true, and yet insufficient. The Charter gives the courts wide discretion in determining the scope of the rights and whether an infringement is justified. There is no doubt that this discretion exists and should exist. Thus, to a large extent, the courts have the freedom to define the tests of constitutional review themselves. Of course, these tests must conform to the text of the Charter; but there is still much room for discretion. I do not believe we can seriously claim, as a matter of textual interpretation, that while the Court was allowed to infer the Oakes test out of section 1, the inclusion of deference is prohibited. We must then examine the argument on its merit; assuming that courts have the power to insert deference into the analysis, is there any justification to do that?

---


4 See note 2, supra.
9.3 From counter-majoritarian to anti-democratic accusations

American constitutional scholarship has always been obsessed with reconciling constitutional review with democracy. Numerous accusations have been slammed over the years against constitutional review in the name of democracy\(^5\). The situation is not any different in Canada; critics use the same line of argument – the anti-democratic accusations – to attack the Charter itself\(^6\). Many others – who accept the existence and legitimacy of the Charter – use the same argument to call for judicial deference.

The most common form of the argument is based on the counter-majoritarian difficulty. When the court invalidates laws, it is argued, it acts against the will of the majority and therefore against democracy. The first two parts of this section deal with this argument. First the counter-majoritarian nature of constitutional review is explained (section 9.3.1). The connection between the counter-majoritarian difficulty and the anti-democratic argument is then questioned (section 9.3.2). The last part of this section examines a different argument from the democratic standpoint, dealing with the responsibility and functioning of the political branches (section 9.3.3).

---


9.3.1 The counter-majoritarian difficulty

“The root difficulty is that judicial review is a counter-majoritarian force in our system”\(^7\). When Alexander Bickel first wrote that in 1962, he reflected on an old and ongoing debate. He wasn’t the first to acknowledge this difficulty. Yet his succinct formulation and discussion of the problem defined the terms of the constitutional debate ever since.

The difficulty is simple: It is true that the constitution expresses the will of the people, by defining a framework for the actions of the different branches of government and setting limitations on their powers; but “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it throttles the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it”\(^8\). Surely no one would argue that the people in the day of the constitution’s entrenchment should prevail over the people of here and now. If there is a conflict between the will of past and present majorities, it is the present majority that should count. And since legislatures represent the current majority – invalidation of their legislation is counter-majoritarian.

It has been argued that decisions of legislatures and governments do not necessarily represent the will of the majority (but rather the will of powerful minorities, or a compromise that no one really wants)\(^9\). This may be to some extent true, but at the same

---

\(^7\) A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2\(^{nd}\) ed. (New Haven: Yale, 1986), at 16.


time there is also no doubt that legislatures and governments do represent the will of the majority, at the very least, better than courts\(^\text{10}\). Constitutional review is thus, indeed, counter-majoritarian. But so what? Why is it wrong if courts make decisions contrary to majority’s will? The will and the opinions of the majority are not necessarily, as of course, better or more correct. Nonetheless, majority rule is a basic principle of democracy. The claim is, therefore, that constitutional review, by being counter-majoritarian, is in fact anti-democratic.

### 9.3.2 The democratic character of constitutional review

The idea that constitutional review is anti-democratic is based, quite clearly, on a certain notion of democracy, what we might call a “simple” or a “parliamentary” democracy. This kind of democracy is based solely on the principle of majority rule. The parliament – which represents the people – has unlimited powers, including the power to infringe fundamental rights and freedoms without any limitation; in fact, there is no such thing as rights and freedoms, at least as far as the legislature is concerned. If the people are not satisfied, they can always elect other representatives. In a parliamentary democracy, this is all they can do.

There is also, however, a different kind of democracy, one which we might call a constitutional democracy. Here all the institutions of government – including the legislature itself – are subordinated to a constitution. There is a framework that all the institutions must adhere to, and where a constitution includes a bill of rights, this framework includes some fundamental rights and freedoms, which cannot be infringed

\(^{10}\) See Ely, *supra*, note 5, at 67.
(unless the constitution itself permits it), even by the legislature. Of course, the constitution itself is based on the consent of the majority, and it can be amended at any time. But in a constitutional democracy there is more than just majority rule. This is still a basic and important principle, probably even the most basic and most important. But other principles are respected too. Majority rule will not prevail in all circumstances and over all other values. The power of temporary majorities is limited, based on the understanding that the ruling majority itself cannot be counted on to take care of minorities and treat them fairly. Some fundamental rights and freedoms are not a matter of vote preference anymore; they cannot be abridged unless the constitution itself allows it. And the judiciary — as the neutral, non-political branch of government — is the most appropriate body to interpret the constitution and decide whether rights have been infringed and whether the constitution allows it. Constitutional review is thus an important element in this kind of democracy; it is necessary to limit the powers of majorities and to provide some minimal protection to those who have no access to these powers.

This account of democracy is, of course, very basic and schematic. My only purpose is to point out that democracy is not necessarily just majority rule. Democracy can certainly include counter-majoritarian elements like constitutional review. In a constitutional democracy this is not only acceptable, it is an important part of democracy itself. The protection of human rights — through the process of judicial review — is considered a necessary element of democracy. The counter-majoritarian nature of judicial review is thus anti-democratic only in a parliamentary democracy. In a constitutional

---

11 See A. Barak, Judicial Discretion (New Haven: Yale, 1989), 195-6; Chemerinsky, supra, note 9, at 75; J. Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto, 1997), 39.
democracy judicial review does not create any difficulty; on the contrary, it provides solutions.

Needless to say, the people of Canada – just like the people of the United States and any other nation with a constitution – have chosen the second, more complicated kind of democracy. They included constitutional review as part of their democracy. One can still argue that a parliamentary democracy is better, but it must be clear that this is an argument against the constitution itself, or at least against the possibility of constitutional review (and the concept of rights). One cannot accept the possibility of judicial review, based on the concept of a constitutional democracy, and then criticize and limit constitutional review because it doesn’t fit the concept of a parliamentary democracy. This doesn’t make sense.

It turns out, then, that the counter-majoritarian difficulty can be used as an argument against the Charter itself; but once the Charter is accepted – it is not a difficulty any more. The entrenchment of the Charter necessarily means acceptance of a different kind of democracy, one which is based on other values alongside majority rule.

9.3.3 Responsibility and participation in the democratic process

There is another argument that targets constitutional review as anti-democratic, one which is not based on the counter-majoritarian difficulty. This argument is most

---


associated with James Thayer, who argued more than a hundred years ago that "our doctrine of constitutional law has had the tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it"\textsuperscript{14}. Judicial review, agreed Alexander Bickel years later, "have a tendency over time seriously to weaken the democratic process"\textsuperscript{15}. He went on directly to say, however, that "although they may somewhat dampen the people’s and the legislature’s efforts to educate themselves, [the courts] are also a great and highly effective educational institution"\textsuperscript{16}. Indeed, as Eugene Rostow noted, "the work of the court can have, and when wisely exercised does have, the effect not of inhibiting but of releasing and encouraging the dominantly democratic forces of American life"\textsuperscript{17}.

