The Politics of Judging: Section 1 of the Charter of Rights and Freedoms

Pamela A. Chapman
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BY PAMELA A. CHAPMAN*

I. INTRODUCTION

As a guide to decision, ‘be nice to poor people’ is better than ‘kick the cat,’ but it does not really pour substantive moral content into constitutional law.¹

It has been five years since Canada embarked upon the “grand constitutional adventure”² of judicial review under the Canadian Charter of Rights and Freedoms.³ The entrenchment of a rights document in the Canadian Constitution has undoubtedly brought changes to the protection of human rights in this country. The Charter has, perhaps, enhanced our rights, but more obviously, it has guaranteed “a particular way of making decisions about rights in which the judicial branch of government has a much more systematic and authoritative role.”⁴ The role of the courts has not only expanded, but has changed in a fairly radical way. Rather than simply deciding which level of government ought to have jurisdiction over a particular public policy, the judiciary has now been invited to hold legislative decisions up to scrutiny against a higher constitutional standard, and perhaps decide that no level of government can legislate in a given area.

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Section 52\(^s\) of the *Charter* gives the courts of Canada their authority to declare legislation inoperative, but it is section 1\(^e\) that prescribes their mandate, guaranteeing as it does the rights and freedoms enshrined in the *Charter* “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Thus the rights set out are not absolute rights, but require that the judiciary assess any government action that purports to limit them for its “reasonableness” balancing the value of the infringed right against the value of some public policy. Section 1 embodies the conflict between individual rights, as protected by the *Charter*, and the goals of the collective, as represented by legislative initiative, making the judiciary umpires of the balancing process.

As discussed in the second part of this paper, much of the controversy over and analysis of judicial review has centred on the involvement of the courts in this “balancing of competing interests.” The problem for legal theorists has been to demonstrate that judges have some unique method of adjudicating these conflicts, a method that reflects their special attributes and expertise but does not compromise their legitimacy as supposedly non-political actors. Thus the formalist “four-corners-of-the-document” theories, the positivism of H.L.A. Hart,\(^8\) and the normative, natural-law theory of Ronald Dworkin,\(^9\) all attempt to establish guidelines and sources for legal reasoning that avoid “political” choices yet are determinative of the appropriate outcomes.

Challengers of these paradigms — first the legal realists, and now advocates of the Critical Legal Studies Movement — argue quite compellingly that no real distinction between “legal” and “political” reasoning can be sustained, especially in the admittedly “penumbral” area of constitutional-rights adjudication. Arguably, the vague, nebulous terms of section 1 of the *Charter*, and the essentially normative conflict it describes, make cases decided under it classic examples of the inadequacy of conventional legal reasoning to guide judicial discretion and differentiate it from the political policy-making it purports to review.

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5 *Charter*, *supra*, note 3, s. 52. Section 52(1) states “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

6 *Ibid.*, s. 1 [hereinafter section 1]. Section 1 states “The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

7 John Hart Ely uses the term “interpretivism” to describe the theory that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution; see his discussion of various “four-corners-of-the-document” theories in Chapters 1 and 2 of *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).


Unfortunately, a survey of the “early returns” on Charter case law reveals, in the third part of this paper, trends in the analysis of section 1 that seem to indicate a failure by the judiciary to consider the implications of their new role. The Supreme Court of Canada has, until recently, notably avoided section 1, choosing instead to articulate a variety of threshold tests that obviate the need for explicit consideration of section 1’s meaning. The judgment in R v. Oakes was the first case to deal directly with the terms of section 1, but in it the Chief Justice attempts to devise a formalist “test” for the resolution of difficult balancing tasks. The limited usefulness of this approach can be seen in the cases which follow Oakes, in which the justices of the Supreme Court continue to utilize threshold tests, legislative deference, and simple denial to avoid the implications of the limitations clause. All of these approaches can be seen to evidence adherence to traditional theories of legal reasoning and formalist analysis, and therefore reflect a denial of the normative and political values inherent in decision making under the Charter. If the judiciary continues to take this narrow view of their role in interpreting the Charter, Canada may well lose the opportunities our new constitution provides for discussion and development — of both a new understanding of the judicial role in our governing institutions, and of a new consensus on the ruling principles of our polity. This thesis is developed more fully in the concluding section of this paper.

II. JUDICIAL REVIEW AND SECTION 1

Section 1 of the Charter of Rights and Freedoms establishes a way of adjudicating conflicts over human rights that may be unique to Canada. Unlike the U.S. Bill of Rights, which articulates rights absolutely and leaves it to the judiciary to read in a standard of reasonable limits, the Charter presents the Canadian judiciary with a pre-fabricated limitations clause. This may be perceived as a restraint on judicial discretion, but section 1 is somewhat more open-ended than the similar clauses in international conventions upon which it was modelled. Most of these conventions enumerate explicit public goals that can be considered “reasonable,” whereas the terms of section 1 are phrased in vague

10 “Legal reasoning is formalistic when the mere invocation of rules and the deduction of conclusions from them is believed sufficient for every authoritative legal choice.” R. Unger, Law in Modern Society (New York: Free Press, 1976) at 194.

11 An example of such a clause is Article 10 of the European Convention for the Protection of Human Rights and Freedoms, which allows restrictions on the freedoms of expression that are prescribed by law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
generalities, indeterminate of meaning through their imprecision, yet at
the same time “inviting of moral and political inquiry.”

Rights and freedoms guaranteed by the Charter are subject to “such
reasonable limits prescribed by law as can be demonstrably justified in
a free and democratic society.” Central to this formula is the notion
of reasonable limits, a notion that invites reference to some principle
or policy lying beyond the words themselves in order to infuse the term
“reasonable” with some specific content. The rest of the section modifies
this phrase but fails to establish any particular meaning. While the limits
must be “prescribed by law,” no definition of what “law” includes is
offered, and it is unclear whether the phrase is intended as a threshold
question to limit resort to section 1, or whether it was a mere rhetorical
inclusion. The assertion that reasonable limits under section 1 must be
demonstrably justified in a free and democratic society points to some
evidentiary or burden of proof requirements, but beyond that does not
add much to the definition of the section. The values of “freedom” and
“democracy” seem to have been invoked, but as a guide to decision
they have severe limitations themselves. Not only are they two elements
of society that may be perceived to be in conflict, or at least not wholly
reconcilable, they are concepts that are in some sense “essentially
contested,” that is: “[T]here is no one clearly definable general use of
any of them which can be set up as the correct or standard use.”
Democracy, especially, is a concept “the proper use of which inevitably
involves endless disputes,” and is therefore incapable of infusing specific
content into the notion of “reasonableness” in section 1.

