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The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits

Adam M. Dodek[*]

I. INTRODUCTION

Few judges have attracted as much attention as Justice Bertha Wilson, whose tenure on the Supreme Court of Canada coincided with the Charter's first nine years (1982-1991).[1] Justice Wilson was considered the Court's most liberal member and the justice who consistently exercised the powers of judicial review more rigorously than any other justice.[2] In so doing, she became a lightning rod for criticism as well as a beacon for praise and hope. She has been called the Charter's "most fervent enforcer on the Court"[3] and she has also been accused of the most egregious violations of judicial impartiality.[4] While

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[*] Faculty of Law, Common Law Section, University of Ottawa. Thank you to Jonathan Bricker and Laura Johnson for providing invaluable research assistance and to Jamie Cameron for making her research materials on Justice Wilson available to me. Thank you to Robin Elliot, Dwight Newman and Jamie Cameron for reading earlier drafts of this paper and providing helpful comments.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"]. While the Charter came into effect on April 12, 1982, the Supreme Court of Canada did not hear and decide its first Charter case until 1984. See *Law Society of Upper Canada v. Skapinker*, [1984] S.C.J. No. 18, [1984] 1 S.C.R. 357 (S.C.C.).

[2] See David M. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990), at 59.

[3] See Andrée Lajoie & Henry Quillinan, "The Supreme Court Judges' Views of the Role of the Courts in the Application of the Charter" in Philip Bryden, Steven Davis & John Russell, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life* (Toronto: University of Toronto Press, 1994) 93, at 95.

[4] See Robert E. Hawkins & Robert I. Martin, "Democracy, Judging and Bertha Wilson" (1995) 45 McGill L.J. 1, at 49-56 (Part IV: Judicial Integrity) [hereinafter "'Democracy, Judging and Bertha Wilson'"] and Robert I. Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (Montreal and Kingston: McGill-Queen's University Press, 2003), at 83.

she was routinely branded as "judicial activist", such labels serve only to caricature Justice Wilson's jurisprudence rather than to illuminate it. During her relatively short time on the Supreme Court, Justice Wilson constructed an independent and distinct approach to the relationship between rights and their limits under the Charter, mostly through her statements regarding section 1 and her application of the *Oakes* test[5] and its larger framework.

Perhaps without much exaggeration, section 1 has been called "the single most important provision" in the Charter because it requires courts to "confront the legitimacy and scope of their mandate under the *Charter* to strike down or alter the laws of Parliament and the legislature".[6] Through her judgments and her speeches, Justice Wilson articulated a confident and coherent approach to section 1 and the new role of the judiciary under the Charter. In an article that she authored almost a decade after she stepped down from the nation's highest court, Justice Wilson expressed frustration with the continued questioning of the legitimacy of judicial review under the Charter. In the appropriately titled "We Didn't Volunteer", Justice Wilson argued that the people's duly elected representatives conferred upon the courts not just the right but the duty to frustrate the will of the majority through the process of judicial review. She expressed difficulty reconciling a policy of judicial deference with "a duty of judicial review designed to protect the entrenched rights of citizens".[7] "We Didn't Volunteer" reveals Justice Wilson's conception of the judicial role under the Charter which manifested itself in her approach to section 1.

To Justice Wilson, judicial review was a duty imposed on the courts by the Charter through a deliberate and high-profile democratic process.[8] Her conception of the judicial role under the Charter draws its sustenance from a strong historical claim about both the purpose and the process of rights entrenchment under the Charter. Justice Wilson's vision of the relationship between rights and their limits under the

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5 *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

6 John A. Terry, "Section 1: Controlling the *Oakes* Analysis" in Patrick J. Monahan, Eleanor A. Cronk & Neil Finkelstein, eds., *Law Society of Upper Canada Special Lectures 2001: Constitutional and Administrative Law* (Toronto: Irwin Law, 2002) 479, at 479.

7 Bertha Wilson, "We Didn't Volunteer" (April 1999) Policy Options 8, at 9.

8 *Id.*; and Bertha Wilson, "The Charter of Rights and Freedoms" (1985) 50 Sask. L. Rev. 169, at 173 (terming the judicial role in interpreting the Charter a "tremendous responsibility"). See also *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 497 (S.C.C.) [hereinafter "*Motor Vehicle Reference*"] (describing the Charter as a "new and onerous responsibility" entrusted to the courts).

Charter is an originalist one — one that is based on the assertion that the legitimacy of the judicial interpretive role finds its source in the events of 1980-1982 when the Charter was enacted. To characterize Justice Wilson, who is widely considered as one of the architects of contextual interpretation,[9] as an originalist may appear contradictory if not puzzling to some. However, as I demonstrate in this article, her conception of the appropriate relationship between rights and limits under the Charter should be considered originalist, properly understood.

This article has three parts in addition to this introduction. In Part II, I analyze Justice Wilson's conception of rights and limits under the Charter and demonstrate how it is anchored in a normative vision of the events of 1980-1982. I explain what I mean by "originalism" and how Justice Wilson's constitutional vision fits this description. Part III demonstrates how this originalist conception of the Charter permeated Justice Wilson's model of the relationship between rights and their limits, mostly, but not exclusively, through her section 1 jurisprudence. In this part, I distinguish between the multiple meanings of *Oakes* — the case, the framework and the test — and show how Justice Wilson focused on the much stricter *Oakes* framework while her colleagues were relaxing the *Oakes* test. This part further shows how Justice Wilson's fidelity to the strictness of the *Oakes* framework translated into her staunch insistence on section 1 as the sole source of limits on rights, her fixation on onus and evidence and her understanding of the relationship between section 1 and other sections of the Charter. Finally, this article ends in Part IV with a brief conclusion on the themes of constitutional duty and destiny.

II. MODERATE ORIGINALISM AND JUSTICE WILSON'S CHARTER

1. Understanding Originalism in Canada

Originalism is a dirty word in Canadian constitutional law. It finds few defenders in the academy and even fewer (if any) on the bench. Justice Wilson would have surely strongly resisted any attempt to characterize her as an originalist.[10] So how can I make the claim that her

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[9] See Shalin M. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability" (1999) 22 Dalhousie L.J. 126.

[10] *Cf.* Bertha Wilson, "The Making of a Constitution" (1988) 71 Judicature 334, at 336-37 [hereinafter "'The Making of a Constitution'"] (acknowledging criticisms of framers' intent and impliedly endorsing such criticisms).

view of the relationship between rights and their limits was based on an originalist conception of the Charter? It begins with the assertion of the failure to properly comprehend the term "originalism" and the inability to imagine the application of the doctrine in the Canadian context. Properly understood, originalism represents a valid but neglected constitutional vision and accurately describes Justice Wilson's conception of rights and limits under the Charter. By "originalism", I mean to include theories of interpretation that give some weight to various aspects of the historical dynamics involved in the making of the Charter. As I explain below, this is a broad definition that encompasses a spectrum of possible resort to historical sources in constitutional interpretation. Justice Wilson's originalism is a moderate variant of originalism.

Originalism is either ignored or denigrated in Canada. While American scholars have developed a rich and sometimes nuanced originalist scholarship,[11] in Canada academic examination of the subject is sparse.[12] Moreover, in Canada there is a tendency to simply equate originalism with "framers' intent" — the strand of originalism which holds that the subjective intentions of the framers of the Constitution should be the authoritative normative source for the interpretation of its substantive provisions. This is further equated with the widely discredited "frozen rights theory" under the *Canadian Bill of Rights.*[13] Under this dominant interpretative theory of the bill, the rights protected by the *Canadian Bill of Rights* were only those that were in existence at the time that the bill was enacted, *i.e.*, 1960. This led critics to label it "the frozen rights theory" and helped fuel the push for a constitutional bill of rights which would both consist of and be capable of growth

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[11] For a recent intellectual and political history of originalism in the United States, see Jonathan O'Neil, *Originalism in American Law and Politics: A Constitutional History* (Baltimore & London: Johns Hopkins University Press, 2005).

[12] For the few articles that touch on originalism, see Peter W. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall L.J. 87; F.L. Morton & Rainer Knopff, "Permanence and Change in a Written Constitution: The 'Living Tree' Doctrine and the Charter of Rights" (1990) 1 S.C.L.R. (2d) 533; Robin Elliot, "*The Charter Revolution and the Court Party:* Sound Critical Analysis or Blinkered Political Polemic?" (2002) 35 U.B.C. L. Rev. 271; M. Stephens, "Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter" (2002) 13 N.J.C.L. 183; Grant Huscroft, "A Constitutional 'Work in Progress'? The Charter and the Limits of Progressive Interpretation" (2004) 23 S.C.L.R. (2d) 413; Justice Ian Binnie, "Constitutional Interpretation and Original Intent" (2004) 23 S.C.L.R. (2d) 345; and Sujit Choudhry, "The Lochner Era and Comparative Constitutionalism" (2004) 2(1) International Journal of Constitutional Law 1, at 16-27 (reviewing the legislative drafting around s. 7).

[13] S.C. 1960, c. 44.

beyond the rights frozen in the 1960 *Canadian Bill of Rights.* Framers' intent was associated with the frozen rights theory because it too focuses on the particular meaning ascribed to specific rights at their point of enactment. The Supreme Court explicitly rejected the frozen rights theory for the interpretation of the Charter.[14]

Justice Wilson explicitly disavowed framers' intent and embraced a purposive approach to constitutional interpretation consistent with the living tree doctrine which sees the Constitution as "capable of growth and expansion within its natural limits".[15] The curt dismissal by Justice Lamer (as he then was) of the intent of the framers in the *Motor Vehicle Reference*[16] together with the talismanic invocation of the living tree doctrine has effectively silenced any discussion of originalism in Canada since 1985. Since the *Motor Vehicle Reference*, the Supreme Court has continued to make reference to the intent of the framers, but such references have been episodic, inconsistent and unpredictable.[17] Justice Lamer's dismissal of framers' intent in *Motor Vehicle Reference* occurred at the same time as a heated and vibrant debate on originalism was being launched in the United States.[18] So while the debate on

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[14] See *Law Society of Upper Canada v. Skapinker*, *supra*, note 1, at 365-66; *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at 209 (S.C.C.) [hereinafter "*Singh*"]; *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 342-44 (S.C.C.); and *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at 1326-27 (S.C.C.). See Tanya Lee, "Justice Wilson and the Charter: An Engagement to Keep" (2008) 41 S.C.L.R. (2d) 263 (for discussion of casting off the constraint of the Bill of Rights in interpreting the Charter).

[15] See "The Making of a Constitution", *supra*, note 10, at 336-38, citing *Edwards v. Canada (Attorney General)*, [1929] J.C.J. No. 2, [1930] A.C. 124, and 126 (J.C.P.C.), *per* Lord Sankey.

[16] *Motor Vehicle Reference*, *supra*, note 8.