The question is, in essence, an empirical one. Is there, in practice, any reason to suspect that constitutional review is harmful to the democratic process? More particularly, is it a cause for less participation of the people or less responsibility of the legislatures? Does it inhibit legislative initiatives?

As for participation and responsibility, whatever the answer was in 1893, when Thayer raised the argument, in the modern state it is a clear negative. The state deals with

\textsuperscript{14} J.B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893), 7 Harv. L. Rev. 129, 155-6. The same line of thought is probably behind Chief Justice Dickson’s assertion that “due deference must be paid... to the symbolic leadership role of government” (\textit{PSAC v. Canada}, [1987] 1 S.C.R. 424, 442 (dissenting in part)).

\textsuperscript{15} Bickel, \textit{supra}, note 7, at 21.

\textsuperscript{16} Ibid., at 26.

\textsuperscript{17} Rostow, \textit{supra}, note 13, at 210.
an enormous range of issues. Huge numbers of statutes and regulations are enacted every year, not to mention state actions which are virtually uncountable. Only a tiny fraction come before the courts. Most of the laws, regulations and actions are never exposed to constitutional review. It would be absurd to argue today that legislators are less responsible because they feel that courts will correct their mistakes, or that there is less participation in the democratic process because people feel that courts can change the decisions anyway.\(^\text{18}\)

It is true that the threat of invalidation can discourage some legislative initiatives. But it is misleading to see this as thoughts of legalism, as opposed to what is just and right. The process can more correctly be described as a dialogue.\(^\text{19}\) By giving concrete contents to the rights and freedoms entrenched in the Charter, and by deciding when an infringement is justified, courts take part in the formulation of what is just and right. Empirical evidence supports the existence of such a dialogue.\(^\text{20}\) The courts do not harm the democratic process when they perform constitutional review; they improve it. Legislators learn to give more attention and consideration to human rights, and the public

\(^{18}\) A strong support for this argument is found in a collection of papers written by senior government officials, who commented on the impact of the Charter on the formulation of public policy. The papers are published in P.J. Monahan and M. Finkelstein (eds.), The Impact of the Charter on the Public Policy Process (North York: York University Centre for Public Law and Public Policy, 1993). The editors conclude that although the Charter forces governments to redesign or to fine-tune the laws to respond to Charter concerns, “the Charter has not substituted judges for politicians, as some critics of the Charter had feared would happen... [the Charter] introduced an important new variable into the political mix but has left a significant element of discretion in the hands of political leaders. Key political decisions are still being made by politicians rather than judges” (P.J. Monahan and M. Finkelstein, “The Charter of Rights and Public Policy”, in P.J. Monahan and M. Finkelstein, ibid., at 1, 6-7).


\(^{20}\) Ibid.
debate is enriched\textsuperscript{21}. "By conscious or subconscious influence", said Benjamin Cardozo, "the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith"\textsuperscript{22}. The democratic process, in short, only profits from the participation of courts through judicial review.

### 9.4 The argument focused: on subjectivity and indeterminacy

In the previous section we have seen that constitutional review is counter-majoritarian, but not anti-democratic. On the contrary, it strengthens democracy and forms an important part of it. But if this is indeed the case, why do so many constitutional scholars feel uncomfortable with judicial review?

The answer is simple. Ever since the rise of legal realism it has become clear that judicial decisions leave a wide room for judgement. Judgement, in turn, includes an element of subjectivity. This is especially true in constitutional law, where the text is especially and deliberately open-ended. Particularly in constitutional cases, then, judges have a wide margin of discretion, and this discretion leads to subjective decisions, to some extent\textsuperscript{23}. "There can be no law without interpretation, no interpretation without interpreters, and no interpreters without politics"\textsuperscript{24}. There is no doubt about that. But this

\begin{itemize}
  \item \textsuperscript{22} B.N. Cardozo, \textit{The Nature of the Judicial Process} (New Haven: Yale, 1921), 93.
  \item \textsuperscript{23} See, e.g., Chemerinsky, \textit{supra}, note 9, at 100-1.
  \item \textsuperscript{24} A.C. Hutchinson, "Waiting for CORAF" (1991) 41 U.T.L.J. 332, 340.
\end{itemize}
simple assertion can lead us in different directions. Some critics believe that subjectivity is so inherent that there is nothing to do about it, except to get it "out of the closet." Others understand that subjectivity can be fought; principles can be developed to limit its scope (and even if we cannot eliminate the possibility of subjectivity entirely, it doesn't mean that law loses its legitimacy and integrity).

The argument against the legitimacy of judicial review is now focused. Once the constitution is accepted, the argument is not based on the counter-majoritarian nature of the review per se. When judges decide cases subjectively, they act against the will of the majority; but they always act against the will of the majority when they invalidate legislation. This is not the problem once we accept the idea of constitutional review. It is the way the powers are applied by the courts that concerns constitutional scholars. We simply do not want judges invalidating legislation based on their personal views. Subjectivity means indeterminacy, and when decisions are taken in a subjective and indeterminate way the judiciary loses its legitimacy.

Invalidating legislation based on subjective reasons can be seen as anti-democratic. But this only confuses the real issue at stake. When the courts perform constitutional review, their struggle to legitimacy has nothing to do with democracy. Subjectivity and indeterminacy are the problems that courts must avoid. To put it another way, courts must keep the line between law and politics separated. Or, to put it in yet another way, they must beware not to do what the American Court did in Lochner. If judges make decisions based on their personal views – based on their own politics – there is no differentiation

---

between law and politics and no legitimacy to these decisions. Courts are surely not justified in invalidating political decisions of the majority based only on political views of the judges themselves.

Limiting subjectivity – separating law from politics – is indeed the main goal of constitutional scholarship. Most constitutional theories, as well as the tests developed by the courts, can be understood in this light.

9.5 The *Oakes* test: trying to separate law from politics

The problem becomes even clearer when looking at the text of the *Charter*. The scope of the substantive rights is a question open to wide discretion, but the courts stand on relatively firm ground in determining this scope. At this stage, rights and freedoms are defined in the abstract. It is a matter of legal interpretation, and the courts have the legitimacy – more than anyone else – to perform this interpretation. The problem is rather with section 1. Here the courts must examine a piece of legislation, or a government action, and decide whether it is justified in abridging human rights. The *Charter* itself shows extreme confidence in the courts in this matter; they were granted the widest room of discretion possible. Judges were given the task of deciding whether the limits are “reasonable” and whether they can be “demonstrably justified in a free and democratic society”, without any other guidance.

The Supreme Court of Canada perfectly understood the problem with these abstract terms. They leave so much room for discretion, that judges will inevitably make subjective and indeterminate decisions. To avoid these problems and preserve its legitimacy, the Court developed the *Oakes* test. *Oakes* gave concrete substance to the
abstract words of section 1, turning the courts’ task into a principled and systematic analysis. Instead of making subjective decisions based on vague terms, courts now have to answer, step by step, a few clear and specific questions. The examination is not only clearer for the courts; it also makes the decision much less indeterminate and much more predictable for the litigants.

The *Oakes* test is thus a formula designed to separate law from politics. It is an attempt to make judicial decisions as principled and objective as possible. To be clear, the analysis did not turn into a rigid and mechanical one; there is still wide room for discretion that allows the Court to deal with difficult and unexpected situations. But there is now much more than just the personal opinion of a judge as to whether a law is “reasonable” and “justified” or not.