The open-ended words of the section, therefore, circumscribe a
conflict between values but fail to provide a resolution. The limitations
clause guarantees the freedoms enumerated in the Charter, but at the
same time it allows qualifications of those rights subject to certain criteria.
This establishes tension between two political theories associated with
liberalism and also with traditional legal thought. One is premised on
the notion that individual rights must have priority over the will of the
majority. The other, utilitarianism, claims that the goal of society must
be the aggregate welfare of its members and that this, where reasonable,
supersedes individual rights. Determination of an appropriate point of
balance between these values reproduces the eternal and apparently

12 W. Conklin, “Interpreting and Applying the Limitations Clause: An Analysis of Section
1” (1982) 4 Sup. Ct. L. Rev. 75 at 75.
13 Charter, supra, note 3, s. 1.
Society 167 at 168.
15 Ibid. at 169.
irreconcilable conflicts of man in society — freedom versus order and the individual versus the collective. Moreover, the process of deciding whether a governmental action meets the criterion of reasonableness requires exactly the kind of political cost-benefit analysis that Chief Justice Laskin had in mind when he stated: "[T]he wisdom or expediency or likely success of a particular policy expressed in legislation is not subject to judicial review."16 It seems that with the enactment of the Charter, and by the words of section 1, we have delegated to the Canadian judiciary a mandate that classical constitutional thought is preoccupied with justifying and at the same time restraining.

The problem that rights adjudication presents for traditional legal theories is that it challenges on a more explicit level than other forms of "legal" reasoning the idea that one can find or invent "a small set of general principles that can be applied in many specific instances" to determine outcomes — or at least "severely constrain the possible outcomes."17 General rejection of the literalist notion that "texts have any inherent meaning"18 has dealt extreme formalism a serious blow, but the positivist theory of H.L.A. Hart still attempts to limit judicial interpretation to consideration of only the "legal" materials. The application of a complex "rule of recognition" determines what can properly be considered a "legal" source.19 Thus Hart argues that judges need cross the line between law and policy only interstitially, in "penumbral cases."20 Judicial review almost inevitably falls within this penumbra, however, for as Hart himself concedes: "Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values," although he adds that the judiciary will bring to this choice "a concern to deploy some acceptable general principle as a reasoned basis for decision."21

This belief that "the otherwise unbounded process of 'interest balancing' can be rendered non-political by the instrument of 'principled reasoning'"22 is also characteristic of scholars such as Ronald Dworkin

19 Hart, supra, note 8 at 92-93.
20 Ibid. at 132.
21 Ibid. at 200.
22 Monahan, supra, note 18 at 69.
and John Hart Ely. Dworkin puts forward a sort of "normative logic" that recognizes the moral element in judicial decision making but at the same time seeks to constrain it:

We must accept that the Supreme Court must make important political decisions. The issue is rather what reasons are, in its hands, good reasons. My own view is that the Court should make decisions of principle rather than policy — decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted. . . .

Judges are limited not only by this principle-policy distinction, but by the means they are expected to use to select the appropriate principle. In the words of Peter Gabel, they must proceed "by an intuitive apprehension of the principle's relationship to the moral direction of the community's political institutions," which comes down to a sort of conventional political morality. Ely draws a distinction between law and policy on different grounds than does Dworkin, arguing for a "representation-reinforcing" rather than "value-protecting" approach to judicial review,

fueled not by a desire on the part of the court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process — which is where such values are properly identified, weighed, and accommodated — was open to those of all viewpoints on something approaching an equal basis.

Such a "process" theory, however, represents a particular concept of equality that can itself be considered a substantive value, and therefore suggests the possibility that there may be other values worthy of protection. As Dworkin has said, "intention and process are mischievous ideas because they cover up these substantive decisions with procedural piety, and pretend they have not been made."

This same criticism has been directed at Dworkin. The possibility of his judge-as-Hercules ascertaining an objectively valid and discernible principle seems in the final analysis to come down to his own belief that equal concern and respect is the foundational principle of modern

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23 P. Gabel, Book Review (1977) 91 Harv. L. Rev. 302 at 306. Dworkin's theory can be characterized as "normative" because he recognizes that the decisions of the court, at least on constitutional matters, involve making important moral and even political choices. He asserts a form of "logic," however, by claiming that the judiciary can, and does, structure these choices according to the guidelines discussed below. Thus, the term "normative logic" seems apt.


25 Gabel, supra, note 23 at 304.

26 Ely, supra, note 7 at 74.

27 Dworkin, supra, note 24 at 470-71.

28 Dworkin, supra, note 9 at 272-73.
society. Adherents of the Critical Legal Studies (CLS) movement have accused both Hart and Dworkin of converting normative statements into descriptive statements, of turning “questions that require active judgment and choice... into questions that seem to require only passive mimicry.”

By analyzing the indeterminacy, manipulability, and reliance on non-objective judicial value choices inherent in all of these theories, these scholars have sought to establish that “ultimately, choices can be made only by resort to the same forms of moral and ethical arguments generally that are found in political disputes.”

In Canada, this debate over the possibility of determinacy and neutrality in judicial review has had only limited impact. Perhaps this is because the role of our courts in federalism disputes and in quasi-constitutional Canadian Bill of Rights adjudication has appeared so innocuous compared to the more radical intervention of the U.S. Supreme Court. Even a more critical analyst like Paul Weiler, who has established a solid case against judicial intervention in industrial relations and federalism disputes, appears surprisingly acquiescent to the view of the court as “defender of our civil liberties.”

The enactment of the Charter witnessed a considerable debate over the pros and cons of entrenchment and there has been general recognition of the tension between adjudicative and political roles created by a rights document. There is a real paucity, however, of theoretical studies of these implications, despite a massive literature on the technical aspects of the Charter. Most of the articles written on section 1 have taken a rather mechanical view of its operation, attempting to “venture a measure of precision and predictability in both its interpretation and its application.” A few analysts have mounted attempts to define and delimit

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29 Singer, supra, note 17 at 29.
32 Canadian Bill of Rights, R.S.C. 1970, Appendix III.
33 For example, see the controversial decisions relating to abortion, Roe v. Wade, 410 U.S. 113 (1973), and desegregation, Brown v. Board of Education, 347 U.S. 483 (1954).
34 P. Weiler, In the Last Resort (Toronto: Carswell, 1974), especially at 206.
35 See for example, Russell, supra, note 4 at 19; M. Gold, “Equality Before the Law in the SCC: a case study” (1980) 18 Osgoode Hall L.J. 336 at 338.
judicial discretion under the *Charter*. Barry suggests that the primary goal of statutory interpretation ought to be the determination of the social policy intended by Parliament,38 Fairley puts forward an Ely-like standard whereby judges ought only to aim to perfect the democratic process,39 and Bender suggests that guidelines for the application of section 1 “are mainly to be found in — or derived from — the subsequent provisions of the *Charter* that define and describe the guaranteed rights that the *Charter* seeks to protect.”40

On a different level, Hovius and Martin have argued that the courts will avoid taking on any new, activist role, and “will instead strive to ensure that the legislatures continue to bear the responsibility for determining social policy.”41 The common element in all these analyses, however, is an avoidance and implicit denial of the possibility that section 1 in fact requires that the judiciary make essentially normative and political choices.