[17] See, *e.g.*, *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at para. 106 (S.C.C.); *R. v. Prosper*, [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236, at para. 30 (S.C.C.); *R. v. Finta*, [1994] S.C.J. No. 26, [1994] 1 S.C.R. 701, at para. 107 (S.C.C.); *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] S.C.J. No. 99, [1993] 3 S.C.R. 327, at para. 107 (S.C.C.); *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at 340-41 (S.C.C.); *United States of America v. Cotroni*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469, at 1479-80 (S.C.C.); *R. v. Morgentaler,* [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 143-44 (S.C.C.); *Reference re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] S.C.J. No. 44, [1987] 1 S.C.R. 1148, at 1163 (S.C.C.); and *Reference re Public Service Employment Relations Act* (*Alta.)*, [1987] S.C.J. No.10, [1987] 1 S.C.R. 313 at 412-13 (S.C.C.).

[18] The time during which the *Motor Vehicle Reference* was under reserve coincided with the rise of originalism as both a political issue and a constitutional theory of interpretation through notable speeches by President Ronald Reagan's Attorney General Edwin Meese III and Judge Robert Bork, and a public response by Justice William Brennan. See generally Steven G. Calabresi, "A Critical Introduction to the Originalism Debate" in Steven G. Calabresi, ed., *Originalism: A Quarter-Century of Debate* (Washington: Regnery Publishing, Inc. 2007) 1, at 1-17. For the text of the referenced speeches see Calabresi, *Originalism: A Quarter Century of Debate*, *id.*, at 47 *et seq*.

originalism was opening up and heating up in the United States, it was being closed down and quieted in Canada. As a result, Canadians have failed or refused to explore the possibilities of originalism in a Canadian context.[19]

Originalism and framers' intent are not coterminous; the latter is but one subset of the former. In its strictest form, originalism professes "the binding authority of the text of the Constitution or the intention of its adopters".[20] However, commentators often distinguish between stricter and looser or more moderate forms of originalism. The loose form views originalism as an informed point of departure for a contemporary decision, whereas the strict form insists that the original meaning should

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(Speech by Attorney General Edwin Meese III, before the American Bar Association, July 9, 1985), 55 *et seq*. (Speech by Justice William J. Brennan, Jr., at Georgetown University, October 12, 1985), 83 *et seq*. (Speech by Judge Robert H. Bork at the University of San Diego Law School, November 18, 1985). The nomination of Judge Bork to the U.S. Supreme Court ignited a public and academic debate over originalism. See, *e.g.*, Jonathan O'Neil, *Originalism in American Law and Politics: A Constitutional History*, *supra*, note 11, at 161-89 (chapter on Robert Bork and the Trial of Originalism).

[19] This is not the place for a full analysis of the contextual differences between concerns about framers' intent in the United States and Canada. However, several critical distinctions may be notable. First, framers' intent is often criticized on the normative grounds that the American polity should not be ruled by the intentions of a long-dead class of men. Given the recentness of the enactment of the Charter, Canadian jurists cannot simply dismiss framers' intent on this basis. Moreover, the recentness of the Charter supports framers' intent in Canada and a normative argument must be presented as to why the intent of the framers should be ignored in Canada. Second, framers' intent is often criticized in the United States on empirical grounds, for the lack of authoritative records of the Constitutional Convention at Philadelphia which produced the Constitution. No such problem exists in Canada as we are awash in official and unofficial records of the various conferences, the proceedings before the Joint Committee, debates in Parliament and provincial legislatures, *etc*. See also Lorraine E. Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002) 6 Review of Constitutional Studies 119, at 156 n. 95 (listing additional factors) [hereinafter "'Canada's *Charter of Rights*: Paradigm Lost?'"]. Tanya Lee has articulated an interesting explanation for the Supreme Court of Canada's disregard for framers' intent. She states that it "likely sprang from a prosaic cause". According to Lee,

> [w]hen the Americans speak of framers' intent, they speak of those who drafted the American *Bill of Rights*, of revolutionary heroes, of Madison and Jefferson. In contrast, the Charter was the product of its age, of its champions, such as Prime Minister Trudeau, but also of public participation . . ., and political brinkmanship. Unlike the American founding fathers, the framers of the Charter were alive and kicking and available for comment. However, if they had been called as witnesses, the Supreme Court likely would have seen these individuals, despite their outstanding contributions, as contemporary practitioners of the rough art of politics, not as golden historical figures. Perfection is more easily perceived from afar.

Tanya Lee, "Justice Wilson and the Charter: An Engagement to Keep" (2008) 41 S.C.L.R. (2d) 263.

[20] Paul Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 Boston U. L. Rev. 204, at 204 [hereinafter "'The Misconceived Quest'"].

prevail.[21] Originalism can operate on a very specific level, examining the meaning of specific constitutional terms, or it can function on a higher level of generality. Justice Wilson's originalism is of this moderate variant, which focuses on the original understanding of the Charter at a higher level of abstraction.

There are various forms of originalism. The terms "original meaning", "original intention" and "original understanding" are often used interchangeably in an imprecise manner. However, as explained by Pulitzer Prize-winning historian Jack Rakove, they each have distinct meanings. *Original meaning* refers to the attempt to recover the literal wording — the language — of the many provisions of the Constitution. *Original intent* refers to those actors whose decisions produced the constitutional language whose meaning is at issue, *i.e.*, the framers. *Original understanding* is a broader term which covers the impressions and interpretations of the Constitution formed by its original readers — the citizens, polemicists and convention delegates who participated one way or another in ratification.[22] On a strict view of originalism, the specific meaning, intent or understanding should be authoritative because it provides the best democratic licence for judicial review under a written constitution. On a more moderate view, such originalist conceptions are entitled to some weight in constitutional interpretation but are not authoritative.

As critics of strict originalism have pointed out, framers' intent has two components. Framers' *substantive intent* consists of the views of the framers regarding the meaning of particular constitutional provisions that they enacted. Their *interpretive intent* refers to how those substantive understandings are interpreted and applied by the courts.[23] There is no necessary connection between substantive intent originalism and interpretative intent originalism. The framers of a constitution may have very specific views regarding the content of particular constitutional provisions but not intend that those views be authoritative and conclusive for purposes of constitutional interpretation.[24] This point is

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[21] See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1997), at 9 [hereinafter "*Original Meanings*"]. On Brest's different forms of originalism, see *id.*, at 204-205.

[22] *Original Meanings*, *id*., at 7-8.

[23] See Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), at 77 [hereinafter "*Politics and the Constitution*"], citing "The Misconceived Quest", *supra*, note 20, at 205-16. See also H. Powell, "The Original Understanding of Original Intent" (1985) 98 Harv. L. Rev. 885.

[24] See "The Misconceived Quest", *id.*, cited by *Politics and the Constitution*, *id.*

critical for differentiating between originalism in the United States and Canada because we are much closer in time to the original events. Patrick Monahan's conclusion regarding the record of the view of the drafters is that they did not intend that their substantive views on the content of particular provisions of the Charter would be determinative of their constitutional meaning. Instead, Monahan contends that the interpretive intent of the framers can be described in terms of a "modified judicial realism" based on their analysis of how constitutional interpretation had developed in the United States.[25] In the Canadian context, progressive interpretation in the form of "the living tree doctrine" is consistent with the interpretative intent of the framers.[26] The clear intention of those who framed the Charter was that the courts break from the frozen rights theory that had marginalized the Bill of Rights. Justice Wilson's constitutional vision was originalist in this sense of professing fidelity to this interpretive intent of the framers. It is therefore not at odds to claim Justice Wilson as an originalist at the same time as she was a proponent of purposive and contextual interpretation.

Justice Wilson's originalism is of the moderate variant. It does not require that judges be bound by the specific meaning of the document for those who gave it legal authority, but rather that they should be guided by the original understanding of the Charter at a higher level of abstraction. By this I mean "the motives, expectations, fears, and aspirations that surrounded the enactment of the document in 1982".[27] This includes both the written record and the general context surrounding the enactment of the Charter. The written record includes the explicit discussion of the Charter found in the proceedings before Parliament, provincial legislatures and at the various federal-provincial meetings.[28] The context includes the surrounding assumptions and concerns that informed the manner in which the framers and ratifiers thought about the issues in the Charter.[29] Thus, the American Constitution can only be properly understood in contrast to the failure of

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25 *Politics and the Constitution*, *id.*, at 78.

26 See Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Toronto: Thomson Carswell, 2007+) at 60.1(f) [hereinafter "*Constitutional Law*"] and *Politics and the Constitution*, *id.*, at 78-82.

27 Patrick J. Monahan, "The Charter Then and Now", in Philip Bryden, Steven Davis & John Russell, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life* (Toronto: University of Toronto Press, 1994) 105, at 106 [hereinafter "'The Charter Then and Now'"].

28 *Cf. Original Meanings*, *supra*, note 21, at 12.

29 *Id.*

the Articles of Confederation.[30] Similarly, the Charter can only be comprehended in contradistinction to the experience under the *Canadian Bill of Rights* where "[j]udicial intransigence to that statutory instrument, in the purported service of legislative sovereignty, paved the way for the constitutional entrenchment of rights."[31] These elements are part of the context of an originalist conception of the Charter that explains Justice Wilson's jurisprudence on the relationship between rights and their limits under the Charter.

This constitutional context forms the foundation for Justice Wilson's originalist conception of the Charter. It is based on a particular interpretation of the historical events surrounding the enactment of the Charter which is contested. Critics of judicial review in the Canadian context draw heavily on American arguments for judicial restraint and against judicial review. However, the more that they do so, the weaker their protestations against judicial review under the Charter become. There are several critical distinctions between judicial review in the United States and Canada which limit the transfer north of anti-judicial review arguments from south of the border. First, the American Constitution is silent on judicial review whereas the Canadian Constitution explicitly sanctions it.[32] Second, the Charter was enacted against the backdrop of the debate over the legitimacy of judicial review and judicial power in the United States and the liberal decisions of the Warren Court. Third, the Charter contains a legislative override of judicial review whereas the American Constitution does not. For these and other reasons, interpretations of the events of 1982 which seek to preserve parliamentary sovereignty and tether the power of judicial review are problematic. Justice Wilson's originalist conception of the Charter is based on a more solid foundation. Her constitutional vision contains a democratic conception of originalism that goes beyond the Charter's drafters and the

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[30] *Cf. Original Meanings*, *id*., at 17 (stating that "[t]he only understanding we can be entirely confident that the majority of the ratifiers shared was that they were indeed deciding whether the Constitution would 'form a more perfect union' than the Articles of Confederation").

[31] Lorraine E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 S.C.L.R. 469, at 471 [hereinafter "Section One and the Charter"].