9.6 The paradox of deference: subjectivity enhanced

Let me summarize the moves we have taken so far in this chapter. The claims against the legitimacy of constitutional review led us directly to the counter-majoritarian difficulty. We have seen that constitutional review is indeed counter-majoritarian, but it is not anti-democratic. We were then in a better position to understand the argument in favour of deference. Once constitutional review itself is accepted, the counter-majoritarian difficulty is not the real problem. Subjectivity and indeterminacy are what we are trying to avoid.

The argument for deference is thus the following: (1) the enforcement of the constitution is open to a very wide discretion; (2) using this discretion involves subjective, and thus indeterminate, elements; (3) these elements are especially
unacceptable when courts invalidate legislation; and (4) an attempt must be made to limit the scope of subjectivity.

Interestingly, these were also the reasons behind the development of the *Oakes* test. Indeed, as we have seen, *Oakes* turned the section 1 analysis into a principled, systematic, and much more objective examination. As it turns out, the insertion of deference has been justified on the same basis. There are some situations, it is argued, in which a decision of the court is bound to be especially subjective. It is in these situations that judges should avoid using their own judgement and give preference to the judgement of the legislature.

This section is devoted to showing that the concept of deference undermines its own justification. Deference is supposed to provide an answer to problems of subjectivity, but in fact it only enhances the problem and leads to more subjectivity. This is what we can call *the paradox of deference*. The argument is developed in two parts. First we will see that there is no way of determining when should the court use deference. Then we will see that deference does not have any clear meaning, in other words, determining the impact of the concept in any given case is completely subjective.

9.6.1 Deciding when to use deference

No one argues that deference should be used in *all* the cases. The Supreme Court of Canada performs strict scrutiny in a large part of the cases, especially in the criminal sphere. The European Court of Human Rights reduces its margin of appreciation to nil in a variety of situations, and the American Court likewise abandons its regular

---

26 See chapter 1, *supra*. 
deferential approach quite often. All three courts have created—by using deference selectively—different levels of review. Even those judges who were considered the most deferential over the years have put limits to the use of deference. For Holmes and Brandeis it was freedom of expression, for Frankfurter it was criminal procedure. For La Forest it's privacy and personal autonomy.

There are, of course, theories that lead to a deferential analysis in all the cases, although no court has ever subscribed to them. Thayer, for example, suggested that laws should be invalidated only when the legislature made a "clear mistake" (as opposed to merely a mistake), "so clear that it is not open to rational question." The result of such a theory is indeed deference to the legislature, but not in the meaning discussed in this thesis. There are numerous other suggestions regarding the proper level of review—numerous suggestions for the proper tests—and every one can be seen as more (or less) deferential than the other. Needless to say, these will not be discussed here. Our subject is rather different levels of review. Assuming the existence of some tests—some level of review—is it justified to use a relaxed level in certain situations? Is it justified to show deference—to attenuate the level of review—in some cases? This is the question of this thesis. It was, of course, made clear from the beginning, but it seems appropriate to reiterate it here.

27 See chapters 2 and 3, supra.


30 Thayer, supra, note 14, at 144.
For those who advocate the use of deference, the difficulty is, then, to single out the cases in which deference is warranted; in other words, to distinguish the situations in which subjectivity is more likely, more problematic. If the whole idea is to limit subjectivity, it is clear that the decision of when to use deference must be principled and objective. As a matter of practice, we have already seen that deference is used inconsistently\textsuperscript{31}. One cannot find any objectivity or determinacy in the way courts have decided when to use deference. It is still possible to argue that there is a theory, which when applied correctly can bring the desired distinction. An examination of the various suggestions in this regard, however, reveals that no such theory exists.

First, it is clear that “flexible” approaches to deference are totally unjustified. If the level of deference will change from case to case, according to the “nature of the legislation” and the “nature of the right infringed” in the specific circumstances\textsuperscript{32}, then there are no principles and no objectivity. It is all open to the judgement and personal opinions of the specific judges. Subjectivity and indeterminacy are thus substantially enhanced. It is worth repeating that the context and all the circumstances surrounding whatever law is being reviewed can still (indeed, they should) be examined and taken into account. But this can be done within the same level of review. To illustrate: restriction of political speech will require, as of course, a much more powerful justification comparing to restriction of hate speech. But this does not mean that the court defers to the state’s judgement when it comes to limiting hate speech. The standard of review is the same, only the facts lead to a different conclusion. When the court inserts

\textsuperscript{31}Chapter 6, \textit{supra}.

\textsuperscript{32}See section 2.2.6, \textit{supra} (Justice La Forest’s approach) and section 3.3, \textit{supra} (the European Court of Human rights).
deference into the analysis, it means that limitations can be out of proportion to what is really necessary in the circumstances. It means that human rights are being undercut where the protection of the court is needed the most (where people are most likely to ignore others’ rights). It is more than just taking the circumstances into account; it is allowing gratuitous (unnecessary) infringements.

Looking at the American levels of scrutiny next, it is once again striking how little principle and objectivity one can find. Is there any principled or objective reason to use extreme deference when examining sexual orientation discrimination, less deference for gender discrimination, and strict scrutiny – no deference at all – when it comes to race discrimination? Is there any reason to believe that decisions are more open to subjective opinions when the court examines discrimination on the basis of sexual orientation? Surely this is not the case. I am, of course, twisting the American thinking a little bit. American jurisprudence after Lochner is built on the idea that in the usual case deference is in order. Race discrimination is simply an exception; it is a situation in which the court felt that there are reasons to suspect the state’s motives, in light of the historic experience. Put in this way, the levels of review might seem less absurd. But the first description still stands. Once we understand what deference really means, once we understand that deference allows gratuitous infringements of rights (for example), it becomes clear that deference requires a serious justification. It is the fear of subjective decisions that has been advanced as the most common and powerful justification for deference, and the American three-tier system cannot be explained based on this fear.

---

See section 2.2, supra.
The American levels of scrutiny are not only inconsistent with their only serious justification; they are also subjective in themselves. How can judges decide that racial minorities deserve more protection than women, who in turn deserve more protection than gays? How can judges decide, to put it another way, that the last two groups do not deserve full protection? Or that some rights are less fundamental than others, and thus deserve a lesser level of review? These are all subjective decisions. The classification of people into groups and classes, just like the classification of rights into categories, are all based on personal preferences.

The suggestions made by the Supreme Court of Canada are much more to the point in this matter. It has been suggested that deference should be accorded to legislation balancing between different groups of society, or to legislation allocating scarce resources, or simply to all social and economic issues34.

The last proposal is highly problematic, as some of the judges themselves pointed out35. Why should we allow more infringements when the issue is social or economic? There seem to be no reason for that, except if the differentiation is based on the other two proposals. We can then turn to examine the first two proposals directly.

The first two suggestions seem attractive at first. Balancing between groups of society and allocating scarce resources seem especially suited for politics. Legislation which is based on these kind of decisions can be difficult to evaluate; decisions in these matters are often a matter of personal opinions, and when judges review them they might tend to insert their own opinions – even if unintentionally. To be clear, it is not the judges that

34 See section 4.4, supra. Deferece to social and economic issues can also be found in the American and the European Court’s jurisprudence; see ibid.