As discussed earlier, the conflict that section 1 describes and requires the judiciary to mediate appears on its face to require the input of moral and political values: “[J]udges are faced with essentially open-ended moral categories into which they must pour precise meaning and content.”42

As well, most adjudication under section 1 will “involve conflicts between legitimate interests on either side, and require a delicate adjustment for a satisfactory resolution.”43 This process of balancing and mediation is normally considered to be part of the development of policy and the responsibility of the legislature. The explicit invitation in section 1, for the judiciary to evaluate the considerations that have gone into the formulation of a specific legislative approach, seems to rule out even Professor Dworkin’s principle-policy dichotomy or at least blur an already nebulous distinction beyond the point of usefulness. Section 1 poses a difficult, perhaps insurmountable challenge to our traditional theories of legal reasoning. As one of the few constitutional thinkers to acknowledge this difficulty has noted:

42 Weiler, *supra*, note 34 at 213.
The kind of litigation an entrenched document engenders is not suited to adjudicative solution: the issues in dispute are polycentric, and are based on multiple interacting criteria; the standards to be applied are directed not to acts, but rather to intentions; and most importantly, the range of relevant justificatory materials necessarily must stretch beyond the narrow concept of a record. . . .44

The next section of this paper will examine a number of cases decided since the 1982 entrenchment to consider how successful our judiciary, and especially the Supreme Court of Canada, have been in meeting this monumental challenge.

III. JUDICIAL TREATMENT OF SECTION 1 BEFORE R v. OAKES: AVOIDANCE

The case law decided under the Charter since 1982 is replete with ringing judicial pronouncements of a new role for the courts, of a "new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court."45 Some judges appear to have explicitly recognized the normative element inherent in this new venture: "It requires, perhaps for the first time in our national history, that judges articulate the fundamental values of society and set their order of priority."46 In general, though, the case law provides few clues as to how the judiciary intends to accomplish this weighty task, and is in fact characterized most notably by avoidance (and occasional denial) of the challenge presented to legal reasoning by section 1. Judges speaking outside the confines of a judgment have noted the need for the judiciary to develop new attitudes and techniques to evaluate a wide range of societal values without "refuge in traditional legal language and concepts."47 Their focus, however, has been on the need to "affect the sources on which the courts must rely for guidance"48 through changes in the rules of evidence, standing, and intervention. In early Charter cases, the Supreme Court of Canada, where it discussed the limitations clause at all, largely avoided any development of the section 1 mandate by relying on a series of "threshold tests" that

44 MacDonald, supra, note 36 at 337.
precluded direct consideration of the implications of the section. A brief survey of the case law will serve to elaborate this trend.

Only one case at the Supreme Court level has yet been decided under a section 1 redemption of a rights violation, which to some extent may explain the highest court’s hesitancy to elaborate on its meaning and application. The lack of an ideal case, however, cannot entirely justify the lengths to which the court seems to have gone in failing to advance, until the Oakes case, to any explicit consideration of section 1. In Skapinker, the court did not proceed to a discussion of section 1 because it declared that the right in question had not been violated. A finding of an infringement of section 7 in the Singh case, however, did not lead to a thorough discussion of section 1 despite Wilson J.’s recognition that the question of what standards the court should use in applying section 1 was one “of enormous significance for the operation of the Charter.” While asserting that utilitarian considerations based on administrative convenience would not be adequate to constitute a section 1 justification, she declined to make further observations as to what factors might deserve consideration.

Such a refusal to speculate may well be commendable in dealing with a constitutional document, but it causes problems for lower courts attempting, without guidance, to deal with a wide variety of justifications. This is certainly the case when dealing with the interface between section 1 and sections of the Charter that seem to carry their own implicit limitations. The analysis of the unreasonable search and seizure provisions of section 8 in Hunter v. Southam considers the meaning of “reasonable” in that section in a fashion analogous to the endeavour under section 1:

[An] assessment must be made as to whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals...

The court noted that the guarantee against “unreasonable” conduct lacked both specificity and a context from which to derive an “obvious gloss” on its meaning, an insight which might also be applied to the phrase

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52 Ibid. at 219.
53 Ibid. at 220.
55 Ibid. at 159-60.
56 Ibid. at 155.
"reasonable limits." In dealing with section 1, however, the court hedges the question of whether an "unreasonable" search and seizure could nonetheless be considered a "reasonable" limit.\(^\text{57}\)

Similarly, the Supreme Court did not proceed to a consideration of section 1 in the *Operation Dismantle* case, despite an analysis by Wilson J. that relies heavily on the notion that rights in the *Charter* must of necessity be interpreted so as to accommodate both the rights of others and the mandate of the state. In determining that the challenged government action in the case was never intended to be caught by section 7, Madame Justice Wilson states that: "The 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."\(^\text{58}\)

Whether or not these attempts to confine "balancing" analyses to the definition of a right indicate an avoidance of section 1, they do perpetuate confusion as to the structure of the *Charter*'s constitutional protection and ignore the burden of proof and evidentiary questions that arise. The approach of Wilson J. is especially puzzling considering her admirable attempt in the same case to articulate an appropriate level of judicial review in cases involving "political questions" or raising questions of justiciability. While the learned justice conceded that some issues could be labelled non-justiciable "because they involve moral and political considerations which it is not within the province of the courts to assess,"\(^\text{59}\) she nonetheless asserts that "however unsuited courts may be for the task, they are called upon all the time to decide questions of principle and policy."\(^\text{60}\)

The limitations clause is central to Wilson J.'s view of this judicial responsibility to review political decisions where they affect constitutionally-protected rights:

Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. . . . It obviates the need for a 'political questions' doctrine and permits the court to deal with what might be termed 'prudential' considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.\(^\text{61}\)

Considering the important role that section 1 appears to play in balancing the political and judicial roles in Wilson J.'s theory of judicial review,

\(^{57}\) *Ibid* at 169.

\(^{58}\) *Operation Dismantle Inc. v. The Queen* (1985) 59 N.R. 1 at 56.

\(^{59}\) *Ibid* at 27.

\(^{60}\) *Ibid*. [emphasis added].

\(^{61}\) *Ibid*. at 58.
it is disappointing that she declines to proceed to its analysis in the *Operation Dismantle* case, which raised a particularly controversial question.

This identification of the policy-making or policy-reviewing function of the courts with the terms of section 1 is to be seen in the *B.C. Reference*, yet another case which addressed the interface between sections 1 and 7. Any substantial analysis of section 1 in that case was avoided by the judgment that a limit on section 7 effected through a violation of principles of fundamental justice could only in the most exceptional of circumstances be sustained under section 1. Wilson J. articulated this preclusion absolutely, suggesting that “the concepts are mutually exclusive,” while Justice Lamer cited “natural disasters, the outbreak of war, epidemics, and the like” as the only types of rationale under section 1 likely to justify a violation of section 7. At the same time, however, the court makes it clear that the public interest as justification for government action is not a factor to be considered in determining whether or not a violation of section 7 has occurred.

The intimation, therefore, seems to be that public policy justifications have no role to play in the analysis, beyond a sort of section 1 emergency doctrine, which is borne out by Lamer J.’s attempts to define the scope and content of the principles of fundamental justice invoked by section 7. Much of his determination rests on what he describes as a “purposive” approach to the Charter, articulating “objective and manageable standards” that “secure for persons the full benefit of the Charter’s protection under s. 7, while avoiding adjudication of the merits of public policy.” It is this latter restriction on the court’s function that seems to concern the learned Justice most, and which, he argues, is central to many analysts’ concern over any expansion of section 7 to include a notion of substantive due process. He suggests that fear of the courts coming “to adjudicate upon the merits of public policy” has led to “the characterization of the (section 7) issue in a narrow and restrictive fashion,” focusing on the distinction between procedural and substantive due process rather than on the meaning of principles “found in the basic tenets of our legal system.” Mr. Justice Lamer emphasizes that meaningful content can

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be attributed to section 7, all the while avoiding adjudication of policy matters, and thus the furor over substantive due process.