[32] See s. 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (providing that "[t]he 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").

framers to include the participants in the public debate between 1980 and 1982.[33]

2. Justice Wilson's Vision of the Charter

Justice Wilson's view of the relationship between rights and their limits flows directly from her larger vision of the Charter, which is rooted in the twin concepts of liberalism and democracy. While Justice Wilson's fidelity to a liberal vision of rights is widely accepted, the proposition that her vision of the Charter is a democratic one is strenuously contested.[34] Both elements are originalist in the sense of being grounded in assertions regarding the context for the Charter's enactment. On liberalism, she explained her view in a memorandum to Chief Justice Dickson in one case: "I tend to see the Charter as an anti-majoritarian document and the role of the Court to ensure that minorities are not sacrificed to the majority will."[35] Her liberalism emphasized personal autonomy, revealed in her explanation that "[the Charter tells] us that there will be rights. These rights erect around each individual an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of these

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[33] Whether Justice Wilson's originalist conception is correct as a question of history is a matter that must be left for another day, given the subsequent academic neglect of the events of 1980-1982. Robert Hawkins and Robert Martin argued strongly that Justice Wilson's expansive view of the role of the courts under the Charter contradicts the view of the framers. See "Democracy, Judging and Bertha Wilson", *supra*, note 4, at 29-33. The authors take a more narrow view of originalism than I do in this article, considering only the views of the politicians and government officials who were involved in the drafting of the Charter and excluding the views and the participation of the Canadians who appeared before the Joint Committee. The authors also fail to consider the significance of the changes that occurred to the text of s. 1. In fact, they consider the original federal draft of August 22, 1980 to be "more or less [s. 1's] current form". *Id.*, at 31. This is a significant oversight which undercuts their argument. Further, Justice Wilson's originalist view of the Charter is supported by Peter Hogg, who states that "in the case of Canada's Charter of Rights, I think it is clear as a matter of fact that the original understanding of many of the framers of 1982 was not that the Charter rights should be frozen in the shape that seemed good in 1982 but rather that the rights should be subject to changing judicial interpretations over time." *Constitutional Law*, *supra*, note 26, at 36.8(a). See also *Politics and the Constitution*, *supra*, note 23, at 78. To the extent that I cite sources that confirm Justice Wilson's assumptions or assertions, it is to show that her views have some support, not that they are necessarily correct as a matter of historical interpretatation.

[34] See, *e.g.*, "Democracy, Judging and Bertha Wilson", *supra*, note 4.

[35] Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: Osgoode Society for Canadian Legal History, 2003), at 409. The case was *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

fences."[36] This understanding of the purpose of the Charter, which privileges personal autonomy, is contestable and Justice Wilson has been criticized for failing to recognize and account for collectivist elements in the Charter.[37]

The democratic component of Justice Wilson's vision is more complicated and more disputed since her judgments have often been labelled "anti-democratic".[38] If one conceives of democracy as simply majoritarian rule and a democratic vision of the judicial role as deference to the expression of majoritarian preferences through the legislative process, then claiming Justice Wilson as a democrat is a lost cause. However, judicial deference to the will of the majority does not accord with the constitutional project, either. As is generally recognized, there is a tension between majoritarian democracy and the constitutionalization of rights.[39] Justice Wilson's democratic vision of the Charter may itself appear paradoxical but I attempt to explain it below.

Justice Wilson saw the enactment of the Charter as a national political choice. In her view, Canada's democratically elected Parliament had entrusted the courts with a mission — to uphold the Charter — and the courts had a duty to fulfil that mission. She saw the Charter as a transformative enterprise in the sense of its potential impact both on the institutions of government (the legislature, the executive and the courts) and on the lives of ordinary Canadians.[40] To Justice Wilson, the legitimacy of judicial review under the Charter was a settled question. In her mind, the traditional argument against the legitimacy of judicial review based on the unrepresentative character of the judiciary was conclusively settled by the enactment of the Charter. In her words, the

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[36] Wilson, *supra*, note 10, at 338. Justice Wilson later incorporated these words almost verbatim into her opinion in *R. v. Morgentaler*, *supra*, note 17, at 164.

[37] See Robin M. Elliot, "The Supreme Court of Canada and Section 1 — The Erosion of the Common Front" (1987) 12 Queen's L.J. 277, at 281. To the extent that her emphasis on personal autonomy clashed with the collectivist goals of s. 15, this tension has not been adequately reconciled by Justice Wilson and is beyond the scope of this article. See also *McKinney v. University of Guelph*, *supra*, note 17, at 356 (*per* Wilson J.) (stating that in Canada, freedom is not co-extensive with the absence of government; rather, freedom has often required the intervention and protection of government against private action).

[38] See "Democracy, Judging and Bertha Wilson", *supra*, note 4, especially at 57-58.

[39] See generally Christopher P. Manfredi, *Judicial Power and the Charter: The Paradox of Liberal Constitutionalism*, 2d ed. (Toronto: Oxford University Press, 2001), at xii-xiii [hereinafter "*Judicial Power and the Charter*"] (explaining the tension between energetic self-government and individual liberty).

[40] That the Charter was intended to have transformative effects is again supported by the history of the making of the Charter, most notably by the inclusion of a three-year waiting period before s. 15 of the Charter was to come into effect.

government "bit the bullet, so to speak, in 1982 when it gave the courts the power to review legislation to make sure it complied with the constitution".[41] In less colloquial terms, she adopted the words of Justice Lamer (as he then was) in the *Motor Vehicle Reference*:

> . . . It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.[42]

According to this view, the critics of judicial review took an ahistorical if not dehistorical view, neglecting the historical context for the Charter: the failure of the Bill of Rights, the hearings before the Joint Committee, the changes to section 1, the strengthening of the equality guarantee, *etc.* By the time she had stepped down from the Court, Justice Wilson was more blunt in expressing her position, stating that the time had come "to give the lie to some political commentators who still maintain that the advent of the Charter was a colossal 'power grab' by the courts".[43] She made the democratic claim that "Canadians decided to charge the courts with the onerous responsibility for reviewing legislative and executive action for compliance with the constitution" through a "widely accepted constitutional process".[44] All of this was done with "full knowledge of the American experience" and of the criticism of the power of the courts and the debate over judicial review.[45] This view finds support in leading members of the academy[46] and was taken as an article of faith by Justice Wilson.

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[41] Bertha Wilson, "Human Rights and the Courts" (Seminar on the Functioning of Government: The Canadian Experience, Ottawa, May 30, 1991), in *Speeches Delivered by the Honourable Bertha Wilson 1976-1991* (Ottawa: Supreme Court of Canada, 1992), 742, at 744 [hereinafter "*Speeches*"]. Professor Hogg notes that "[t]he courts have assumed that the constitutional status of the Charter resolves their former uncertainty as to the legitimacy of judicial review" under the Bill of Rights. *Constitutional Law*, *supra*, note 26, at 35.5.

[42] *Motor Vehicle Reference*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 497 (S.C.C.), quoted by Bertha Wilson, "Law and Policy in a Court of Last Resort" in Frank E. McArdle, ed., *The Cambridge Lectures* (Montreal: Canadian Institute for Advanced Legal Studies, 1990) 219, at 223.

[43] Bertha Wilson, "We Didn't Volunteer" (April 1999) Policy Options 8, at 9.

[44] *Id*.

[45] *Id*.

[46] See, *e.g*., Peter W. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall L.J. 87, at 88; "Section One and the Charter", *supra*, note 31.

Justice Wilson's vision accounts for and credits the role of the many Canadians who appeared before the Special Joint Committee of the Senate and the House of Commons on the Constitution ("Joint Committee") in the fall of 1980 through the winter of 1981. It is contrasted with a more cynical view which dismisses the Joint Committee as the political handiwork of the federal government designed to strengthen its hand against the recalcitrant provinces.[47] Justice Wilson's vision of the Charter implicitly recognizes and values the multiplicity of voices that contributed to the enactment (or "the framing") of the Charter. Whatever the government's intention in establishing the Joint Committee, it is clear that the parliamentary hearings took on a dynamic of their own. As described in one of the popular contemporary accounts of those events:

> In the fall of 1980, in a chandeliered ballroom in Parliament's West Block, the Liberal government lost control of its constitutional strategy. The centerpiece — the candy-coloured charter of rights and freedoms that was to be the prize in Trudeau's reform package — was wrenched from the cool hands of the government planners, and taken over by ordinary Canadians and parliamentary backbenchers.[48]

The participation of many Canadians before the Joint Committee led to critical changes to the text of several provisions of the Charter, including the limitations clause. Justice Wilson's conception of the relationship between rights and limits can only be appreciated against this background.

The strictness of Justice Wilson's approach to section 1 can be directly tied to the proceedings and the product of the Joint Committee process. In the proceedings before the Joint Committee, the limitations clause became the focus of much attack; it was the most criticized section of the Charter.[49] As detailed by key participants in the constitutional debates of those years, the original limitations clause from the federal government's August 1980 draft of the Charter was clearly "designed to encourage judicial deference to legislative choices even

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47 For examples of this view see, *e.g.*, *Judicial Power and the Charter*, *supra*, note 39, at xiv.

48 Robert Sheppard & Michael Valpy, *The National Deal* (Toronto: Fleet Books, 1982), at 135 [hereinafter "*The National Deal*"]. But see Edward McWhinney, *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982), at 57 [hereinafter "*Canada and the Constitution*"] (asserting that the testimony before the Joint Committee had little impact).

49 *The National Deal*, *id.*, at 149.

though they affected civil liberties".[50] Such a limitations clause appealed to those who opposed the constitutional entrenchment of the Charter as, in some ways, superior even to a notwithstanding clause.[51] The text of the limitations clause that was referred to the Joint Committee in October 1980 provided:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.[52]

This text was viewed as a further concession to the interests of the provinces "in building into the charter as large an element of judicial deference to legislative choices as possible".[53] This was the first public draft of the Charter and of section 1 and "[w]omen's groups, civil liberties organizations, ethnic and racial minorities, the disabled community, and even Canada's human rights commissioner all urged the federal government to go back to the drawing-board and produce a Charter that would have real teeth".[54]

The result of their successful campaign produced changes to the Charter, including the limitations clause, which was redrafted to include the text that is now enshrined in section 1.[55] Notably, the phrases "prescribed by law" and "demonstrably justified" were added and the reference to "a parliamentary system of government" was dropped. The phrase "demonstrably justified" reflected the concerns of witnesses before the Joint Committee that the burden of proof of limiting rights

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[50] Roy Romanow, John Whyte & Howard Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984), at 243 [hereinafter "*Canada … Notwithstanding*"].

[51] *Id.*

[52] Draft of October 1980, reproduced as "Appendix A (Proposed Resolution — First Draft)" in McWhinney, *supra*, note 48, at 142. Appendix A is also contained in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. II (Toronto: McGraw-Hill Ryerson Ltd., 1989) 743, at 745-46 [hereinafter "*Canada's Constitution Act 1982*"].

[53] *Canada … Notwithstanding*, *supra*, note 50, at 245.

[54] "The Charter Then and Now", *supra*, note 27, at 109.