35 See page 64, supra.
have to take those decisions. It is always the other branches that make these political choices. But even though the task of the court is different, the process of constitutional review does involve an examination of the legislation; and it is indeed possible that subjective elements will be inserted into the analysis.

The question is, however, is there any piece of legislation that doesn’t fit these descriptions? It seems to me that legislation always balances between different groups of society. The Court usually invoked this formulation to differentiate between criminal and socio-economic legislation. But the socio-economic sphere is not more political than any others. Even criminal laws are based on a compromise between different groups of society. At the very least, there are the interests of the victims, the accused, and society in general. Quite often the situation is much more complicated; consider, for example, laws on abortion or pornography. It should be remembered that Edwards Books was in fact a criminal case, and the laws examined in Irwin Toy and RJR-MacDonald were criminal laws as well. Even when it comes to criminal procedure, at least in one case the Court admitted that the legislation balanced between different groups of society. It is simply impossible to make any differentiation between laws that compromise the interests of different groups and laws that don’t. At the most, we could say that there are


37 See Beatty, supra, note 3, at 83; Mandel, supra, note 6, at 334; P.J. Monahan, “The Charter then and now”, in P. Bryden et al. (eds.), Protecting Rights and Freedoms (Toronto: University of Toronto, 1994), 105, 115.

38 See Beatty, supra, note 3, at 83.

39 See sections 1.2.1, 1.2.3 and 1.2.6, supra.

different levels of such compromise; there are cases in which more groups and interests are involved and the balance is more complicated. But as we have seen, the classification for criminal laws and other laws is not helpful in this matter. There is no escape but to recognize that there is no principled and objective solution here. Any attempt to single out the cases in which there are more groups and interests and the balance is more complicated is bound to be subjective.

“Allocating scarce resources” is similarly problematic as a yardstick. Every piece of legislation has some financial implications; someone always has to bear the costs of the legislation. At some level, then, all the laws are allocating scarce resources. Of course, in some cases it is clearer than others; but it is always a matter of degree, a matter of subjective judgement. There is no way of differentiating between laws that allocate resources and laws that don’t. To illustrate, consider the cases of Eldridge\(^{41}\) and Vriend\(^{42}\). The issue in the former was a government decision not to provide sign-language translators in hospitals. The issue in the later was a law providing remedy against discrimination on various grounds, but not including sexual orientation. The first is clearly an allocation of resources; the government simply decided not to allocate resources to a specific need of the deaf. The second also has an impact on the allocation of resources, although it is somewhat ancillary; expenses for human rights tribunals are smaller. The legislature chose not to allocate resources to human rights tribunals for cases involving sexual orientation discrimination. In both of the examples, it must be clear, the allocation of resources is not the “objective” of the state. Allocation of resources is


\(^{42}\) Vriend v. Alberta, supra, note 12.
always a by-product, a result of achieving some other objectives. Sometimes this result is more direct, sometimes less. But there is no way that a court can make any principled differentiation between the cases.

After looking into the different classifications developed by the courts, it is safe to conclude that none of them can provide an acceptable test as to when should courts use deference (or, to put it otherwise, when should courts be more or less deferential). Some of the suggestions are not at all related to the problem of subjectivity, which, as we have seen in the previous sections, is the reason behind the concept of deference. Other classifications are simply too vague and indeterminate to provide an applicable standard. They only add more subjectivity to the courts’ analysis.

9.6.2 Deciding the meaning of deference

Even if we assume that some theory can be found to single out, in a principled and more objective way, the cases that warrant deference, there is still the question of what this deference means. We have seen that in practice, it meant different things in different cases; the impact of deference changed dramatically from case to case without any explanation from the courts. Sometimes – though quite rarely – it was the first and last word, the one and only reason sufficient to uphold a law. Some other times it meant a shift to a relaxed, articulated test (usually a subjective-reasonableness one). Quite often deference meant shifting the burden of proof, and there were also the cases in which it was only a post-decision-justification, or even just lip service to the other branches.\(^{43}\)

\(^{43}\) See chapter 5, supra.
Deference is thus a cause for serious confusion. Even if one can predict *when* deference will be used – which is highly doubted – there is no way of telling *what will it mean*, what impact it will have on the decision. It is not surprising that judges prefer to keep the concept so vague. This way they hold a perfect tool: powerful when they want it, meaningless when they don’t. It creates an illusion of limiting subjectivity, but at the same time gives the courts unlimited discretion to achieve any desired result.

The use of deference as such a flexible tool cannot be justified. As we have seen, the idea behind deference is to limit the situations in which judges insert their personal opinions. But the changing meaning of deference only adds to those situations. To solve this problem, deference must have a fixed and definite meaning. Once this is understood, it becomes equally clear that there is no need to use the concept of deference at all. If the meaning of deference is, for example, shifting the burden of proof, these are the words the courts should use. Only then will litigants be able to know in advance what the standards and requirements are.

### 9.7 Conclusions

We started the discussion with the understanding that although the constitutional text includes no mention of deference, reliance on the text is insufficient to exclude the possibility of deference. We then turned to examine the counter-majoritarian difficulty, and it became clear that once constitutional review is accepted, this difficulty cannot justify deference. We were then in a position to better understand the argument; deference is justified as a response to the fear that judges will decide cases according to their subjective views. Naturally, this is especially troubling when courts perform
constitutional review and hold the power to invalidate legislation, enacted by the people’s representatives. The problem is undoubtedly real and attempts to solve (or limit it) should be welcomed. We have seen that the Oakes test is itself a step in this direction. The Supreme Court of Canada created in Oakes a test that turns the section 1 examination from a completely open-ended search into a principled, step-by-step analysis. If one tries to justify deference – it can only be understood as a further attempt in this direction; an attempt to further limit subjectivity and indeterminacy.

An examination of the concept quickly revealed that it undermines its own justification. Not only cannot it provide solutions to concerns of subjectivity; deference actually intensifies the problem. We have seen that there is no principled and non-subjective way to decide when to use deference. There is also no way of understanding and predicting the meaning (the impact) of deference in a given case. The concept of deference is vague and confusing. It can be (and has been) manipulated to justify any desired result.

After reviewing all the arguments advanced to justify deference, in the last three chapters, we can safely conclude that the concept of deference has no place in constitutional law. Deference undercuts the protection of fundamental rights and it exacerbates subjective reasoning in the judgements; and there is no meaningful reason to justify that. We are all subject to the rule of law, including legislatures and governments, thus all pieces of legislation and all actions of those in power must stand up to the same strict scrutiny.

It must be clear that this does not mean rigidity or legalism. There is no doubt that standards must be applied with sensitivity to the context. But surely, this cannot justify
laws which restrict constitutional rights more than the minimum necessary, or laws which are out of proportion to the severity of the infringement.
Chapter 10
Improving Oakes: Some Preliminary Thoughts

10.1 Introduction

We have gone through a long road and I would like to shortly summarize it. In the first, descriptive part, we have seen how the concept of deference developed, in Canada and other jurisdictions. We then tried to make sense of the ways deference is used by the courts, first by examining different aspects of the application of deference, and second by understanding the actual impact of deference in different cases. Ultimately, we have seen that the only consistent feature of deference is its inconsistency. No explanations are given by the courts for the different uses of deference in different cases; it turned out that judges simply do with the concept whatever they want.