This judgment can be seen to be organized around an assertion made early on in the report of the case: "In neither case, be it before or after the Charter, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments." As the court recognizes that section 1 not only invites but demands a consideration of the public interest, such as the need for a "legislative scheme aimed at reducing the human and economic costs of bad driving," it faces an increasing conflict between the terms of the limitations clause and its view of its own role. The definition of a right, however, appears to be an enterprise more consonant with a view of legal reasoning as statutory interpretation or "purposive analysis." It is instructive that the Supreme Court attributes a "balancing of interests" function to section 1 but still seems anxious to complete its analysis under the definition of a right or freedom.

Confusion over where the definition of a right ends and the balancing exercise under section 1 ought to begin is particularly evident under sections 7 and 10 because the words "unreasonable" and "in accordance with principles of fundamental justice" appear to make the rights "self-limiting." The difficulties in these cases point, however, to a more general problem with the notion of legal reasoning in the context of the Charter as a whole. The interpretation of even a "pure" right such as freedom of expression will inevitably entail decisions about which interests are worthy of protection. Political and artistic expression might fit within the definition of the right, for example, while speech having a commercial flavour was excluded from its ambit. Would such a decision differ in any meaningful way from a judgment which defined the freedom more broadly, but held that certain restrictions on public nudity were in the public interest and therefore "reasonable limits demonstrably justified" under section 1? Any number of examples could be invoked to show that: "The indeterminacy and manipulability of levels of generality is closely related, if not ultimately identical, to the arbitrariness inherent in accommodating fundamental rights with competing government interests." There is clearly an analogy to be made, therefore, between the analysis under section 1 and the problem of infusing highly abstract statements of rights with some determinate content. The completion of

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69 Ibid. at 272.
70 Ibid. at 286, quoting from the appellant's factum.
72 Brest, supra, note 30 at 1085.
a Charter analysis within the definition of a right does not mean that the political and moral choices inherent in the problem have been avoided as much as disguised by the more formal language of "violations" and "breach."

Whether these cases evidence prudence or folly in their avoidance of the limitations provisions, they can be seen to establish threshold tests, such as the violation of a right, which must be passed before the invocation of section 1. Three other Supreme Court cases have used similar reasoning, but their rationales for effectively precluding consideration of section 1 have been a little more complex and therefore more difficult to explain as simply cautious statutory interpretation. Perhaps the best example is the Protestant School Boards case, which was really the first Supreme Court case to discuss section 1. After concluding that Quebec language legislation was clearly in violation of section 23 of the Charter, the court asserted that Bill 101 "cannot possibly have been regarded by the framers of the Constitution as coming within 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'" The court seemed to feel that section 23 was enacted with a view to correcting just this kind of linguistic regime and that the legislation therefore challenged the right's very basis and could not possibly be legitimized under section 1. This can be perceived to some extent as an historical or originalist approach attempting to ascertain and enforce the intentions of the framers, but the Court tried to make it clear that its decision was not premised on the existence of this particular legislative scheme at the time of the Charter's enactment. Rather, its analysis focused on the level of the breach, following the lower courts' distinction between a "limitation" and a "denial" of a Charter right, the latter never being redeemable under section 1. The court asserted that, whatever their actual scope, reasonable limits could never be so broad as to constitute an amendment or exception to the Charter guarantees, such as that contemplated by the section 33 override. In other words, a limit so onerous that it constitutes a denial is prima facie unreasonable.

74 Ibid. at 67.
75 Ibid.
76 Ibid. at 84.
77 Ibid. at 85.
78 Quebec Association of Protestant School Boards v. A.G. Quebec, supra, note 73 at 88. Subsection 33(1) of the Charter reads "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."
This distinction based on the immensity of a breach is a rather nebulous one, as the notion that section 1 does not effectively apply to a denial but only a limitation would seem to be ultimately manipulable. In the Protestant School Boards case it allowed the Supreme Court to decide, having "only assumed for the sake of discussion, without deciding the point,"\textsuperscript{80} that section 1 applied to section 23, and without any consideration of the extensive evidence put forward to support the Quebec legislation, that Bill 101 could not be justified. This concern to find some resolution of the question without actual resort to section 1 has been echoed in two more recent cases. In \textit{R. v. Big M Drug Mart Ltd.},\textsuperscript{81} Dickson C.J.C. does not really consider the adequacy of the federal government's submissions on public convenience, order, and health, for he concludes that such objectives would be \textit{ultra vires} the federal Parliament and could never, therefore, constitute reasonable limits under section 1.\textsuperscript{82} Similarly, the court in \textit{R. v. Therens} states that section 1 is not called into question because the accused's right to counsel was limited arbitrarily by police, and therefore not "prescribed by law."\textsuperscript{83} Thus, only a limitation that is required by legislative provisions or results "by implication from their terms or operating requirements"\textsuperscript{84} will be considered under section 1. In all of these cases, substantive questions such as the extent of provincial powers in the treatment of linguistic minorities, the status of "secondary purposes" in justifying suspect legislation, and the appropriate timing and extent of police warnings in different circumstances were neglected in favour of the articulation of "formulas" for the exclusion of section 1.

What all these Supreme Court cases have in common, therefore, is a paucity of discussion as to the meaning and implications of the terms of section 1. Despite apparent recognition of the importance of developing principles under which government objectives can be balanced against constitutionally protected rights,\textsuperscript{85} the court had consistently avoided any direct confrontation with that task until the release of \textit{R. v. Oakes} in February 1986. This failure to address section 1 may point to a more general reluctance to recognize the political and moral elements inherent in decision making under the \textit{Charter}, a trend that is not really

\textsuperscript{80} Ibid. at 85.
\textsuperscript{82} Ibid. at 117.
\textsuperscript{83} \textit{R. v. Therens} (1985), 59 N.R. 122 at 124.
\textsuperscript{84} Ibid. at 136.
\textsuperscript{85} \textit{R. v. Big M Drug Mart Ltd.}, supra, note 81 at 116.
reversed by Oakes, despite the Court’s attempt in that case to begin to set out an authoritative approach to the interpretation of section 1.

IV. JUDICIAL TREATMENT OF SECTION 1 IN R. v. OAKES: FORMALISM

R. v. Oakes will undoubtedly become an often-cited authority for its interpretation of section 1. Chief Justice Dickson recognizes that the rights and freedoms set out in the Charter are not absolute, but rather may be limited “in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.” He sets out the “criteria of justification” for such limitations and starts with a number of explicit assertions which largely echo the decisions of lower courts. Among these assertions are: the onus of proof in a section 1 defence “rests upon the party seeking to uphold the limitation”; the standard of proof is the civil standard of “proof by a preponderance of probability,” applied rigorously; and the evidence should be “cogent and persuasive,” the party presenting it making it clear to the court “the consequences of imposing or not imposing the limit.”

After these preliminary observations, Dickson C.J.C. goes on to set out the two central criteria that must be satisfied in order to meet the terms of section 1:

First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be [shown to be] 'of sufficient importance' ... Second ... the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified.