[55] See Peter W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), at 650 (noting that the change to s. 1 tended to narrow the focus of the limitation clause and by indirect means to broaden the rights guarantees); Joseph E. Magnet, *Constitutional Law of Canada* (Toronto: Carswell, 1983), at 663 (noting that the original draft of s. 1 was unacceptable and was redrafted); and Timothy J. Christian, "The Limitation of Liberty: A Consideration of Section 1 of the Charter of Rights and Freedoms" (1982) (Charter Edition) U.B.C. L. Rev. 105, at 107 [hereinafter "'The Limitation of Liberty'"].

should properly rest on the government.[56] Thus, when then-Minister of Justice Jean Chrétien returned before the Committee in his "we have listened and we have heard you" testimony on January 12, 1981 in which he tabled an amended version of the Charter with the Committee, Chrétien declared:

> You have been told over and over again that Canadians want a strong Charter . . . You have been told by many witnesses that Canadians are not satisfied with the type of compromise which weakens the effectiveness of constitutional protection of human rights and freedoms. I accept the legitimacy of that criticism.[57]

Chrétien claimed that the proposed new wording for section 1 was even more stringent than that suggested by some of the leading critics who appeared as witnesses before the Joint Committee.[58] The explanatory notes to the new, more robust section 1 stated:

> The proposed amendment would narrow the limits that could be placed on the rights and freedoms guaranteed in the Charter. For a right to be limited, the limitation would be required to be prescribed by law and to be both reasonable and capable of being demonstrably justified.[59]

In the words of some of the leading participants in the events of 1980-1982 who would clearly be considered framers, "[i]f these changes to section 1 were applied literally, claims by governments that their limitation on individual rights were reasonable would face a tough test."[60]

In addition, the inclusion of the notwithstanding clause played an important role in Justice Wilson's democratic vision, although it operated mostly in the background of her constitutional mindset. Writing in 1988 while still on the Court, Justice Wilson hedged her position on the notwithstanding clause, stating that it would be hard to predict the impact of section 33 on Charter interpretation:

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56 *The National Deal*, *supra*, note 48, at 149-50.

57 Proceedings of the Special Joint Committee of the Senate and the House of Commons on the Constitution, January 12, 1981, 36:10 (Testimony of Minister of Justice Jean Chrétien).

58 *Id.*, at 36:11.

59 See Explanatory Notes to January 12, 1981 draft of the Charter, contained in Robin Elliot, "Interpreting the Charter — Use of Earlier Versions as an Aid" (1982) (Charter Edition) U.B.C. L. Rev. 11, at 24. For side-by-side comparison of the two versions of s. 1, see *Canada's Constitution Act 1982*, *supra*, note 52, at 766.

60 *Canada … Notwithstanding*, *supra*, note 50, at 251.

> Perhaps Canada's courts will be more venturesome in finding that inviolable human rights exist, secure in the knowledge that their word is less final than their United States' counterparts. Perhaps they will be less venturesome, feeling that their authority as a Court will be eroded by frequent governmental resort to the notwithstanding clause.[61]

A decade later, after she had retired from the Court, Justice Wilson was less restrained in her comments. In "We Didn't Volunteer", she articulated a robust role for the courts, grounded in the legitimacy of the democratic process that produced the Charter. Section 33 fit into this scheme by providing a mechanism for preserving parliamentary sovereignty if and when governments have the political will to use it.[62]

In the formative years of the Charter which coincided with Justice Wilson's tenure on the Court, the existence of the notwithstanding mechanism loomed large in constitutional thinking. After it was invoked by the Quebec government following the Supreme Court of Canada's decision in December 1988 in the *Ford* case,[63] the notwithstanding clause quickly became politically illegitimate outside of Quebec.[64] However, the notwithstanding clause was part of the mix that contributed to Justice Wilson's constitutional thinking while she developed and articulated her thoughts about the relationship between rights and their limits under the Charter.

The drafting process was "a battleground" between pro and anti-Charter forces and the Joint Committee process produced significant changes to strengthen section 1.[65] It was widely recognized, even by its critics, that the Charter would profoundly alter the existing relationship between courts and legislatures and notably alter the role of the Supreme Court.[66] The efforts at the Joint Committee and afterwards to strengthen the Charter in 1980-1982 were important in sending a message to the

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[61] Bertha Wilson, "The Making of a Constitution" (April-May, 1988) 71:6 Judicature 334, at 336.

[62] See Bertha Wilson, "We Didn't Volunteer" (April 1999) Policy Options 8, at 11.

[63] *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.).

[64] Arguably in the 20 years since *Ford*, *id*., a convention has developed against the use of the notwithstanding clause. On the rise and decline of the notwithstanding clause, see *Judicial Power and the Charter*, *supra*, note 39, at 181-88.

[65] See Lorraine E. Weinrib, Canada's *Charter of Rights*: Paradigm Lost? (2002) 6 Review of Constitutional Studies 119, at 136, 139.

[66] See, *e.g.*, *Canada and the Constitution*, *supra*, note 48, at ix (criticizing the federal government for failing to be more explicit in this respect). See generally Peter W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), at 652-53 (noting that a major effect of the Charter would be an expansion of judicial review and that this responsibility would be "a formidable task" for the courts).

judiciary about the nature of the Charter as a rights-protecting document to be taken seriously.[67] Justice Wilson not only heard this message but she served as its most vocal proponent.

III. CHAMPION OF THE *OAKES* FRAMEWORK

1. Section 1 as the Battleground for the Charter's Soul

Section 1 has become the focus of attention for much of the debate over the appropriate role of the courts under the Charter. It is critical to Hogg and Bushell's dialogue theory,[68] which has dominated discussions about constitutional interpretation in Canada since 1997 and succeeded in capturing the Court's attention as well.[69] The importance of the limitations clause was recognized during the drafting process before the Joint Committee and has rightly been called "the pivotal provision in the Charter".[70] Writing the year after *Oakes*, Robin Elliot correctly predicted

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[67] See "The Charter Then and Now", in Philip Bryden, Steven Davis & John Russell, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life* (Toronto: University of Toronto Press, 1994) 105, at 119.

[68] See Peter W. Hogg & Alison A. Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75. Hogg and Bushell updated their theory in 2007. See Peter W. Hogg, Alison A. Bushell Thornton & Wade K. Wright, "Charter Dialogue Revisited — or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall L.J. 1.

[69] Hogg and Bushell's dialogue theory spawned a cottage industry of commentary. See F.L. Morton, "Dialogue or Monologue?" (1999) 20(3) Policy Options 23; Janet L. Hiebert, "Why Must a Bill of Rights Be a Contest of Political and Judicial Wills?" (1999) 10 Public Law Review 22; Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513; Peter W. Hogg & Alison A. Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall L.J. 529. To commemorate the 10th anniversary of the Hogg and Bushell article, the Osgoode Hall Law Journal dedicated a special edition to "Charter Dialogue: Ten Years Later" led off by Peter W. Hogg, Allison A. Bushell & Wade K. Wright, "Charter Dialogue Revisited — Or "'Much Ado About Metaphors'", *id*. This volume includes commentaries by Richard Haigh and Michael Sobkin, Christopher Manfredi, Carissima Mathen, Andrew Petter and Kent Roach, as well as a reply from Hogg, Bushell and Wright. The Supreme Court of Canada has embraced the concept of dialogue. See, *e.g.*, *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at paras. 137-39, 178 (S.C.C.); *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3, at para. 328 (S.C.C.); *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1990] S.C.J. No. 24, [1999] 2 S.C.R. 203, at para. 116 (S.C.C.); *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at paras. 20, 57, 125 (S.C.C.); *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R 1120, at para. 268 (S.C.C.); *Bell ExpressVu v. Rex*, [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559, at paras. 65-66 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827, at para. 37 (S.C.C.).

[70] Robin M. Elliot, "The Supreme Court of Canada and Section 1 — The Erosion of the Common Front" (1987) 12 Queen's L.J. 277, at 279 [hereinafter "'The Supreme Court and Section 1'"]. See also "Paradigm Lost?"), *supra*, note 65, at 120 (terming s. 1 the "centerpiece of the new constitutional arrangement").

that section 1 was "likely to become the focal point of debate about the proper scope of judicial review".[71] In more dramatic terms, one commentator writing in 1982 prophesized that section 1 was "the tool with which the fragile freedoms contained in the Charter . . . will be cultivated or nipped in the bud".[72] Section 1 is a window into the judicial soul. Its interpretation not only reveals the impact of the Charter on other branches of government but also tells us "about the Court itself and how it perceives its role under the Charter".[73] Justice Wilson correctly identified section 1 as the fault line between liberal and conservative approaches to the role of the courts. She saw the essential question as being "when is it permissible to sacrifice individual or minority rights in order to achieve what is perceived by government [*i.e.*, the majority] to be the common good?"[74] Justice Wilson clearly saw section 1 as the vehicle for the Court to carry out its mission under the Charter.

The Supreme Court's development of the *Oakes* test and its subsequent adaptation or relaxation in cases such as *Edwards Books*[75] and *Irwin Toy*[76] are well documented and not repeated here.[77] For our purposes, we are interested in analyzing Justice Wilson's role in this process as it sheds light on her view of the relationship between rights and their limits under the Charter. Her position was clear: she saw other members of the Court desiring to replace the strict standard of review under *Oakes* with a much more deferential standard of "reasonableness".[78] This she was unwilling to do and she was prepared to and did fight it every step of the way, both on and off the Court.

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71 "The Supreme Court and Section 1", *id*., at 293. *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

72 "The Limitation of Liberty", *supra*, note 55, at 105.

73 "The Supreme Court and Section 1", *supra*, note 70, at 279.

74 Bertha Wilson, "Human Rights and the Courts" (Seminar on the Functioning of Government: the Canadian Experience, Ottawa, May 30, 1991), *Speeches*, *supra*, note 41, 742, at 746.

75 *R. v. Edwards Books and Art Ltd*., [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.) [hereinafter "*Edwards Books*"].

76 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

77 See especially "The Supreme Court and Section 1", *supra*, note 70; Lorraine E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 S.C.L.R. 469. See generally Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Toronto: Carswell, 2007+) at 38.11(b).

78 Bertha Wilson, "Human Rights and the Courts", *Speeches*, *supra*, note 41, 742, at 747.

2. Mission Instructions: The *Oakes* Framework and the *Oakes* Test

Justice Wilson frequently began her limitations analysis by quoting section 1 in its entirety. She did so even in her last judgments,[79] eight years after the Charter had come into force and the contents of that section had become well known to jurists and lawyers, and to a new generation of law students. However, by quoting section 1, Justice Wilson was emphasizing the entirety of its contents — that the Charter *guaranteed* the rights and freedoms set out in it subject *only* to such reasonable limits prescribed by law as can be *demonstrably justified* in a free and democratic society.[80] By the time of her final year on the Court, she openly acknowledged the existence of two separate and distinct limitations analyses. The first was *Oakes* — the original framework developed in that case — and the second was a more relaxed limitations analysis.[81] To her, the "original" *Oakes* test was the default and the relaxed application was the exception, much like her view of the relationship between rights and their limits.