The second part left the practice behind and dealt with the theory. To examine whether deference can be justified, we took three different steps. First, we discussed the impact of deference on rights and interests. It became clear that deference undercuts constitutional rights, and it is not necessary to the protection of public interests. Second, we examined the institutional competence of the courts. Several arguments have been raised in favour of deference under this heading, most importantly the courts’ lack of expertise. We have also examined the possibility of judicial errors in this context. None of the arguments was able to seriously justify deference. Third, we discussed the arguments from the standpoint of legitimacy (or democracy or separation of powers). These are unambiguously the most common and powerful arguments. We have seen that
the problem is, in fact, the possibility of subjective decisions. The Oakes test\textsuperscript{1} was an important step towards solving (or at least minimizing) the problem, and deference should be understood as a further attempt in the same direction. It became clear, however, that deference only enhances the problem of subjectivity. We therefore concluded that the use of deference is not justified.

Nonetheless, the problem still exists. The aim of this chapter is to make some preliminary suggestions with regard to the problem of subjectivity, or, to put it in other words, the separation of law from politics. I will take the Oakes test as a starting point for the discussion. The different stages of the Oakes test will be examined, one after the other, through the lens of the subjectivity problem. I will try to identify the aspects of the test which are problematic in these terms; the points where law gets too close to politics. With regard to these points I will make some suggestions towards minimizing the problem.

It must be emphasized at the outset, that I do not believe law and politics can be completely separated. Judges are always human; law always involves judgement; and judgement – at least sometimes and to some extent – is based on personal views. We must strive to minimize the scope of the problem, to limit the situations of subjectivity and indeterminacy. At the same time, though, we must accept the fact that a complete separation is impossible. This should not be taken to mean that constitutional review is illegitimate. Our main and primary goal is not to limit subjectivity, but to protect human rights. First and foremost, any constitutional doctrine must be directed at this end. True, we must try and limit, as much as possible, the possibility that judges will decide

constitutional cases based on their personal political views. But at the same time we must be careful not to destroy the protection of human rights. We must always remember what our main goal is when formulating constitutional doctrines.

10.2 The legislative objective

According to Oakes, in order to survive section 1 scrutiny the objective of legislation must be “pressing and substantial”. This is clearly a problematic standard. There’s lots of room for the infusion of judges’ personal views. Some social goals might not seem “pressing and substantial” to a politically conservative judge, for example. Indeed, this is what happened with the American judges in Lochner\(^2\); and in this respect things haven’t changed much in the United States ever since. Judges still invalidate laws based on their views that the objectives are not important enough\(^3\), and these views are, inevitably, influenced by their personal political beliefs.

It is important to note that outside of the United States the scrutiny of objectives has not posed much of a problem. The Supreme Court of Canada, the European Court of Human Rights and other courts around the world, all try to avoid second-guessing of legislative goals\(^4\). In Canada, since the entrenchment of the Charter there were only five cases in which goals were declared unconstitutional (and three of them were prior to


\(^3\) See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969), and see the references cited in D.M. Beatty, Constitutional Law in Theory and Practice (Toronto: University of Toronto, 1995), at 109-110.

\(^4\) See Beatty, supra, note 3, chapters 3 and 4.
The Court, apparently well aware of the difficulty, generally accepts any objective that legislatures can think of.

This does not mean, however, that we can ignore the problem. If there's any way to limit the risk of subjectivity, this must be done. Decisions like *Lochner* are always a possibility, and the "pressing and substantial" standard is simply too vague to avoid it.

There are two different directions that can be taken in this regard. One is to articulate a theory of rights; to maintain that rights can only be limited for certain reasons. An example for such a theory is the one advanced by Lorraine Weinrib, according to which rights can be limited only to the advancement of constitutional values. This will indeed create a principled framework for the examination of objectives. The are two problems with this solution, however. One is at the stage of choosing and accepting the theory. Surely there will be different opinions regarding the appropriate theory of rights, and the choice is bound to be somewhat subjective. A second difficulty is that such a theory might be too binding for the state; it might block some important legislative initiatives at the first stage of the examination, thus precluding the possibility of achieving certain social goals even if the infringement is in fact trivial.

To illustrate, let us look again at the case of *Eldridge*. At issue was the refusal of the British Columbia government to finance sign-language translators in hospitals. The Court

---


6 L.E. Weinrib, "The Supreme Court of Canada and Section one of the Charter" (1988), 10 Sup. Ct. L. Rev. 469, 492, 500.

maintained that this was an infringement of section 15, a discrimination against the deaf, since in practice they were not able to enjoy the same quality of medical care. The reason for the government's decision could only be to save money. It is most likely that any theory of rights would preclude such an objective; Weinrib specifically states that saving money is not a sufficient reason to abridge rights, and the Court itself said much the same in one of its earliest Charter decisions. But this money can be used for other purposes. The decision of the government should be seen as an allocation of scarce resources. If the deaf receive sign-language translators, the money is necessarily taken from someone else. This does not mean that the government can do whatever it wants. _Eldridge_, in fact, was an easy case: the cost of the translators was only $150,000 per year, out of a health care budget of billions. In these circumstances it seems clear that the infringement is unjustified. But assume that the cost of translators was, say, $100,000,000. Is it still so clear that the state must provide the translators? In other words, can we really say that cost doesn't matter?

This analysis is not limited to equality rights. Take _Singh_ for example. When the Court has set out the requirements for refugee hearings, dismissing arguments of cost, the judges probably never imagined what the actual costs would be. In retrospective, it was estimated that in 1989-90 alone the Canadian taxpayers bore a total cost of $83,000,000

---

8 The Court itself defined the objective in similar terms ("controlling health care expenditures"; _ibid._, at par. 84). The constitutionality of this objective was not discussed; the court found it sufficient to strike down the government's decision based on the minimal impairment test.

9 Weinrib, _supra_, note 6, at 483 and on.

10 _Singh v. Minister of Employment and Immigration_, _supra_, note 5.

11 _Ibid._
because of the Court’s decision\textsuperscript{12}. For the purpose of argument, assume that the cost is even ten times higher than that. Can we still say that cost is not a factor? That the rights of refugees should be fully respected no matter what the costs are?

Cost does matter. An infringement of rights may not be justified for a certain amount of money, but justified for a higher sum. We must always remember that goals stand behind this money; if the government is allowed to abridge rights in order to save money, it is in fact allowed to do so for the sake of some other goals, that require this money to be achieved. This should all be taken into account when the section 1 analysis reaches its last stage – proportionality (in the narrow sense). The severity of the infringement and the importance of the reasons behind it are weighed against each other at this stage. If we use a theory of rights to preclude some objectives altogether, at the first stage of the analysis, then the most trivial infringement would never be allowed, even if it means that society has to pay billions for it.