This second inquiry involves “a form of proportionality test,” requiring the court to “balance the interests of society with those of individuals and groups.” In assessing the means chosen, the court must consider three important factors:

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86 R. v. Oakes, supra, note 49 at 335.
87 Ibid.
89 R. v. Oakes, ibid.; see also Re Southam Inc. and the Queen (No. 1) ibid. at 129; Federal Republic of Germany v. Rauca, ibid. at 715-16.
90 R. v. Oakes, ibid. at 336; see also Law Society of Upper Canada v. Skapinker, supra, note 45 at 383-84; Singh v. Minister of Employment and Immigration, supra, note 51 at 217.
93 R. v. Oakes, supra, note 49 at 337.
The measures adopted must be carefully designed to achieve the objective in question... [they] should impair 'as little as possible' the right or freedom in question... [and] there must be a proportionality between the effects of the measures... and the objective.94

This formula for evaluating a section 1 limitation follows upon a number of lower court decisions which have outlined the notions of “balancing,” “proportionality,” and “less onerous means.”95

Perhaps the most notable element of the Oakes test is the very high level of scrutiny that it appears to establish in the determination of an issue under section 1. By requiring the demonstration of an important government objective, and of both a rational connection and proportionality between this goal and the means chosen, the court has placed a fairly onerous burden on the party seeking to uphold a limitation. An even higher standard has been imposed, however, by the assertion that the means “should impair ‘as little as possible’ the right or freedom in question.”96 Such a “less drastic means” test, as articulated in American jurisprudence under the First Amendment, has proved very difficult to meet, since, “in one sense, a less repressive or even non-repressive alternative is always available, provided that the government is willing to sacrifice effectiveness.”97 Perhaps the phrase “as little as possible” is meant to include questions of cost-benefit analysis in the determination of “possibility,” but this is clear neither from the plain words of Dickson C.J.C.'s formulation, nor from the application of the Oakes test in recent cases. In R v. Blainey,98 for example, the court relied on the phrase without even specifying what alternate means might have been pursued.99 In any event, the Supreme Court appears to have specifically denied the relevance of practical, utilitarian considerations to section 1 analysis in the Singh case.100

The Oakes decision, then, seems to come down squarely on the side of individual rights in the section 1 calculus to the extent that it makes government decisions difficult to justify under the limitation clause. It may, in fact, if read strictly, make section 1 virtually unavailable as

94 Ibid.
96 R v. Oakes, supra, note 49 at 337.
99 Ibid. at 530.
100 Singh v. Minister of Employment and Immigration, supra, note 51 at 219.
a forum for Charter decision making. While this will likely affect the substantive analysis of the Charter in the future, it would also appear to force much of the focus of argument back into the construction of rights provisions. This, as noted above, does not necessarily change the outcome but certainly changes the image of legal reasoning. In a strange way, therefore, the direct tackling of section 1 by the court in Oakes may result in the same obfuscation of the notion of “reasonable limits” as did its earlier avoidance.

Confusion will undoubtedly arise in the application of the Oakes decision because it hints, through its strict interpretation of section 1, at a particular view of the Charter calculus, but passes up any explicit articulation of a theory of rights for the delineation of a formalist “test.” If the Supreme Court’s decision is perceived by another panel of judges to represent a position weighted towards the protection of rights, and that court agrees with such an interpretation, then the Oakes test will undoubtedly be used to enforce the right or freedom in question and preclude justification under section 1. On the other hand, the judiciary may well feel that in a particular case an extremely important societal goal or a less central right is at stake. This would justify a more intrusive but nonetheless “reasonable” means of government action. In such a case, a court might read the Oakes “test” narrowly, either by holding the right not to have been violated, by finding the words “as little as possible” to contain an evaluation of effectiveness and cost, or by relying on Dickson C.J.C.’s general limiting words that, “the nature of the proportionality test will vary depending on the circumstances.”101 The courts’ interpretation of Mr. Chief Justice Dickson’s four-part test will certainly indicate that a choice has been made, but can the test itself truly structure and inform that choice?

The problem with the articulation of ‘tests’ for the application of section 1, as was attempted in Oakes, is their limited usefulness in dictating and explaining the final outcome of each balancing exercise. American commentators have made compelling arguments that the use of terms like “rationality” and “less drastic means” in constitutional jurisprudence dealing with the Bill of Rights only confuses and obscures the real choices inherent in comparing the relative merits of competing public policies.102 A note in the Yale Law Journal asserts that “it is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it,” making the traditional rationality test “an empty requirement and a misleading analytic device.”103 The

101 R. v. Oakes, supra, note 49 at 337.
102 Notes, infra notes 97 and 103, supra, note 97 and infra, note 103.
103 Note, “Legislative Purpose, Rationality, and Equal Protection” (1972) 82 Yale L.J. 123 at 128.
same problem can be seen with the inevitable availability of some "less onerous means" if the phrase is read plainly. And, "since the Court lacks the competency to measure the relative efficiency, cost, and repressive effect of alternative measures, consideration of less drastic means cannot provide any form or structure [to constitutional decision making]."\textsuperscript{104}

What all these tests seem to reduce to is the balancing of competing interests that we began with, the essence of which is captured by the final part of Dickson C.J.C.'s test and the notion of proportionality. His invocation of "rationality" and "imperil as little as possible" may assist in this mental process of step-by-step balancing by forming a checklist of factors to be weighed. These formulations are more likely, however, to obscure judicial reasoning, for "[T]he nature of the conflict between the political values at stake as well as the underlying bases of judicial reasoning would be made more explicit if the competing public policies were weighed outright without diversionary discussions. . . ."\textsuperscript{105}

The \textit{Oakes} test is interesting as a catalogue of the types of arguments that are likely to be made in the interpretation and analysis of section 1. It is reasonably clear, however, that the Supreme Court has suggested a standard of review that weighs heavily in favour of individual rights, without fully articulating a theory of rights that can either justify such a degree of scrutiny, or constrain judicial choice in conformity with it. Inasmuch as different courts are likely to have different views on the underlying conflict between values that is inherent in section 1, they are likely to have different views of their own role in the resolution of that conflict, which will inevitably colour their interpretation of Dickson C.J.C.'s test. The activism in the \textit{Oakes} case has been paralleled in other cases by a more conservative approach to judicial review, evidencing a different perception of the appropriate "balance" between individual rights and collective goals. In each of these cases, however, as in \textit{Oakes}, arguments and assertions about this balancing exercise are subordinated to formalist modes of reasoning and traditional approaches such as legislative deference.

V. JUDICIAL TREATMENT OF SECTION 1 SINCE \textit{R v. OAKES}: DOWN THE SLIPPERY SLOPE

The \textit{Charter} cases decided by the Supreme Court of Canada since \textit{R v. Oakes} amply demonstrate the difficulty inherent in the use of a formalist test in the resolution of constitutional questions dealing with

\textsuperscript{104} Note, \textit{supra}, note 97 at 474.

\textsuperscript{105} Note, \textit{supra}, note 103 at 154.
rights. The reasons written by various members of the Supreme Court bench confront these difficulties in different ways, but they all reveal the avoidance of the political implications of their role that was evident in the pre-\textit{Oakes} period. The ineffectiveness of the Chief Justice's test in answering the difficult questions posed by section 1 has apparently led the judiciary back down the slippery slope of balancing and choice, despite their continuing reliance on such avoidance techniques as resolution within the rights sections, threshold tests, and of course simple denial.