Justice Wilson's originalist understanding manifested itself in her approach to section 1. She began to articulate her conception of the sharp delineation between rights and their limits prior to *Oakes.* Much of Justice Wilson's commentary regarding section 1 foreshadowed the framework set out by the Court in *Oakes.* In *Operation Dismantle*, she stated that "[t]he rights under the *Charter* not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under s. 1."[82] She developed this point in *Singh*[83] and reiterated it post-*Oakes* in *R. v. Jones*.[84]

In *Singh*, Justice Wilson explained that the rights and freedoms set out in the Charter "are fundamental to the political structure of Canada and are guaranteed by the Charter as part of the supreme law of our nation".[85] She then continued, expressing the idea of the courts' duty under the Charter, noting that it was "important to remember that the

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79 See, *e.g.*, *Stoffman v. Vancouver General Hospital*, [1990] S.C.J. No. 125, [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700, at para. 34 (S.C.C.).

80 On the duality of s. 1, see "Paradigm Lost?", *supra*, note 65.

81 See *Stoffman v. Vancouver General Hospital*, *supra*, note 79, at 553.

82 *Operation Dismantle Inc. v. Canada,* [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441, at 489 (S.C.C.).

83 *Singh*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.).

84 [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284, at para. 18 (S.C.C.).

85 *Singh*, *supra*, note 83, at 218.

courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in other sections of the Charter".[86] This would become a frequent theme in Justice Wilson's judgments.

Justice Wilson recognized the tension inherent in the limitations process. Articulating the dilemma of adjudication under section 1, she stated that if too low a threshold was set, the courts would run the risk of "emasculating the Charter" while if too high a threshold was set, the courts would run the risk of "unjustifiably restricting government action".[87] And in a critical precursor to the analysis in *Oakes*,[88] Justice Wilson stated that the question was not whether the government action was reasonable but whether it was reasonable to deprive an individual of their Charter rights in the particular context.[89] Many of the themes of *Singh* would make their way into Justice Dickson's judgment in *Oakes.*

In discussing *Oakes,* we need to differentiate between its three different meanings: (1) the *Oakes* case; (2) the *Oakes* framework; and (3) the *Oakes* test. The *Oakes* case is straightforward. It refers to the Court's examination of the issue of whether the reverse onus provision in the *Narcotic Control Act* concerning possession for purposes of trafficking offends the presumption of innocence protected by section 11(d) of the Charter. This is the narrowest meaning of *Oakes* and the least important jurisprudentially. The most frequent meaning of *Oakes* is the *Oakes* test consisting of the well-known formula for conducting the limitations analysis under section 1: (1) the objective must be pressing and substantial in a free and democratic society; (2) the means chosen must be proportional to the objective, *i.e*. (a) they must be rationally connected to the objective; (b) they should impair the right "as little as possible"; and (c) there must be a proportionality between the effects of the measures limiting the right and the objective.[90] This is only part of the larger *Oakes* framework which has generally been overshadowed and largely overlooked by the *Oakes* test. The *Oakes* framework provides the

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[86] *Id.*, at 218.

[87] *Id.*, at 217.

[88] Lorraine E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 S.C.L.R. 469, at 483-88.

[89] *Singh*, *supra*, note 83, at para. 218. The issue in *Singh* was whether it was reasonable to deprive an individual of his or her right to life, liberty and security of the person by adopting a system for the adjudication of refugee claims which does not accord with the principles of fundamental justice. *Id.*

[90] *R. v. Oakes*, *supra*, note 71, at 139 as modified by *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 889 (S.C.C.). See generally Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Toronto: Carswell, 2007+) at 38.12.

guidelines and the context for how the *Oakes* test should be applied, as described below. The critical distinction between Justice Wilson and her colleagues was that they tended to focus on the *Oakes* test whereas she focused on the *Oakes* framework. The gap between Justice Wilson and the other justices grew as they began to relax elements of the *Oakes* test and to ignore the rest of the *Oakes* framework while she continued to be faithful to the latter, including insisting on the strict application of the former. I develop the distinction between the *Oakes* test and the framework below.

Oakes was a rare Charter case where Justice Wilson did not write separately. While joining the majority decision of Dickson C.J.C., Wilson J. quickly assumed ownership of *Oakes* — both the test and the framework — and became its most ardent defender on the Court. The *Oakes* test is set out above. It is important to understand the framework which surrounded it, as it is often overlooked and because it provides the basis for Justice Wilson's limitations analysis during her tenure on the Court. In *Oakes*, the introduction to the section 1 test begins by reproducing the text of section 1 (as Wilson J. often did) and noting the dual functions of section 1: "first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 . . .) against which limitations on those rights and freedoms must be measured".[91] Then, drawing on Wilson J.'s statement in *Singh* that "it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*",[92] Dickson C.J.C. emphasized that any section 1 inquiry "must be premised on an understanding that the impugned limit violates constitutional rights and freedoms".[93] After proceeding to review the criteria of "a free and democratic society", Dickson C.J.C. concluded that these criteria "impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally-guaranteed right or freedom and the fundamental principles of a free and democratic society". Turning next to the question of onus, Dickson C.J.C. stated that it was clear from the text of section 1 that limits are exceptions and that the presumption is that "the rights and freedoms are guaranteed unless

91 *R. v. Oakes*, *supra*, note 71, at 135.

92 *Singh*, *supra*, note 83, at 218.

93 *R. v. Oakes*, *supra*, note 71, at 135.

the party invoking s. 1 can bring itself within the exceptional criteria which justify [*Oakes*] their being limited".[94] The primacy of the default to rights rule was expressed through the *Oakes* framework.

On the standard of proof, Dickson C.J.C. determined that it was to be the civil standard of a preponderance of probabilities but that standard was to be "rigorously" applied.[95] Again, he found support for this conclusion in the use of the phrase "demonstrably justified" in section 1. On the important question of evidence to meet the constituent elements of the *Oakes* test, Dickson C.J.C. noted first that evidence would generally be required and that it "should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit".[96] The *Oakes* framework is consistent with an originalist understanding of section 1 and of the Charter. In fact, the framework was predicted by some of the key framers of the Charter, who stated that the insertion of the phrase "demonstrably justified" appeared "to impose a burden on governments to impose actual evidence of the need to limit rights instead of relying on a more abstract claim that the legislation under challenge was within a range of acceptable responses to the social situation".[97] This originalist description accurately describes the *Oakes* framework and contrasts Justice Wilson's steadfast adherence to it with its abandonment by other members of the Court in favour of a relaxed application of the *Oakes* test. Despite such predictions by some framers, Justice Wilson frequently found herself alone in applying the *Oakes* framework.

3. Going It Alone: Applying the *Oakes* Framework

(a) Section 1 as the Sole Source of Limits

Consistent with her originalist conception and her fidelity to the *Oakes* framework, Justice Wilson saw section 1 as the sole source of limits on Charter rights. Chief Justice Dickson had expressed as much in *Oakes* itself.[98] To Justice Wilson there were always two important

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94 *Id.*, at 137.

95 *Id.*, at 137.

96 *Id.*, at 138. Chief Justice Dickson did recognize that there might be cases where certain elements of the s. 1 analysis are obvious or self-evident.

97 See *Canada . . . Notwithstanding* (Toronto: Carswell/Methuen, 1984), at 250.

98 *R. v. Oakes, supra*, note 71, at 135 (noting that s. 1 states explicitly "the exclusive justificatory criteria (outside of s. 33 …) against which limitations on those rights and freedoms must be measured.").

assumptions operating in the background as she opined on this issue. The first was her vision of the Charter as set out above — specifically that rights are the norm and limits the exception. Second, Justice Wilson viewed section 33 as another legitimate mechanism available to limit rights. She saw section 1 as the sole source of *judicial* limits on rights and section 33 as an available *legislative* source to limit rights.[99] She developed the position that section 1 is the sole source of limits on rights in a number of cases.

In the early case of *Operation Dismantle*,[100] Justice Wilson would not accept the position that certain government activity could be beyond the reach of the Charter. In rejecting the political questions doctrine, she refused to place an external limit on the types of issues amenable to judicial review. In her words, the Court was obliged under the Charter to examine such issues and if they were determined to violate an individual's right to life and liberty under section 7, then the only way to limit the infringed rights was through section 1.[101] Similarly, in *Canada v. Schmidt*,[102] the Court held that section 11(h) of the Charter did not have extraterritorial effect and thus did not apply to extradition proceedings. Justice Wilson disagreed with this, stating that "Charter rights which are enshrined in our Constitution as part of the supreme law of Canada must be recognized and given effect in any judicial proceeding in Canada unless a reasonable limit under s. 1 has been imposed upon them."[103]

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[99] Justice Wilson's views on s. 33, generally referred to as "the notwithstanding clause", are beyond the scope of this paper. She concurred in *Ford v. Quebec (Attorney General)*, *supra*, note 63, which dealt with s. 33. It is fair to say that s. 33 remained a real rather than a remote option during her tenure on the Court when she was developing and applying her view of rights and their limits. Since Justice Wilson retired from the Court in 1991, no government has used this section to "limit" or "override" a Charter right and the notwithstanding clause has become politically illegitimate, so much so that a desperate Prime Minister Paul Martin promised during the 2006 election to enact federal legislation to prohibit its use. See "Martin wraps campaign in constitutional pledge", CBC News (January 10, 2006), online: <http://www.cbc.ca/story/canadavotes2006/national/2006/01/09/elxn-debates-look.html>. See also Paul Wells, *Right Side Up: The Fall of Paul Martin and the Rise of Stephen Harper's New Conservatism* (Toronto: Douglas Gibson, 2006), at 220-22.

[100] *Operation Dismantle Inc. v. Canada*, *supra*, note 82.

[101] *Id*., at paras. 64-65. As discussed below in part III.4, later that year in the *Motor Vehicle Reference*, Wilson J. adopted the view that a violation of s. 7 could not be saved under s. 1. See *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 523 (S.C.C.).

[102] [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 (S.C.C.).

[103] *Id.*, at 533. See also *Argentina (Republic) v. Mellino*, [1987] S.C.J. No. 25, [1987] 1 S.C.R. 536, at 561 (S.C.C.) (*per* Wilson J., concurring) and *United States of America v. Allard*, [1987] S.C.J. No. 20, [1987] 1 S.C.R. 564, at 576 (S.C.C.) (*per* Wilson J., concurring).