A completely different direction is the one taken by David Beatty, who argues that any objective should be allowed, unless the objective itself is only to deny a constitutional right. Beatty believes that constitutional review should focus entirely on the means chosen to achieve the objectives. The goals themselves, on the other hand, are a matter of politics, and courts should not interfere with the choice of goals (except for the extremely rare occasions in which the infringement itself is the only goal)\textsuperscript{13}.

\textsuperscript{12} C.P. Manfredi, Judicial Power and the Charter (Toronto: McClelland & Stewart, 1993), 166.

As far as limiting subjectivity is concerned, this is a perfect solution. If all the objectives are legitimate, there is no risk of judges second-guessing the legislative purposes according to their personal views. The exception is narrow and clearly defined; there is no reason to believe that personal views will substantially enter the analysis through this route. But doesn’t it leave too much room for the state to infringe constitutional rights? To answer this question, we must consider the last stage of section 1 analysis, the proportionality (in the narrow sense) test. If the proportionality test is given its full meaning (see below) – if it is applied in practice in accordance with its articulation in theory – then there is really no need to scrutinize the objective itself, in the abstract. During the proportionality analysis, the importance of the objective will be carefully examined in light of the specific infringement. The courts can invalidate the law if the goal is not important enough vis-à-vis the infringement. This seems to be sufficient; there is really no need to decide, without considering the circumstances, that some objectives are never constitutional.

The exception is, of course, necessary. If the legislature or government wants to infringe constitutional rights only for the sake of infringing constitutional rights, this could never be justified. Of course, in these cases the law will not pass the proportionality test anyway. But here invalidation at the first stage of the analysis is appropriate; it will send a clear message to the state authorities and to the public about the inappropriateness of the goal.

---

14 An example is A.G.P.Q. v. Quebec Association of Protestant School Boards, supra, note 5, dealing with Quebec’s restriction of admission to its English-language schools, with the direct goal of infringing section 23(1)(b) of the Charter. Another example is Vriend v. Alberta, supra, note 5, dealing with Alberta’s Individual’s Rights Protection Act, which deliberately excluded the discrimination of gays from its protection.
I would, however, make the exception a bit wider that what Beatty suggests. First, whenever the purpose itself is to limit constitutional rights, the law should be invalidated, even if this is not the only purpose. Take Big M. Drug Mart\textsuperscript{15}, for example. In this case the Lord’s Day Act was struck down because its whole purpose was to impose the Christian day of rest on all people, no matter what religious beliefs they hold. The intention was clearly to impose the Christian Sabbath on the whole community; in other words, to infringe the freedom of religion on non-Christians. A year later, Ontario’s Sunday-closing law was upheld since its purpose was social and not religious\textsuperscript{16}. Now assume a third law, the purpose of which is both religious and social. Should the legitimate social goal “rescue” the law, even though it is based, at least partially, on an unconstitutional goal? I believe it should not. The legislature should not be allowed to pursue the infringement of rights only because there is also an acceptable objective to the same law. Respect for people’s fundamental rights requires more than that.

A second way in which the exception should be widened relates to the direct infringement of constitutional/democratic values. There are cases in which the goal of the law is not to infringe a specific constitutional right, but the law is nonetheless aimed directly against some constitutional or democratic value implied in the constitution. Take, for example, the law examined in Zundel\textsuperscript{17}. At issue was section 181 of the Criminal Code, which provided that “Every one who willfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public

\textsuperscript{15} Supra, note 5.

interest is guilty of an indictable offence”. The Court, rejecting the possibility of a “shifting purpose”, examined the original, historic purpose of the section, which was “to preserve political harmony in the state by preventing people from making false allegations against the monarch and others in power”\(^\text{18}\). We are not interested here in the question of whether this was indeed the purpose of the impugned law; let’s assume that it was. Surely this objective is unacceptable; it must be, in itself, unconstitutional. It is not directed against a specific constitutional right; but it is directed against basic constitutional and democratic values. This should be enough, in my opinion, to declare it as unconstitutional\(^\text{19}\).

It is true that by widening the exception we will allow more room to subjective opinions. But as emphasized at the outset, our main goal is the protection of human rights. We must limit the possibility of subjective reasoning to the minimum possible while still achieving this desired goal, and not more than that.

10.3 Rational Connection

The next stage of the *Oakes* test requires the courts to examine whether there is a rational connection between the purpose of the law and the means chosen by the legislature. At this stage, the connection required is simply a logical one: the law must further the purpose that it is supposed to advance. Hence, the law is examined in its own

\(^{17}\) *R. v. Zundel, supra*, note 5.


\(^{19}\) This suggestion follows, in fact, the assertion of Chief Justice Dickson in *Oakes*, according to which “the standard must be high in order to ensure that objectives which are… discordant with the principles integral to a free and democratic society do not gain s. 1 protection” (*Oakes, supra*, note 1, at 227). See also P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, loose-leaf ed.), 35.9(d).
terms; no matter what the goal is and how badly the means were tailored, at this stage the only thing that matters is that the means can somehow advance the goal that the legislature itself sought to achieve.

At first sight, it seems hard to imagine that a modern legislature will draft a law so poorly, that it will not even advance its own goal. Indeed, in most cases the state should be able to clear this hurdle in no time. However, there could be situations in which the state will have to prove that the risk or the assumptions on which the law is based are real. In *Butler*\(^\text{20}\), for example, at issue was the *Criminal Code* provision directed against obscenity. The purpose of the provision was the avoidance of harm to society, and the state had to prove that obscenity indeed creates some harm (or a risk of harm) to society. This can sometime be problematic, but the rational connection requirement is important. There could be cases in which the legislature will base a law on some mistaken, prejudiced assumptions. A good example is *Brown v. Board of Education*\(^\text{21}\), dealing with school segregation. There were probably several legitimate purposes in the Board members’ minds, but the decision to segregate races could not be justified since it was based on prejudiced assumptions. There was no rational connection, in other words, between the purposes (say, maintaining a high level of education) and the segregation; the later could not advance the former.

Even in those harder cases, where the state must prove its assumptions, the risk of subjectivity is quite small. The courts’ task is to assess the evidence impartially. It is, of


course, always possible that judges themselves will be prejudiced; in *Lochner*\(^{22}\), for example, the American Court refused to accept the maximum hours legislation as rationally connected to the goal of protecting the bakers' health. But this is subjectivity of a kind that we cannot eliminate (unless we eliminate constitutional review altogether). Our interest here is not with the possibility of judges' prejudices or abuse of power, but rather with the problem of questions that necessarily involve politics. At the rational connection stage no question of politics arises. Even in the harder cases, the courts' task is still just to make sure that some logical connection between the goal and the means exists.

10.4 Minimal impairment

The next step of the section 1 examination – the minimal impairment – attracts opposing views when it comes to the possibility of subjective reasoning.

On the one extreme, there is the view that "a judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down"\(^{23}\). According to this view, the minimal impairment analysis is wide open to personal opinions and manipulations. However, this ignores the fact that the test examines whether there are less restrictive means *to achieve the desired objective*\(^{24}\). Surely, if a law is


designed to achieve some social goal, and infringes some rights along the way, it would be easy to suggest other laws that avoid the infringement but also – at least to some extent – prevent the achievement of the goal. This is not what the minimal impairment test is about. The idea is to examine whether the same goal can be achieved without gratuitous infringements. Judges cannot come up so easily with alternatives that will allow the (full) achievement of the goal with less restriction of rights. And if they can – there is no reason why the state should not use these alternatives.