Perhaps the most obvious aspect of the treatment of the \textit{Oakes} test in the more recent Supreme Court cases is the extent to which the test is ignored. Only the dissent of Madame Justice Wilson in \textit{Jones v. The Queen}\textsuperscript{106} and Chief Justice Dickson's reasons in \textit{Edwards Books}\textsuperscript{107} deal directly with the factors enumerated in \textit{R. v. Oakes}, out of a total of eleven sets of reasons delivered in these two cases and \textit{Dolphin Delivery}.	extsuperscript{108} Both La Forest J. in \textit{Jones} and McIntyre J. in \textit{Dolphin Delivery} refer to the \textit{Oakes} decision, but only to cite Dickson C.J.C.'s words to the effect that there may be cases where "no evidence" is required to prove a section 1 justification.\textsuperscript{109} Other reasons advert often to the significance of the \textit{Oakes} statement on section 1, but do not go on to utilize its apparently exhaustive recitation of the relevant factors.

Similarly, there is a noted avoidance in these cases of the seemingly onerous standard of "least restrictive means." In \textit{Jones}, the judgment of La Forest J. appears to conclude the question of the constitutionality of sections of the Alberta \textit{School Act} dealing with private instruction on the basis of a section 1 justification. After conceding that the Act "does constitute some interference with the appellant's freedom of religion,"\textsuperscript{110} La Forest J. goes on to emphasize the compelling interest of the province in the education of the young, noting that "it may, in advancing this interest, place reasonable limits on the freedom of [individuals]."\textsuperscript{111} The learned Justice concludes that the requirement of a certificate of efficient instruction for private educators "constitutes a minimal, or . . . peripheral intrusion on religion," the absence of which "would create an unwarranted burden on the operation of a legitimate legislative scheme to assure a reasonable standard of education."\textsuperscript{112}

\textsuperscript{106} Jones v. The Queen, [1986] 2 S.C.R. 284.
\textsuperscript{109} Jones, supra, note 106 at 299; Dolphin Delivery, supra, note 108 at 590.
\textsuperscript{110} Jones, supra, note 106 at 295.
\textsuperscript{111} Ibid. at 297.
\textsuperscript{112} Ibid. at 299.
The judgment of La Forest J. is puzzling for two reasons. First, it contains no reference to the well-defined test in *R v. Oakes*, and in its treatment of the “least restrictive means” part of the test it seems to veer quite sharply away from Dickson C.J.C.'s earlier approach. This is particularly interesting in that Chief Justice Dickson joined in the La Forest judgment on *Jones*, the first *Charter* case decided following *Oakes*. La Forest J. refuses in *Jones* to speculate as to how far the province could go in imposing conditions on religious freedom in education, but concludes that the present infringement is well justified.113 No further discussion of the degree of restriction imposed ensues until, several pages after concluding that the appellant cannot succeed in his *Charter* argument, he refers to the approach to issues of efficient instruction taken by other provinces. Considering the scheme of judicial determination available in other jurisdictions, he notes that despite some increased benefits in terms of detachment, court involvement would “create a more cumbersome administrative structure.”114 La Forest J. states that “some pragmatism is involved in balancing between fairness and efficiency,” and that the province must be given some leeway to choose an administrative structure unless it is “manifestly unfair.”115

This balancing approach taken by La Forest J. is in sharp contrast to the *prima facie* meaning of the phrase “least restrictive means,” and appears to provide a much more flexible standard incorporating a fair degree of legislative deference. Combined with the admitted lack of evidence put forward to establish a section 1 justification, it is hard to reconcile the judgment in *Jones* with the rigorous and highly structured approach outlined in *Oakes*. This conflict is perhaps related to the second puzzling aspect of Mr. Justice La Forest's reasons. It is far from clear in the judgment as to whether the case of the appellant fails on a section 1 justification or whether the court finds no violation of his section 2(a) right to freedom of religion. While La Forest J. indicates early on in the judgment that some interference with religious freedom is likely under the *School Act* regime, and then goes on to take a balancing approach consistent with section 1 analysis, he later suggests that *Charter* rights must be interpreted “within reason.”116 He then states that “I do not think the appellant can succeed in his argument under section 2(a) of the *Charter*.“117 In fact, the headnote to the Supreme Court Reports' report

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113 Ibid. at 298-99.
114 Ibid. at 304.
115 Ibid.
116 Ibid. at 300-01.
117 Ibid. at 301.
of the case suggests that La Forest J. finds no violation of sections 2(a) or 7 in denying the appeal of Jones. However the case was actually decided, it certainly shows continuing confusion about the enterprise under section 1 and its connection with the catalogue of rights. It would be ironic indeed if the test in *Oakes* is seen to require such a strict level of scrutiny that any attempt at more flexible, policy-sensitive balancing is forced back into the definition of a right.

It is certainly this result that is suggested by the dissent of Madame Justice Wilson in *Jones*, who clearly finds no violation of section 2(a) and does not, therefore, "save" the impugned sections under section 1.118 Wilson J. states that:

... even assuming that this legislation does affect the appellant's beliefs ... not every effect of legislation on religious beliefs or practices is offensive to the constitutional guarantee of freedom of religion. ... [L]egislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion.119

The learned Justice rejects the argument that this kind of concern should be dealt with under the limitations clause,120 and in fact concludes that if the Act was found to be in violation of section 2(a) it could not be saved under section 1.121 This conclusion appears to rest on Wilson J.'s interpretation of the requirements of the *Oakes* test. She cites *Oakes* for the proposition that, where a violation of a right has been found, the means employed must impair as little as possible the freedom in question.122 As the government adduced no evidence to demonstrate that the certification approach was the least drastic means of effecting its goals, Wilson J. concludes that they have not met the "stringent standard of justification" lying upon them under *Oakes*.123

This avoidance of the *Oakes* test by a return to analysis within the right seems to parallel the earlier avoidance of the terms of section 1 described above. Not surprisingly, this general avoidance has persisted. In *Jones*, McIntyre J. is joined by both Beetz and LeDain, JJ. in concluding that there is no violation of the appellant's freedom of religion.124 Similarly, Beetz J. finds no violation of a *Charter* right in either the *Dolphin Delivery* or *Edwards Books*125 cases, and he is joined in the latter case by McIntyre

118 Ibid. at 309.
119 Ibid. at 313-14.
120 Ibid. at 314; Wilson J. cites her earlier comment in *Operation Dismantle, supra*, note 58.
121 Ibid. at 315.
122 Ibid.
123 Ibid. at 315, 322-23.
124 Ibid. at 308.
125 *Dolphin Delivery, supra*, note 108 at 604; *Edwards Books, supra*, note 107 at 788.
The majority decision in *Dolphin Delivery* authored by McIntyre J. also evidences a form of “threshold” test. While concluding that “in any form of picketing there is involved at least some element of expression,”126 the learned Justice goes on to conclude that the Charter does not apply to the action alleged to be an infringement. McIntyre J. holds that the granting of an injunction pursuant to litigation between private parties does not involve the requisite degree of governmental action so as to attract constitutional scrutiny.127

The most recent case to deal with section 1 of the Charter, *R v. Edwards Books*, is a particularly interesting example of the trends in its analysis identified above. In addition, it is the first case where a majority of the Supreme Court has redeemed an admitted violation of the Charter as a reasonable limit under section 1, and it is Chief Justice Dickson’s first discussion of section 1 since *R v. Oakes*. The reasons of the Chief Justice once again include a very thorough discussion of section 1.128 They represent a departure from his earlier comments in *Oakes*, however, in a number of ways.