She did not support reading internal limits or qualifications into the plain language of enumerated rights because this usurped the role of section 1 and collapsed the two-stage analysis into a single-stage one. Thus, in *R. v. Strachan*,[104] a case involving the right to counsel under section 10(b), the Court interpreted "the right to instruct and retain counsel without delay" as providing time for police, upon their entry into a home with knowledge that weapons were located on the premises, to get "matters under control" before allowing the person arrested to call a lawyer. In Justice Wilson's mind, this had the effect of reading a qualification or limit into section 10(b) which was simply not there; the Court read "the phrase 'without delay' as 'without unreasonable delay'".[105] It had taken 40 minutes for the police to get matters under control. Justice Wilson acknowledged that while this justification might have been necessary under the particular circumstances of the case, it was not a norm that the courts were free to substitute for the constitutional standard of "without delay". Justice Wilson saw this implied qualification as a slippery slope and chastised the Court for removing "all certainty as to the citizen's rights under section 10(b)" in a manner that was also "completely inconsistent with its plain words and purpose".[106]

Justice Wilson's concern with reading in implied limitations was that the *Oakes* framework could be rendered inoperative and the end result would be reduced rights protection. In a passage that reflects her background assumptions on the relationship between rights and their limits, Wilson J. stated that "[i]t would be unfortunate indeed if the exception were to become the rule and one of the fundamental rights of the citizen was to be so easily gainsaid."[107] To Justice Wilson, section 1 was the sole source of reasonable limits which had to be prescribed by law and not imposed by the police in their discretion.[108]

Moreover, reading in qualifiers flew in the face of Justice Wilson's original understanding of the Charter. By reading in a "reasonableness" requirement to the definition of the right, the Court was effectively returning to the text of section 1 as originally referred to the Joint Committee prior to its amendment and ultimate enactment. Such a move

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104 [1988] S.C.J. No. 94, [1988] 2 S.C.R. 980 (S.C.C.).

105 *Id.*, at 1010 (*per* Wilson J., concurring).

106 *Id.*, at 1011 (*per* Wilson J., concurring).

107 *Id.*, at 1013.

108 See *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R 613, at 621 (S.C.C.).

can be viewed as anti-democratic in a number of ways. It rendered the work of the Joint Committee respecting section 1 — both of its members and of the witnesses who appeared before it — a nullity. It implicitly overrode the amendment brought forth by Minister of Justice Chrétien, embraced by the Joint Committee and ultimately endorsed by joint resolution of the House of Commons and the Senate. The effect of reading in a reasonableness requirement is to ignore the requirement of "demonstrably justified" and do an end run around the original understanding of section 1 and arguably of the Charter as well.[109]

Justice Wilson resisted other attempts to import limiting criteria into the right-definition stage. For example, in *R. v. Turpin*,[110] she clearly distinguished between the individual rights protecting nature of the right to a jury trial under section 11(f) and any collective societal interest in limiting that right, whose proper place was to be found under section 1.[111] She stated that "[t]o prevent an individual from waiving his or her right to the benefit of a jury trial is clearly to elevate the interests of society over the interests of the individual. This is normally achieved through the application of s. 1 and not through reading a limit into the right itself."[112]

Justice Wilson's comments about the relationship between section 15 and section 1 also reveal the mischief about which she was concerned by reading in internal qualifiers to enumerated rights. In *Andrews*,[113] McIntyre J. addressed the relationship between sections 15 and 1. Justice Wilson agreed with his comments that consideration of any limiting factors take place under section 1, not under section 15. It was important to keep them analytically distinct if for no other reason than the burden of proof: "It is for the citizen to establish that his or her Charter right has been infringed and for the state to justify the infringement."[114] In *R. v. Turpin*,[115] Wilson J. twice repeated that each equality right (the right to the equal protection and equal benefit of the law without discrimination) should be given "its full independent content, divorced from any justificatory factors applicable

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[109] This is the sort of example where terms like "judicial activist" and "legislative deference" become highly contestable concepts.

[110] [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 (S.C.C.).

[111] *Id.*, at 1310-11.

[112] *Id.*, at 1320.

[113] *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

[114] *Id.*, at 178, *per* McIntyre J.

[115] *Supra*, note 110.

under s. 1 … ".[116] Quoting McIntyre J.'s statements above with approval, she disapproved of attempts to read in limitations to the right to equality under section 15 through the development of tests of whether a particular distinction was "unreasonable", "invidious", "unfair" or "irrational". In Wilson J.'s view, such tests imported limitations into section 15 which simply did not exist in the text.[117]

Justice Wilson was arguably not always wholly consistent. Her decision in *R. v. Jones*[118] has often puzzled commentators. In this case she disagreed with the majority that Alberta's requirement that all school-aged children attend school unless they attend an approved private school or obtain certification that efficient schooling is occurring elsewhere violated the Charter's guarantee of freedom of religion. She held that the claimant had failed to demonstrate "any substantial impact" of the impugned legislation on his religious belief.[119] Justice Wilson openly acknowledged that this sort of determination could be dealt with under section 1 rather than in the definition of the right under section 2; however, she asserted that the content and scope of Charter rights must be discerned separate from any limitation imposed upon them under section 1.[120] It may be easy to conclude that in *R. v. Jones* Justice Wilson failed to live up to her own standards which she so steadfastly

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[116] *Id.*, at 1325.

[117] *Id.*, at 1328. Given such statements, it is hard to see how Wilson J. would have approved of the *Law* test. See *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.). This case has been much criticized. See, *e.g.*, Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002) 6 Rev. Const. Stud. 291; Debra M. McAllister, "Section 15 — The Unpredictability of the *Law* Test" (2003-2004) 15 N.J.C.L. 3; Christopher D. Bredt & Adam M. Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for Section 15" (2003) 20 S.C.L.R. (2d) 33; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48 McGill L.J. 627; Daniel Proulx, "Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles", [2003] R. du B. (numéro spécial) 485; Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor Y.B. Access Just. 111; Christian Brunelle, "La dignité dans la *Charte des droits et libertés de la personne* : de l'ubiquité à l'ambiguïté d'une notion fondamentale", in *La Charte québécoise : origines, enjeux et perspectives* (2006), numéro thématique de la Revue du Barreau en marge du trentième anniversaire de l'entrée en vigueur de la Charte des droits et libertés de la personne, sous la direction de M[e] Alain-Robert Nadeau, 143; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70 Sask. L. Rev. 1; Peter W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at 55-28 and 55-29; Alexandre Morin, *Le droit à l'égalité au Canada* (2008), at 80-82.

[118] [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284 (S.C.C.).

[119] *Id.*, at 315.

[120] *Id.*, at 314 quoting *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441, at 489 (S.C.C.).

pronounced during her years on the Court.[121] However, her judgment also demonstrates the difference between purposive interpretation and a "large and liberal" interpretation and how that connects with her liberal vision of personal autonomy, epitomized by her metaphor of the task of the judiciary to map out the parameters of the invisible fences that surround each individual over which the state will not be allowed to trespass.[122]

(b) "Demonstrably Justified": Onus and Evidence

We have seen so far how the words "demonstrably justified" were added to section 1 through the Joint Committee process and how in *Oakes*, Dickson C.J.C. referenced them to explain the evidentiary requirements and the onus of proof for the limitations analysis.[123] True to Justice Wilson's vigilance in upholding the *Oakes* framework, onus and evidence were frequent themes in her judgments. She applied the *Oakes* framework faithfully in *Edwards Books*, a case that followed soon after *Oakes* and is often characterized in terms of a relaxation or a retreat from the strictness of *Oakes*, described in more detail in the next section. She dissented, in part because of the failure of the Crown to adduce sufficient evidence to justify its disparate treatment of Saturday Sabbath observers. She chastised the Crown for failing to adduce any evidence that would establish that allowing retailers who chose on religious grounds to close on Saturdays to remain open on Sundays would cause substantial disruption to Sunday as the uniform day of rest. She further rejected as speculative the assertion that allowing such a policy would motivate other retailers to close on Saturdays in order to open on Sundays. Expressing a sense of judicial frustration, she concluded on this point that "[w]e simply do not know. . . . [T]he Crown failed totally to discharge its burden under s. 1 . . .".[124]

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[121] For a view in this respect, see David M. Beatty, *Talking Heads and the Supremes: The Canadian Production of Judicial Review* (Toronto: Carswell, 1990), at 85-86, 106.

[122] Bertha Wilson, "The Making of a Constitution" (1988) 71 Judicature 334, at 338. Justice Wilson later incorporated these words almost verbatim into her opinion in *Morgentaler*. See *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 164 (S.C.C.). See also *Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 (holding that freedom of expression was not violated).

[123] On the importance of onus and burden of proof under the *Oakes* test, see Sujit Choudhry, "So What is The Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 35 S.C.L.R. (2d) 501.

[124] *Edwards Books*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at 810 (S.C.C.).

She repeated the twin themes of onus and evidence under the *Oakes* framework time and again and was demanding in their fulfillment. In *Jones*, the case where Justice Wilson had found no violation of freedom of religion, the majority found that that right had been infringed but was saved under section 1. Justice Wilson took the government to task for failing to adduce any evidence that the impugned government policy was the least drastic means to accomplish the desired objective.[125] Similarly, in *R.W.D.S.U. v. Saskatchewan*,[126] Justice Wilson emphasized that the onus rested with the government to establish the purported objective and that it required evidence to establish it. She found no evidence to support the allegations that dairy workers provide an essential service, the delivery of important food products to the consumer, and that the cessation of such delivery might threaten the health of part of the population.[127]

Justice Wilson's fidelity to the evidentiary requirements of the *Oakes* framework did not wane five years after *Oakes* with retirement on the horizon. Thus, in *Thomson Newspapers*,[128] she expressed a concern about the level of proof required in order for the government to meet its onus. She reminded the Court that "[t]he government's onus under *Oakes* is to justify the limit on the right of the citizen on a preponderance of probability. Dickson C.J. referred to this as 'a very high degree of probability' commensurate with the occasion."[129] Similarly, in *Stoffman v. Vancouver General Hospital*,[130] she stated that where there was a serious question "as to whether a pressing concern as alleged in fact exists, it is incumbent on the party bearing the burden of proof under s. 1 to establish the pressing and substantial concern".[131] Continuing, she opined that where the party carrying the burden of proof failed to adduce evidence to support its assertion, the first branch of the *Oakes* test could not be met.[132] In the next part, we see the strictness of these aspects of the framework at work when applied to the components of the *Oakes* test.

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125 *Supra*, note 118, at 315.

126 *R.W.D.S.U. v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.) [hereinafter "*R.W.D.S.U.*"].

127 *Id.*, at 494.

128 *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425 (S.C.C.).

129 *Id.*, at 487.

130 [1990] S.C.J. No. 125, [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700 (S.C.C.).

131 *Id.*, at 550.

132 *Id*.