At the other extreme, there is the view that the minimal impairment test offers determinate, almost objective answers. According to this view when the court examines alternative means political views are irrelevant to the analysis. The question is simply whether the means are too harsh, whether the infringement is gratuitous to some extent; it is a factual question that involves no personal politics.

Before examining this view, it is important to emphasize the difference between the minimal impairment and the proportionality (in the narrow sense) tests. One of the common mistakes with the application of the minimal impairment test concerns the examination of means that compromise the achievement of the objective. For purposes of the minimal impairment test, it is not enough that there are less restrictive means. These means must be good enough to achieve the goal in full. This is what this test is all about; if the same objective can be achieved with a lesser infringement of rights, this is what the state must choose. On the other hand, if the alternative cannot achieve the goal in full, the

25 See D.M. Beatty, *supra*, note 4, at 145; and see his “law and politics”, *supra*, note 13, at 143.
examination moves to its last stage (proportionality). Here — and only here — the alternative of compromising the objective is considered.

To illustrate, take the recent case of *Thomson Newspapers*26, dealing with a ban on the publication of opinion survey results during the final three days of a federal election campaign. The Court concluded that the objective, “guarding against the possible influence of inaccurate polls late in the election campaign by allowing for a period of criticism and scrutiny immediately prior to election day”, is a pressing and substantial one27. The Court went on to conclude, however, that the means chosen, a complete ban for the last three days before the election, impair the freedom of expression more than necessary. The less restrictive alternative that the Court pointed out to was “a mandatory disclosure of methodological information without a publication ban”28. But surely, this alternative cannot be as effective as a complete ban. Most people are not capable of understanding the statistical methodology of a survey. If there is not enough time for interested parties to reveal inaccuracies, we cannot count on the self-understanding of the readers to completely resolve the risk of misleading polls. The above-stated objective cannot be achieved *in full* with the alternative means suggested. Assuming that there are no other alternatives sufficient to achieve the objective in full (a ban for a shorter period, perhaps?), a correct application of the minimal impairment test must lead to the conclusion that the requirement of this test is met. The real question is about proportionality: if the alternative means are enough to achieve, say, 70% of the objective,


28 *Ibid.,* at par. 119.
the Court must decide what is worse in the circumstances, the loss of 30% of the public interest served by the law or the abridgement of the constitutional freedom of expression. In other words, the question is whether the importance of the goal (the achievement of it in full) is proportionate to the infringement of rights in the circumstances.

This understanding of the relationship between the two tests supports the view that the minimal impairment test involves no politics. The Court is not required to assess the importance of the objective, or the severity of the infringement, at this stage. The question is rather whether the alternative means suggested can be sufficient to the achievement of the full objective. It is an empirical question, and no doubt different judges can come to different conclusions on the matter. But there is no reason to believe that subjective views will play a significant role here. There is thus no reason to make changes to the minimal impairment test as defined in Oakes. What the courts must do to avoid subjectivity at this stage is simply to keep the test apart from the next one (proportionality).

10.5 Proportionality

The proportionality test – the last stage of section 1 analysis – has the potential of being an extremely important stage (as it already is to a large extent in the European Court’s jurisprudence\(^\text{29}\)). It requires the courts to “balance” between the deleterious and the salutary effects of the law. Even if the objective is important enough in principle, the means are rationally related to it and they are narrowly tailored – it is still possible that

\(^{29}\) See Beatty, *supra*, note 4, at 133 and on.
the infringement is too high a price to pay. It is still possible that in the specific circumstances the good of the law is not proportionate – cannot justify – its injurious effects.

To illustrate the importance of this stage, let us look again at the case of *Eldridge*³⁰. The Court tried to frame its decision in minimal impairment terms, but it was clearly a matter of proportionality³¹. The situation in which deaf persons cannot communicate with their doctors simply cannot be justified for the sole purpose of saving $150,000. Another example is the case of *Dudgeon*³²: The European Court of Human Rights found a sufficiently important objective behind a law prohibiting sodomy ("to protect particular sections of society as well as the moral ethos of society as a whole"³³), but this was not weighty enough to justify the prohibition with regard to consenting adults (older than 21). The infringement of rights was simply too much in these circumstances: "Such justifications as there are for retaining the law in force are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant"³⁴. It is all a matter of proportions, of balancing in the specific circumstances. The proportionality stage is so

---

³⁰ *Supra*, note 7.


³³ *Ibid.*, at par. 49.

³⁴ *Ibid.*, at par. 60.
important because only here these questions are considered. Only here are the costs of the law or government action taken into account.\footnote{See J. Cameron, “The Past, Present, and Future of Expressive Freedom Under the Charter” (1997), 35 Osgoode Hall L.J. 1, 66, cited with approval in Thomson Newspapers, \textit{supra}, note 26, at par. 125.}

As for the problem of subjectivity, however, it is as clear and strong as it can get at this stage. Judges are asked to assess the importance of the objective against the intensity of the right’s infringement; they have to decide what is more important in the circumstances. Surely, there is no objective way to appraise the values, rights and interests involved. The personal opinions and political preferences of the judge will necessarily influence the decision.

This can probably explain why the proportionality test became virtually meaningless in Canadian jurisprudence. Since its initiation in \textit{Oakes}, the test has never determined the outcome of a case in the Supreme Court.\footnote{See Hogg, \textit{supra}, note 19, at 35.12.} There were some rare occasions in which the Court maintained that the proportionality requirement was not met, but only as a supporting argument for an already determined decision.\footnote{\textit{Rocket v. Royal College of Dental Surgeons of Ontario}, [1990] 2 S.C.R. 232; \textit{R v. Laba}, [1994] 3 S.C.R. 965; \textit{Thomson Newspapers Co. v. Canada}, \textit{supra}, note 26 (all decided mainly on minimal impairment arguments).} This is not because the proportionality test is redundant, as some may think,\footnote{See Hogg, \textit{supra}, note 19, at 35.12. Hogg sees proportionality as a mere restatement of the first test (the examination of the objective). But the first test examines the objective in the abstract; only in the last stage does the court puts the cost – the infringement in the specific circumstances – against this objective.} but because judges are reluctant to be seen as balancing the good and bad of a law. When they want to uphold a law, they simply ignore this part of the \textit{Oakes} test, going through it without any meaningful examination. When they want to invalidate a law, they prefer to use the minimal
impairment test (which has a much more objective appearance), even when it means misusing it by founding the decision on insufficient alternatives.

None of these options is acceptable. Ignoring the proportionality requirement means that severe infringements can be justified for trivial objectives. It means rigidity without attention to context; disregard to the harshness of the limits in the circumstances. Demanding the use of less effective means as part of the minimal impairment stage is misleading; it means that the court simply performs a "balancing" (proportionality) analysis at this stage without acknowledging it.