Dickson C.J.C. begins his discussion of section 1 in *Edwards Books* with a review of the test articulated in *Oakes*. He goes on, however, to emphasize and “reaffirm” a part of his *dicta* other than the well-known list of factors:

> The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.129

As Dickson C.J.C. proceeds to apply the *Oakes* test to the question of the reasonableness of Ontario’s *Retail Business Holidays Act*, he focuses on just such a variable, flexible approach to its application. This is especially clear when he deals with the question of “least onerous means.” Dickson C.J.C. imparts quite a different meaning to the term by the addition of the word “reasonable” to the standard. Thus, the question becomes whether the Act abridges the freedom of religion of Saturday observers “as little as is reasonably possible,”130 and the Court asks if there is “some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects on religious freedom”131 [emphasis added].

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126 *Dolphin Delivery*, supra, note 108 at 586.
128 *Edwards Books*, supra, note 107 at 768.
130 *Ibid.* at 772 [emphasis added].
It is submitted that the effect of this modification of the words used in *Oakes* is to greatly reduce the strictness of the original standard, in that it returns us to the central notion of balancing of interests. It is impossible to guess whether the Chief Justice has altered his approach in recognition of the particular difficulties identified with the “less drastic means” test experienced in the U.S. constitutional jurisprudence and discussed above. It is a reasonable suggestion, however, that Dickson C.J.C. might have been anxious to respond to the problems with the rigidity of the standard evidenced in the judgments of his colleagues, particularly that of Wilson J. in *Jones*. Further, it is reasonably clear, even on the facts discussed by Dickson C.J.C. himself in *Edwards Books*, that a less restrictive means of ensuring a common pause day could be designed through a system of exemptions different from the Ontario version. Chief Justice Dickson downplays both the under- and over-inclusive nature of the Ontario provisions with respect to Sabbatarian exemptions, and the availability of other, perhaps better tailored schemes. The main comparison he undertakes is with the New Brunswick legislation which provides an exemption for those with sincerely held religious beliefs. Dickson C.J.C. concludes that both schemes, while “genuine and serious attempts” to minimize the infringement of minority rights, provide incomplete relief, and that it is far from clear that one scheme is intrinsically better than the other. He responds to the suggestion that the schemes ought to be combined in some form by stating there is “no constitutional duty on the Ontario legislature to do so.” He essentially sidesteps the question of which approach is least restrictive by concluding that the Ontario Sabbatarian exemption “represents a satisfactory effort on the part of the legislature,” and that the courts are not to substitute judicial opinions for legislative ones “as to the place at which to draw a precise line.”

The judgment of La Forest J. in *Edwards Books* echoes this deference to legislative decision while reaching different conclusions about the reasonableness of Sabbatarian exemptions. The learned Justice underlines the Chief Justice’s comment about avoiding “rigid and inflexible standards,” stating that “that seems to me to be essential.” He goes on to argue firmly that the legislature must be allowed adequate scope to achieve pressing objectives, and the courts “must be sensitive to . . . the

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practical living facts to which a legislature must respond... especially... in a field of so many competing pressures as the one here in question."\[137\] He does not, he asserts, mean to infer deference to legislative judgments where they trench on rights, but only that the courts must recognize that important goals will often only be achieved to the detriment of some.\[138\]

La Forest J. considers the legislative approaches of other provinces with respect to Sabbatarian exemptions, but notes that any exemption threatens the essence of the legislative goal and raises a complicated array of factors to be considered.\[139\] He states that "the nature of the choices and the compromises that must be made in relation to Sunday closing are essentially legislative in nature."\[140\] In conclusion, La Forest J. holds that the Act would be valid even without an exemption for Saturday observers, commenting that, indeed, "an exemption may be subject to constitutional weaknesses" (such as a challenge under section 15 of the Charter).\[141\]

Despite his observations on section 1, it is not clear that La Forest J. actually decides the case under the limitations clause. In fact, while conceding that the economic burden imposed on Saturday observers by the Act might violate their freedom of religion, he counters that it "would require evidence to warrant the conclusion that the burden on Saturday-observing retailers is sufficiently substantial as to constitute an abridgment of their religious freedom."\[142\] Such a transfer of the balancing analysis back into the right is also countenanced by Dickson C.J.C., despite his determination of the case under section 1. He notes in Edwards that it is not always necessary to turn to section 1 to justify legislation, agreeing with Wilson J. in Jones that legislative or administrative action is not prohibited if it creates a "trivial or insubstantial" burden.\[143\]

The judgments of both Dickson C.J.C. and La Forest J. in Edwards Books evidence a clear retreat from the formalism and strictness of the Oakes test. On the other hand, however, they do not represent a sudden acceptance by the Court of its political role in deciding Charter questions. By retreating into a position of deference to legislative decision they have only avoided the mandate clearly given them by the Constitution.

\[137\] Ibid. at 795.
\[138\] Ibid.
\[139\] Ibid. at 796.
\[140\] Ibid. at 806.
\[141\] Ibid. at 794.
\[142\] Ibid. at 793.
\[143\] Ibid. at 759.
Similarly, the transfer of the balancing process back into the definition of a right, explicit denials of a policy-making function, and the use of threshold tests all aid the Supreme Court judiciary in affirming the "legal" nature of their reasoning and therefore denying the spectre of "politics."

One final form of this avoidance is worthy of comment, and that is the firm support of formalist analysis put forward by Wilson J. in all three post-\textit{Oakes} cases. In \textit{Jones}, the learned Justice argues for a strict interpretation of the \textit{Oakes} test, the corollary to which was the completion of the analysis under section 2(a) as the legislation could not be justified under section 1. Wilson J. criticizes the approach of McIntyre J. in \textit{Dolphin Delivery} as not being sufficiently "objective," stating that "the search under section 1 is for the appropriate test to apply."\textsuperscript{144} It is in \textit{Edwards Books}, however, that her formalism becomes most explicit. Wilson J. rejects the notion of balancing embraced by the other justices by condemning the "compromise" position taken by the legislature in designing the section 3(4) exemption in the \textit{Retail Business Holidays Act}. She quotes Ronald Dworkin in \textit{Law's Empire}\textsuperscript{145} for the assertion that government must legislate on the basis of principle. Thus, there "must be compromises about which scheme of justice to adopt rather than a compromised scheme of justice."\textsuperscript{146} The application of this principle requires that the legislature, and then presumably the courts if a constitutional challenge is mounted, choose between the competing goals of a common pause day and the religious freedom of non-Sunday observers. Attempts to balance these interests by further references to the size of the establishment, the number of employees, or the interests of employers versus those of employees and consumers, are illegitimate as internal compromises. Wilson J. concludes that the present scheme of the Act, as it was supported by the other members of the panel, constitutes a compromised scheme of justice which cannot be upheld under section 1.