(c) Pressing and Substantial Objective

The requirement that there be a pressing and substantial objective is the element of the *Oakes* test that has attracted minimal scholarly interest and arguably does the least analytical work. During Justice Wilson's tenure on the Court, the only instances where the Court found that this requirement was not satisfied were in the pre-*Oakes* cases of *Singh* and *Big M Drug Mart.*[133] Not surprisingly, Justice Wilson refused to take a *pro forma* approach to this requirement. She saw its purpose as ensuring "that constitutional rights and freedoms will only be sacrificed where it is reasonable and justifiable to do so. The concept of constitutional entrenchment requires that rights and freedoms be curtailed only in response to real and not illusory problems."[134] Time and again she demanded evidence to satisfy this requirement. In *R. v. Hess*, she chastised the government for failing to submit any evidence to support its deterrence argument in defence of the statutory rape provision. Justice Wilson asserted that "[w]here one is dealing with the potential for life imprisonment it is not good enough, in my view, to rely on intuition and speculation about the potential deterrent effect of an absolute liability offence. We need concrete and persuasive evidence to support the argument."[135] In several instances, Justice Wilson found that the impugned government activity failed to satisfy this requirement. In *R.W.D.S.U. v. Saskatchewan*,[136] one of the cases in the *Labour Trilogy*,[137] she would not conclude that the prevention of economic harm to a particular sector was *per se* a government objective of sufficient importance to justify abrogating the freedom protected by section 2(d).[138]

Justice Wilson famously questioned whether administrative convenience and cost in particular could ever meet the pressing and substantial requirement for limiting a Charter right. Thus in *Singh*, she stated that "the guarantees of the Charter would be illusory if they could

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[133] See Peter W. Hogg, *Constitutional Law of Canada,* 5th ed. Supp. (Toronto: Carswell, 2007+), at 39.8.

[134] *Stoffman v. Vancouver General Hospital*, *supra*, note 130, at 550.

[135] *R. v. Hess*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906, at 923 (S.C.C.).

[136] *Supra*, note 126.

[137] The others were *Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.) and *PSAC v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.). Justice Wilson agreed with Dickson C.J.C. in each of these cases that the right to bargain collectively was protected by freedom of expression under s. 2(d) of the Charter.

[138] *R.W.D.S.U.*, *supra*, note 126, at 487.

be ignored because it was administratively convenient to do so."[139] She reiterated this position equally forcefully in one of her final cases when she asserted: "administrative convenience is not an adequate reason for sacrificing Charter rights and freedoms."[140] She expressed the belief that it would always be more convenient from an administrative perspective to treat disadvantaged groups in society "as an indistinguishable mass" rather than to determine individual merit.[141]

In *R. v. Lee*,[142] the impugned provision stripped an accused of his right to trial by jury for failing to appear without a legitimate excuse for so doing. The avowed purpose of the provision was to further the orderly and efficient administration of justice, and to foster public respect for the criminal justice system in general and the jury trial system in particular. Justice Wilson recast this objective in more narrow terms, defining it down to the objective of ensuring court attendance. The objective so defined, Wilson J. examined the evidence and found that failing to attend was not a major problem.[143] Once the objective was determined in such terms, the examination focused on questions of efficiency, the operation of the criminal justice system and the expense incurred for jury trials. Not surprisingly, Wilson J. then found that reducing administrative inconvenience and reducing expense were not sufficient objectives to override such a vital constitutional right.[144]

Justice Wilson demanded that the asserted problem be real and not hypothetical. One of her final judgments, *R. v. Chaulk*, released a month before she stepped down from the bench, illustrates this. I discuss it in some detail because it represents her parting shots at a Court that had never accepted her vision of the Charter and the role of the Court thereunder. The issue in *R. v. Chaulk* was whether a provision of the *Criminal Code* which presumed sanity unless an accused proved to the contrary violated the presumption of innocence guaranteed by section

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[139] *Singh*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at 218 (S.C.C.). Justice Wilson asserted that s. 15(1) of the Charter demanded otherwise:

> In discrimination claims…, if the guarantee of equality is to mean anything, it must at least mean this: that wherever possible an attempt be made to break free of the apathy of stereotyping and that we make a sincere effort to treat all individuals, whatever their colour, race, sex or age, as *individuals* deserving of recognition on the basis of their unique talents and abilities. Respect for the dignity of every member of society demands no less.

Stoffman v. Vancouver General Hospital, *supra*, note 130, at 555 (emphasis in original).

[140] *Id.*, at 554.

[141] *Id.*, at 555.

[142] [1989] S.C.J. No. 125, [1989] 2 S.C.R. 1384 (S.C.C.).

[143] *Id.*, at 1419.

[144] *Id.*, at 1420-21.

11(d) of the Charter. The majority of the Court, in a decision written by Lamer C.J.C. and concurred in by Dickson C.J.C., La Forest, Sopinka and Cory JJ., held that the impugned provision infringed the presumption of innocence but constituted a reasonable limit under section 1. Justice Wilson held that the first branch of *Oakes* necessitated that the government adduce evidence to demonstrate the existence of a real social problem. The perceived social problem in this case was the prevention of perfectly sane persons who had committed crimes from escaping criminal liability on tenuous insanity pleas.[145]

Justice Wilson took issue with Lamer C.J.C.'s failure to identify any pressing and substantial concern. In her characterization, the provision was "a prophylactic measure designed to fend off a hypothetical social problem that might arise absent the reverse onus".[146] In Wilson J.'s mind, this represented "a significant departure" from the Court's approach to section 1 to that date.[147] She asserted that theretofore the Court had consistently evaluated challenged laws in terms of their justifiability as a response to existing social problems. In the strongest terms, she asked: "[D]o we wish to go down this path and justify infringements of guaranteed Charter rights on a purely hypothetical basis? And, in particular, do we wish to go down this path where such a fundamental tenet of our justice system as the presumption of innocence is at stake? I have serious reservations about adopting such a course … ."[148] Less than a month later, Justice Wilson officially retired from the Supreme Court of Canada. As we see in the next section, similar concerns echoed through her application of the proportionality analysis prong of *Oakes.*

(d) The Proportionality Analysis

It is under the proportionality analysis where the *Oakes* test was most relaxed or, in Justice Wilson's view, compromised. The proportionality analysis of the *Oakes* test consists of three elements: (1) there has to be a rational connection between the means chosen and the pressing and substantial government objective; (2) the means must

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[145] *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, at 1372 (S.C.C.); *Criminal Code*, R.S.C. 1985, c. C-46.

[146] *Id.*, at 1373.

[147] *Id.*, at 1373. Note that Dickson C.J.C. (Chief Justice at the time of the hearing) joined the decision of Lamer C.J.C. (who had become Chief Justice in the interim between the hearing and the decision).

[148] *Id.*, at 1375.

impair the right as little as possible; and (3) there has to be proportionality between the effects of the measures limiting the right and the objective and between the deleterious and salutary effects of the measures.[149] It is under the proportionality analysis — specifically its second prong — that members of the Court developed a more flexible approach that worried Justice Wilson and against which she consistently protested. My comments will accordingly focus on this second prong.

For the most part, Justice Wilson refused to relax the *Oakes* framework. She noted that "[i]t is only in exceptional circumstances that the full rigour of *Oakes* should be ameliorated."[150] In *Edwards Books* itself, which marked the beginning of the relaxation of *Oakes*, Wilson J. dissented as discussed above, specifically on the issue of minimal impairment. Again, she chastised the government for failing to bring forward sufficient evidence and characterized the legislation as "checkerboard" or haphazard.[151] But Wilson J. was one of the three authors of *Irwin Toy*, which attempted to outline the circumstances when a relaxed version of *Oakes* would be appropriate. The authors of that opinion explained:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.[152]

In *McKinney*, Wilson J. tried to explain the rationale for the more flexible approach to section 1. She said that all of the proposed ways of dealing with exceptions to Sunday closing laws in *Edwards Books* had their faults. Respecting *Irwin Toy*, she explained that none of the proposed alternatives adequately accomplished the legislature's admittedly reasonable objective of protecting children from manipulation through commercial media. In that context, the Court refused to second-guess the

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[149] See *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 139 (S.C.C.), as modified by *Dagenais v. CBC*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 889 (S.C.C.).

[150] *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at 404-405 (S.C.C.).

[151] *Edwards Books*, *supra*, note 124, at 809-10.

[152] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 993 (S.C.C.).

legislative wisdom of choosing to protect the interests of vulnerable children at the limited expense of the commercial speech rights of advertisers.[153]

Looking back on the relaxation of *Oakes*, Wilson J. saw the central message to be drawn from these cases as being that deference was appropriate where the legislature was forced to strike a balance between the claims of competing groups or where the legislature was seeking to promote or protect the interests of the disadvantaged.[154] In such contexts, Wilson J. stated, the requirement of minimal impairment would be met where alternative means are not *clearly* better than the means adopted by the government.[155]

It is not necessary to delve particularly deeply into these cases to appreciate the tensions that they presented for Justice Wilson and for the Court. For Justice Wilson, this tension manifested itself in her desire to protect vulnerable groups and therefore to accord some modicum of flexibility to the legislature in so doing while still maintaining fidelity to the strictness of *Oakes.* She never articulated her rationale in such terms, but perhaps the influence of section 15(2) of the Charter leeched into her section 1 conception. This would explain her upholding of legislation under section 1 in cases where vulnerable groups were at issue such as *Irwin Toy* (children), *Lavigne* (union members) and *Keegstra* (ethnic and religious minorities). Conversely, she would not afford deference to the legislature in cases where she felt the group at issue was not a vulnerable one such as *McKinney* (younger academics).

With the notable exception of *R. v. Keegstra*,[156] Justice Wilson generally refused to relax the justification standard in criminal cases.[157]

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153 See *McKinney v. University of Guelph*, *supra*, note 150, at 401.

154 *Id.*, at 401.

155 *Id.*

156 [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.). *Keegstra* is a particularly troubling case for Justice Wilson and her fidelity to the *Oakes* framework because it involves a criminal prosecution, the state as "the singular antagonist" as described in *Irwin Toy* as a candidate for the strictest application of the *Oakes* test. Dickson's biographers explain that

> Wilson wanted to uphold the anti-hate law, but she had consistently supported a relatively strict application of the section 1 test and had always shied away from agreeing that there could be varying degrees of scrutiny under section 1. . . She suggested concentrating on the harmful effects of hate propaganda and avoiding reference to the core and peripheral values of section 2(b).

Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: Osgoode Society for Canadian Legal History, 2003), at 408-409.

157 See, *e.g.*, *United States v. Cotroni*, [1989] S.C.J. No. 56, [1989] 1 S.C.R. 1469 (S.C.C.) (extradition); *R. v. Chaulk*, *supra*, note 145 (presumption of innocence); *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933, at 1032-33 (S.C.C.) (onus of proof for insanity defence).