In his efforts to limit subjectivity, David Beatty suggests a narrow understanding of proportionality. He sees this requirement as demanding that people will be treated equally; in other words, that people will be treated like others, similarly situated, have been treated elsewhere and/or in the past. But this formulation is insufficient. If others are treated badly, or were treated badly in the past, can it justify the same treatment in the present and future? A dictator will be justified, according to this formulation, in infringing the rights of all citizens equally. Moreover, there is no room for progress here. The test looks only at the past, not to the future. It can only protect the status quo, the consensus. The correction of past mistakes and the improvement of human rights' protection are impossible.

It seems to me that in order to provide the full and necessary protection for human rights, the requirement of proportionality must be kept as formulated by the Supreme Court. The Court just has to use it in practice. What about the problem of subjectivity, which is so obvious here? I would suggest some changes with regard to the burden and

---

39 Beatty, “law and politics”, supra, note 13, at 149.
standard of proof, which I believe can substantially limit the problem without removing the sting out of the test itself.

Experience teaches us that quite often, the legislature or the government are simply indifferent to the infringement of rights. They strive to achieve a certain goal, and they don’t care if along the way some constitutional rights — usually of minorities — are limited. In practice, they use means that are not the least restrictive, or ignore the lack of proportionality between the importance of the objective and the severity of the infringement. This is surely unjustified. Those who hold the power to make decisions for the rest of us must (at the very least) take the infringements of people’s fundamental rights into account. “One does not defer to ignorance, forgetfulness or insensitivity as if it were specialized, unique and unchallengeable expertise.” In terms of the subjectivity problem, these are the “easy” cases. In these cases the infringement is not grounded in policies or political opinions; it is based simply on disinterest in some constitutional rights. These cases are now more and more rare as far as the legislature’s work is concerned, since the constitutional angle is now usually examined in advance as part of the legislation process. But such cases still exist, especially when government actions and decisions are concerned. A different group of cases is those in which the rights were taken under consideration, those injured have expressed their objections, but the legislature (or government) decided that the goal is more important, and can justify the


infringement. These are the harder cases. It is still the duty of the Court to examine the decision and make an independent judgment with regard to the proportionality. But here the decision under examination is clearly based on a political choice, on the views of the people’s representatives.

My suggestion is to separate between these two groups of cases. The first group (state’s indifference) deserves the regular burden of proof, i.e. the burden must be on the state to show that the proportionality exists. In the second group of cases, however, when the law (or government action) is based on a deliberated and considerate policy, there should be a strong presumption in favour of the law; in other words, the burden should shift to the plaintiff to show that the law (or action) is clearly not proportional to the infringement.

The “strong presumption” does not mean that the law is presumed to be “right”, but only that it is based on deliberate political choices and therefore the court should be much more reluctant to interfere at the last stage. It must be remembered that the objective has already been found to be legitimate, and the means to be rationally related to it and narrowly tailored (least restrictive). With this background, it is reasonable to limit the interference at the last stage to cases of state’s indifference and cases in which the plaintiff can clearly show the lack of proportionality.

The suggestion can be formulated as follows: With regard to the last stage of the Oakes test, proportionality (in the narrow sense), the burden of proof would shift to the

---

42 For similar views with regard to the distinction between the cases see M. Jackman, “Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter” (1996), 34 Osgoode Hall L.J. 661, 666-9, 680; J.L. Hiebert, supra, note 5, at 124-5. And see, more generally, J. Vining, “Authority and
plaintiff to show that a law (or action) is *clearly not proportional* once the state has proved that (a) the infringement of rights was taken under consideration, i.e. the deleterious effects were considered and other interests were knowingly and deliberately preferred; and (b) the injured parties, or someone in their behalf, were able to comment on the effects of the law and express their objections.

When the state is indifferent to the infringement, or when the injured parties were not heard, the state will have a hard time proving the constitutionality of the law. It will still be possible to prove that the final outcome is in fact justified, but the burden will be on the state all the way. When the decision is political and deliberate and all relevant parties were heard, on the other hand, the state will have a much easier task. It will have to prove the above-mentioned requirements, but this would be easy: the protocols can show that the infringement was considered and that the objections were heard. Then the burden would shift to the plaintiff, who will have to rebut the strong presumption of constitutionality.

This suggested test would substantially reduce the situations in which subjective opinions are used to determine the outcome of a case. In the more political cases, the intervention of the courts would limit significantly. In these cases, the will of the elected branches will be frustrated only when judges can say that the law or action is *clearly not proportional*. And such a claim must, as of course, be somehow supported.

Responsibility: The Jurisprudence of Deference" (1991) 43 Administrative L.R. 135, 140 (courts regularly demand evidence that the agency has in fact responsibly considered the question fully and on the merits).
10.6 Conclusions

The first nine chapters of this thesis dealt with the concept of deference in constitutional law. I have argued that the main reason behind deference is the problem of subjectivity, and that deference only enhances this problem. I therefore concluded that the use of deference in constitutional law is unjustified.

This last chapter is somewhat an independent annex to the thesis. It starts from the understanding that subjectivity is indeed a problem that needs to be solved, that efforts must be made to separate law from politics. While the previous chapters have shown that deference is not the answer, this chapter makes a preliminary attempt towards the suggestion of an answer. The suggestion advanced here is far from being a general theory for the limitation of rights. It is based on the Oakes test and merely tries to improve it in terms of the above-mentioned problem.

Looking at the different stages of Oakes one after the other, we have seen that the problematic stages are the examination of the objective and proportionality (in the narrow sense). It is in these stages that we face a serious risk of decisions based on judges’ personal views. The two stages are closely related to each other: in the former the importance of the objective is examined in the abstract; in the latter the same objective is balanced against the infringement.

I have argued that when proportionality is given its full meaning, there is almost no need for the first examination. I have endorsed Professor Beatty’s view that any objective should be acceptable, with the exception of cases in which the goal itself is solely to limit a constitutional right. I suggested, however, to broaden this exception in two aspects: first, a law should be unconstitutional whenever there is a direct intention to limit a
constitutional right, even if this is not the only objective. Second, a law should be unconstitutional when the objective is to infringe constitutional/democratic values, even if not a specific constitutional right.

As for the last stage of the examination, proportionality, I have pointed out to the fact that it is not used in practice, probably because of the subjectivity problem. For a full protection of human rights, however, the actual use of this stage is necessary. In order to limit the problem of subjectivity, I suggested some changes with regard to the burden and standard of proof. When state authorities are simply indifferent to the infringement of rights, or when the injured parties are not given an opportunity to be heard, than the burden must stay on the state. But in all other cases, when the law (or government action) are based on a deliberated political choice, the burden should shift to the plaintiffs, and the standard should be higher: they must show that the salutary effects of the law (or action) are clearly not proportional to its deleterious effects.

The *Oakes* test, in itself, is a successful attempt to limit subjectivity. It turns the vague terms of section 1 into a framework for a principled and much more objective analysis. The suggestions made in this chapter are intended to improve the *Oakes* standards by going a bit further in the same direction. The Court will still have plenty of room to make a discretionary judgement, but the examination will be more structured and principled.

With *Oakes* changed as suggested, the risk of judges using their own political views to invalidate laws will narrow substantially. And, all in all, the constitutional protection of human rights can only improve.