The comments of Madame Justice Wilson are unique only in the directness with which they refer to a theory of legal reasoning which purports to provide a formal guideline for judicial decision making. Unlike many of the other judgments discussed in this paper, where members of the judiciary seem inevitably to be drawn to the balancing of interests despite their discomfort with the role, Wilson J. has attempted to draw a firm line against balancing and choice. It seems unlikely, however,

\textsuperscript{144}\textit{Dolphin Delivery, supra}, note 108 at 604.


\textsuperscript{146}\textit{Edwards Books, supra}, note 107 at 809.
that this perspective will either garner much support or persevere in the face of difficult and complex constitutional questions. None of the mechanisms utilized by the judiciary to avoid the politics of judging have proved to be very successful in constraining their choices and determining outcomes in a fashion consistent with their view of their role. As will be argued further in the next section, we can only hope that the reality of their role may eventually overcome the formalism inherent in the judicial treatment of section 1 so far.

VI. CONCLUSION — THE FUTURE OF SECTION 1

Shortly before the Charter of Rights and Freedoms was entrenched in its final form, L.D. Barry, Q.C., of the Newfoundland bar, penned an optimistic and enthusiastic prediction for the future of judicial review under the new document:

Judges . . . will be forced to admit they must make choices between competing values. They will no longer be able to portray themselves as mere mechanical finders and appliers of the law. . . . Artificial, question-begging, decision-making should be reduced with fewer sterile exercises in logical derivation and more contact with reality.147

Analysis of case law decided under the Charter in the last four years, however, reveals the survival of what Professor Weiler has called the “traditional, inarticulate, legal positivism of Canadian lawyers and judges.”148 The problem he identified in his study of the Supreme Court of Canada in 1974 seems to be true even under the new, expanded mandate of rights adjudication; the court “exhibits much too narrow a conception of legal reasoning to do justice to the important legal policies it is settling for the Canadian polity.”149 When one considers the inevitable moral and political impact of decisions made under the Charter, this critique becomes even more compelling.

It would be misleading to imply that Canadian courts had played no significant policy-making role before the enactment of the Charter,150 but their new mandate has focused concern on the implications of this role. In approaching rights adjudication, the chief problem for the courts is the rather ephemeral sources they are able to use, of which section 1 is a prime example. Its terms are internally contradictory, non-directive,

147 Barry, supra, note 38 at 264.
149 Weiler, supra, note 34 at 235.
150 Russell, supra, note 4 at 2.
and ambiguous — the description of a political conflict pretending to be its resolution. Any claim that section 1 comprised a rational decision-making procedure based on the distinction between law and policy or law and morality would be difficult to support. The training and background of the judiciary, however, along with the legal mythology with which they have been indoctrinated, lead to a great hesitancy in appealing openly to the values the Charter embodies and a tendency to rely on formalism to obscure the choices they have been directed to make. Such obfuscation can be seen in such mechanisms as threshold tests, emphasis on the definition of a right to the exclusion of section 1 analysis, legislative deference and of course formal “tests” for the resolution of Charter issues. This has prevented the development of coherent and consistent approaches, which is reflected in erratic results in the decided cases. The reasons for Charter judgments are often difficult to discern, for the language of the judiciary masks the political and moral choices they are making behind a rhetoric of legalism.

Such hesitancy to simply recognize the political role courts play may be rooted in fear for their legitimacy. As non-elected officials they are considered to be unrepresentative and not politically responsible. Their suitability is also in question since their particular attributes and expertise may commend them to formal legal dispute resolution but not to a policy-making function. This perception undoubtedly leads some analysts to commend the judiciary for their cautious approach. Attempts to rationalize the court’s role through denial, however, cannot obscure what that role undeniably entails. The legislative decision to entrench a rights document has clearly mandated certain responsibilities to the courts, and in order to scrutinize, direct, or constrain their choices under it, we are going to have to acknowledge the nature of these choices.

A look at the drawbacks of the current tendency to mask the judicial role in policy making leads us to a recognition of the possibilities for development that have been similarly repressed. If judges are able to expand the sources they depend upon through improvements in the law of standing, intervention, and evidence, and perhaps through increased use of a “policy-science model” of analysis, we can surely expect some improvement in the quality of their decision-making. Similarly, the lack of input to, and ongoing dialogue about, the balancing process in which the court is engaged might be ameliorated with increased public understanding of their policy-making capacity. As Professor Russell suggests:

The decisions of Canadian courts interpreting a constitutional charter of rights and freedoms will provide Canadians with a crash course in judicial policy-making.

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151 This approach is suggested by Barry, supra, note 38 at 256.
Among other things we may learn through this course how to improve the adjudicative process so that judges can give adequate consideration to all of the societal facts relevant to deciding whether laws are reasonable. We may also come to care much more about the representative quality of those who are to do our judging.152

Key to this type of discussion is a judiciary that is far more honest and open about the real basis for their decisions despite their desire for neutrality in the face of controversial political and moral issues. An acceptance of responsibility for the policy-making function they are playing should make them more sensitive to the wider impact of their “legal” decisions and thus more concerned about the quality of their product. The use of inappropriate judicial values and biases in rights judgments ought to be reduced. Perhaps more importantly, the possibility for growth and change in a document that is supposed to be, after all, “a living tree”153 may be greatly enhanced. The opportunities are plentiful for the development of a judicial role and a corresponding theory of law that meet Canada’s unique needs.

A constitution embodies a complex set of goals and involves several different government institutions in their attainment. At times it is tempting to draw strict boundaries around their respective responsibilities. A nice, neat model of a legislature that engages in the utilitarian calculus in order to further majoritarian goals can be set off against a judiciary that constrains such goals through the protection of individual rights. A recognition of the interdependency of these two roles, and the impossibility of distinguishing clearly between their methods may, however, lead to a more sophisticated and useful paradigm. Many scholars have suggested that the displacement of certain public policy issues from the domain of the legislature by constitutional law, along with an emphasis on fundamental rights theory, indicates a growing distrust of and flight from politics154 “a deepening disillusionment with the procedures of representative government and government by discussion as a means of resolving fundamental questions of political justice.”155 It may be, though, that the Charter represents not “skepticism about the possibility of public discourse about issues of principle, and ultimately, therefore, about the possibility of shared, reflectively held public values,”156 but

152 Russell, supra, note 4 at 33.
153 The famous dicta in Edwards v. A.G. Canada, [1930] A.C. 124 (P.C.) has been reiterated in the context of the Charter in Re Southam Inc. and the Queen (No. 1), supra, note 88 at 123.
154 See, for example, Brest, supra, note 30 at 1106-07; T. Sandalow, “The Distrust of Politics” (1981) 56 N.Y.U. L. Rev. 446.
155 Russell, supra, note 4 at 32.
156 Brest, supra, note 30 at 1107.
rather a desire to diversify the opportunities for and methods of such discourse. An increased recognition by judges, lawyers, and academics of the political and normative choices inherent in judicial decision making under the Charter, and especially evident in section 1, can only enhance these opportunities for growth. It may be that the final outcome of this “grand constitutional adventure”\textsuperscript{157} will only be the realization that the law “...cannot answer the question of how we are going to live together. We are going to have to answer that question ourselves.”\textsuperscript{158}

\textsuperscript{157} Bayefsky & Cohen, \textit{supra}, note 2.

\textsuperscript{158} Singer, \textit{supra}, note 17 at 59.