In *R. v. Chaulk*, one of her last Charter cases, she expressed dismay that Chief Justice Lamer of all people would relax the application of the *Oakes* test in a criminal case. She disputed his invocation and application of *Irwin Toy*, contending that it "does not stand for the proposition that in balancing the objective of government against the guaranteed right of the citizen under s. 1 different levels of scrutiny may be applied depending upon the nature of the right".[158] Rather, *Oakes* was the rule and flexible application the exception, whose prerequisite was the situation where the guaranteed rights of different groups of citizens could not be fully respected. In such cases, it was appropriate for the Court to respect government's attempt at fashioning a compromise between competing groups on the basis of policy considerations.[159] Justice Wilson invoked the "singular antagonist" language of *Irwin Toy*, quoting at length from this portion of the judgment which she had co-authored with Dickson C.J.C. and Lamer J. (as he then was), both of whom had ignored the singular antagonist rule on the facts of the case before it in *Chaulk.*[160]

By the time she left the Court, Justice Wilson's battle to preserve the *Oakes* framework had clearly been lost. She knew it and she feared that the *Oakes* test was slipping away as well. In a 1992 speech, Justice Wilson, now retired, expressed her feeling that the Court was only paying lip service to *Oakes:*

> [T]here is no doubt that those who continued to cling to the strict *Oakes* test (like myself) did so out of a concern that the Charter not be emasculated, that the shift towards the much more flexible standard of reasonableness makes it increasingly likely that governments' immediate objectives will take precedence over the rights and freedoms of individuals.[161]

Thus, the debate over section 1 had returned full circle to the deliberations before the Joint Committee in 1980-1981. Justice Wilson's statements express a sense that the Court had undone much of what had been fought for in relation to section 1 during that time. Justice Wilson's position on the relationship between rights and their limits remained relatively constant. However, the Court of which she was a member had moved significantly from the early days of *Singh* and *Oakes.*

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158 *R. v. Chaulk*, *id*., at 1388-89.

159 *Id.*, at 1389.

160 *Id.*, at 1389-90.

161 Bertha Wilson, "Constitutional Advocacy" (1992) 24 Ottawa L. Rev. 269.

4. Caveat or Cognitive Dissonance: The Relationship between Section 1 and other Sections of the Charter

So far we have seen how Justice Wilson championed the *Oakes* framework, largely emphasizing it over the text of section 1, despite frequent invocations of the latter. However, when it came to the relationship between section 1 and other sections of the Charter, Justice Wilson favoured argument based on the text of section 1 rather than on the application of the *Oakes* test. Where internal qualifiers existed in the text of the right, Justice Wilson did not think that a violation could be saved under section 1. Thus, Justice Wilson doubted whether a violation of section 7 could ever be saved under section 1. She first expressed this in a concurring opinion in the *Motor Vehicle Reference*.[162] In her view, a violation of the right to life, liberty and security of the person which does not accord with the principles of fundamental justice could neither be "reasonable" nor "demonstrably justified in a free and democratic society".[163] According to her, the only way for government to limit the rights under section 7 was through section 33, a circumstance that she could only foresee in times of emergency, stating that "[t]his, however, will be a policy decision for which the government concerned will be politically accountable to the people."[164] She consistently maintained this position over the course of her tenure on the Court.[165]

In two cases from her last term on the Court, Justice Wilson persisted with this approach. In *R. v. Hess*,[166] Justice Wilson and Justice McLachlin (as she then was) clashed over the proper relationship between section 1 and section 7, each invoking originalist justifications for her respective position. Justice McLachlin accused Justice Wilson of rewriting the Charter by holding that section 1 could never be applicable to certain Charter rights. The future Chief Justice stated that "[t]he framers of the Charter expressly subjected all the rights and freedoms which it guarantees to the override of s. 1. It is not for the courts to alter this by developing categories of rights which are immune from scrutiny under s. 1."[167] In her response, Justice Wilson agreed that one could not say that section 1 was irrelevant or inapplicable to any of the rights and freedoms protected by the Charter. However, she returned to the *Oakes*

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[162] *Reference re s. 94(2) of Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[163] *Id.*, at 523.

[164] *Id.*, at 529.

[165] See, *e.g.*, *Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284, at para. 34 (S.C.C.).

[166] *Supra*, note 135.

[167] *Id.*, at 953.

framework, stating that section 1 was not devoid of values, emphasizing the text of section 1 which stipulates "that the impugned provisions must be 'demonstrably justified in a free and democratic society'".[168] Justice Wilson maintained that the courts could not read "demonstrably justified" in such a manner as "to give licence to governments to infringe rights in any way they please. The values of a free and democratic society must be respected. . . . Far from rewriting the Charter this approach is entirely consistent with the Charter."[169]

In this rare explicitly originalist exchange, each justice sought support for her interpretation in the text and the drafting history of the Charter. Justice Wilson recognized that her position on the relationship between section 7 and section 1 had not carried the day and recast her position in terms that it would be rare for a legislative provision that violated the principles of fundamental justice to still be demonstrably justified in a free and democratic society.[170] Justice Wilson had similar concerns about the relationship between section 8 and section 1.[171]

Justice Wilson's position on the relationship between section 1 and other sections that have internal qualifiers has an internal logic to it. Internal qualifiers like "reasonable" or "principles of fundamental justice" lack the strictness of *Oakes.* On their face, they appear to set a lower threshold for justifying an infringement of a right compared to the strictness of the *Oakes* framework with its requirement that any limitation be both "reasonable" and "demonstrably justifiable". Under such logic, it is hard to fathom how an infringement that was found to be "unreasonable" could somehow be saved under section 1. With this point, we return to the debate over the language of section 1 before the Joint Committee in 1980-1981.

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168 *Id.*, at 926.

169 *Id.*

170 See *e.g.*, *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425, at 487 (S.C.C.). This position became the dominant one on the Court and perhaps the difference between Justice Wilson and her colleagues is more apparent than real, as the Court has never held that a provision which violates s. 7 has been demonstrably justified in a free and democratic society under s. 1. The debate is still an important one because it is about which institution is responsible for limiting a constitutional right in times of emergency, the courts or the legislature?

171 In *Thomson Newspapers Ltd.*, *id.*, at 501, she admitted candidly that she had "great difficulty in understanding how any legislation authorizing an 'unreasonable search or seizure' can be a 'reasonable limit . . . demonstrably justified in a free and democratic society'".

IV. CONCLUSION: DUTY FULFILLED AND DESTINY DENIED

Justice Wilson did not lobby for a seat on the Supreme Court when one was available.[172] With the appointment of Sandra Day O'Connor to the U.S. Supreme Court in September 1981 and the impending mandatory retirement of Justice Martland, speculation about appointing a woman to Canada's highest Court grew. As one of only a few women on Canada's appellate courts at the time, Justice Wilson's name was obviously in the mix and her colleagues on Ontario's Court of Appeal encouraged her to accept the position if the offer came. Like some before and since her who have been considered for appointment to Canada's Supreme Court, Justice Wilson had misgivings. But her biographer describes her acceptance in the following terms: " . . . at the end of the day Bertha and [her husband] John both knew that if she was appointed she had to serve. It was her duty."[173]

Bertha Wilson's conception of duty encompassed both a personal commitment to public service as well as the institutional responsibility of the Supreme Court of Canada under the Charter. Her vision of the role of the courts under the Charter acknowledged and respected the changes that Canada's democratic representatives had made to our system of government. In her view, the courts were given a new responsibility under the Charter and they were duty-bound to fulfil it. She did not seem particularly enamoured of the dialogue theory popularized after she left the bench and which the Court endorsed. Her position was far more direct. In her view, each branch of government had its own responsibility under the Charter. The courts' responsibility was to construct a fence around the individual. The legislature, of course, has a responsibility to ensure that its actions comply with the Charter but it also has the power under section 33 to overrule the courts should it so choose.

The democratic element of Justice Wilson's constitutional vision gave voice to the many groups who participated in the process before the Joint Committee, many of whom were very concerned about the low threshold for limiting rights in the draft of the Charter tabled with the Joint Committee. She would have likely rejected or dismissed the notion that she was an originalist. But her jurisprudence draws its assertions of normative legitimacy directly from the text and the historical context of

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[172] See Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: Osgoode Society for Canadian Legal History, 2001), at 124-28.

[173] *Id.*, at 128.

the framing of the Charter and therefore Justice Wilson is properly considered a moderate originalist, Canadian version. This originalism manifested itself in its strict view of section 1 as translated by the *Oakes* framework to which Justice Wilson remained faithful during her entire tenure on the Court.

It is only in one of her final Charter judgments, *R. v. Chaulk*,[174] that we see a hint of Justice Wilson's frustration with her colleagues for abandoning even a semblance of fidelity to the *Oakes* test. Her positions had remained relatively constant during her five years on the Court since *Oakes*. However, her colleagues shifted and by the time she stepped down from the Court in January 1991, Justice Wilson's position had become increasingly isolated.

In *Singh*, Justice Wilson recognized the tension inherent in the limitations process. She stated that if too low a threshold was set, the courts would run the risk of "emasculating the Charter" while if too high a threshold was set, the courts would run the risk of "unjustifiably restricting government action".[175] Most of the judges were concerned about the latter proposition. The interpretation of certain rights such as sections 7 and 15 became increasingly complex on the one hand and the *Oakes* test was relaxed on the other. In contrast, Justice Wilson was generally comfortable with the results caused by her fidelity to the strictness of *Oakes.*

Justice Wilson's jurisprudence reflects her originalist conception of the Charter as a rights-bearing, potentially transformative document. Looking back on her judgments 17 years after she left the bench causes one to ponder whether her fidelity to the framework of *Oakes* would have been sustainable throughout the 1990s as the Court entered a different period of new challenges and divisions within the Court. I suspect that Justice Wilson would have persisted in her fidelity to *Oakes* but proved more flexible at the rights definition stage as she had demonstrated in cases such as *Jones* and *Hufsky.*[176] The joint author of the expansive definition of freedom of expression in *Irwin Toy*[177] might

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[174] *Supra*, note 158.

[175] *Singh*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at 217 (S.C.C.).

[176] *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284 (S.C.C.); *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.).

[177] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

have joined the minority opinion in *Sharp*[178] which expressed a willingness to retreat from this definition in obscenity cases.

During those nine years on our nation's highest Court, Justice Wilson articulated a robust vision of the Charter and the relationship between rights and their limits thereunder. She was frequently in dissent or concurring separately, raising the question of whether her jurisprudence has any enduring political or legal significance or should simply be considered marginal. One view was expressed by another great dissenter, Justice Claire L'Heureux-Dubé, who invoked the words of Chief Justice Hughes of the U.S. Supreme Court that a "dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed".[179] Dissents may give hope to some that an alternative vision may speak to future generations and one day become a reality,[180] although some think that rarely happens.[181]

Justice Wilson didn't volunteer. But once conscripted to serve, Bertha Wilson fulfilled her duty as she saw it: fidelity to the strictness of the *Oakes* framework which she believed correctly encapsulated the transformational purpose of the Charter project based upon an original understanding of the making of the Charter. The rich historical understanding of the events of 1980-1982 which provided the foundation for Justice Wilson's jurisprudential outlook serves as a reminder of what the Charter's destiny might have been and perhaps what is still possible one day.

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178 *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.).

179 Charles Evans Hughes, *The Supreme Court of the United States* (New York: Columbia University Press, 1928), at 68 quoted in Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" (2000) 38 Osgoode Hall L.J. 495, at 496.

180 See L'Heureux-Dubé, *id*., at 504, 508.

181 See Anthony Lewis, *Freedom for the Thought that We Hate: A Biography of the First Amendment* (New York: Basic Books, 2007), at 35.