Some Reflections on Contextual Reasoning in the Supreme Court of Canada

Jim Driscoll
Department of Politics
Trent University

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Over the course of the last twenty-five years a number of attempts have been made by scholars in the law schools and political science faculties to develop a rationale for the decisions that the Supreme Court of Canada has been making with respect to all or some of the clauses entrenched in the *Charter of Rights and Freedoms*. Some, relying on American scholarship, have assumed that judicial review with reference to an entrenched *Charter* would rely on decision-making strategies that resembled the American Supreme Court's work with their *Bill of Rights*.[1] Others have attempted to map the Canadian Court's decisions with respect to what appear to be the ideological preferences of the judges[2] or the institutional relationships between the Court and other agencies of government.[3] Some have situated the Court's decisions, particularly when precedents are modified or discarded, in the larger context of Canadian politics or the value matrix of Canadian political culture.[4]

Given the publicity that surrounds American confirmation hearings, and the willingness of nominees to the federal courts to reveal their preferences, it may seem empirically plausible to chart sequences of decisions in the Canadian Court as the result of shifting alliances of judicial personnel with personal agendas.[5] However, the Canadian Court must justify decisions that may appear to be readily explicable with reference to ideological factors in terms of a framework of justification that incorporates some distinctive features of the *Charter of Rights*

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[1] See the review and critique of American-inspired conceptions of judicial activism and framers' intent in James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005), Chapter 3.

[2] Ian Greene, Carl Baar, Peter McCormick, George Szablowski and Martin Thomas, *Final Appeal: Decision-making in Canadian Courts of Appeal* (Toronto: Lorimer, 1996); Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer, 2000); and Roy B. Flemming, *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver: UBC Press, 2004).

[3] See the summing up of an extensive debate in "*Charter* Dialogue: Ten Years Later": special issue of the *Osgoode Hall Law Journal* XLV:1 (2007). See also the work done on inter-institutional relationships by Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal and Kingston: McGill-Queen's University Press, 2002); and Kelly, *op. cit.*

[4] For example, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*. Second edition (Toronto: Thompson Educational Publishing, 1994), especially Chapter 3; Rainer Knopff and F. L. Morton, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); and Allan C. Hutchinson, "Judges and Politics: An Essay from Canada." *Legal Studies* XXIV:1-2 (2004), 275-293.

[5] Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: Lorimer, 2000).

and Freedoms; in particular, section 1 which requires the defenders of legislation which is alleged to violate a right or freedom to make a case that it can be "demonstrably justified in a free and democratic society."

Even if we know, following Stephen Waddams, that ". . . the conclusion [of a court case] does not follow from the reason. The conclusion is hidden in the reason itself . . .,"[6] the reason or reasoning must take shape within a limited range of discursive options, or "contexts of justification," which contains and controls the development of jurisprudence. It may be tempting to view the justifications for judgements as rationalisations of a preferred result, and it may in fact be the case that a court has made a judgement call before it has developed a set of reasons for its decision. However, the decision must be justified in terms of principles of law, precedent cases and policy justifications, and the range of available reasons is not unlimited.

Justification focuses on the reasons for a judgement (the how), rather than the exogenous factors (the what, including institutional and cultural constraints) and endogenous factors (the why, including the ideological preferences and voting coalitions of members of the Court). By far the most familiar example of a context of justification would be the "reasonable person" in common law jurisprudence who has "just those qualities and just that degree of knowledge and foresight that will lead to a result that the judge considers desirable."[7]

The focus of this paper will be on the justification of decisions, assuming that the principle of *stare decisis* and closer scrutiny by the public and the profession ensure that the Court will take greater care than may have been the case in the past to produce coherent and consistent reasons for its decisions.[8] In addition, I will be making a claim that the Court's attempt to reconcile abstract rights and freedoms with public policy objectives resembles liberal political theory's attempts to accommodate difference within a regime of universal and equal citizenship rights and the outcome, in both cases, has been a shift toward contextual or practical reasoning.

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[6] Stephen Waddams, *Introduction to the Study of Law*, Sixth edition (Toronto: Thomson Canada, 2004) p. 66.

[7] *Loc. cit.*

[8] I will be extending and increasing the scope of a review of *Charter* jurisprudence in Timothy Macklem and John Terry, "Making the Justification Fit the Breach." *Supreme Court Law Review*, second series XI (2001), 575-640.

Scholars[9] and members of the Court (see below) have commented on the gradual shift during the 1990s away from the rigorous testing of infringements of *Charter* rights and freedoms that had been introduced in *R. v. Oakes* (1986). While a growing body of work is prepared to map these developments to the changing composition of the Court,[10] the Court must present credible reasons for its judgements and there have been some interesting shifts in how the Court has handled *Charter* violations and section 1 justifications based on the policy objectives of legislatures. The preferred alternative in recent years has been to read into the *Charter* an appropriate "context" for assessing the scope and boundaries of the protection.

"Contextual" reasoning in the jurisprudence of the Supreme Court of Canada assumed increasing prominence after the appointment of Bora Laskin to the Court in 1970. Laskin, in some notable dissents and split decisions, insisted that adjudication must go beyond the letter of the law and the intent of Parliament to include a wider range of social, economic and political factors which can affect the application of the law.[11] Since then, the term 'contextual' has not only been deployed as a justification for either extending or restricting the scope of adjudication but has more recently served as an aid to the interpretation of the rights and freedoms proclaimed in the *Charter of Rights and Freedoms*.[12] Concern has been expressed, however, that the Court has not developed a consistent account of how it is done:

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[9] For example, Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights." *Osgoode Hall Law Journal* XL:3-4 (2002), 337-368; and Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1." *Supreme Court Law Review*, second series XXXIV (2006), 501-535.

[10] Peter McCormick, "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada." *Osgoode Hall Law Journal* XLII:1 (2004), 1-40; and C. L. Ostberg, Matthew E. Weinstein and Craig R. Ducat, "Leaders, Followers, and Outsiders: Task and Social Leadership on the Canadian Supreme Court in the Early 'Nineties." *Polity* XXXVI:3 (2004), 505-528.

[11] As Philip Girard put it in his biography of Laskin, "the law had to be sensitive to the realities of the situation in which the parties found themselves" [*Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005), p. 421]. Danielle Pinard refers to this as the "contexte factuel," where a court chooses to take judicial notice of what it considers to be the relevant facts ["La «méthode contextuelle»." *The Canadian Bar Review* LXXXI:2 (2002), p. 326].

[12] Shalin M. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability." *Dalhousie Law Journal* XXII:1 (1999), 126-184.

> . . . the Court must offer a principled explanation of the relevance of any context that it refers to as justification for giving greater or lesser protection to a particular instance of a Charter right or freedom. Yet this is something that the Court has not in fact done with any degree of consistency. As we see it, the Court has too often referred to a context without explaining what makes that context significant for the exercise of the Charter right or freedom in question, and so makes it significant for the analysis of that right or freedom's limitation.[13]

This paper has two objectives. The first is to make a case for a rather different analysis of the jurisprudence of the Supreme Court of Canada. The second is to review the options available when doing section 1 analysis. What I will be recommending is an approach which is more sensitive to the Court's understanding of the novelty of its cautious construction of a series of judgments which give meaning to the bare language of the *Charter*.

The framework I am proposing is agnostic, but not indifferent, to the relationship between judicial decisions and the interests of litigants. This focus on the discursive options available within a sequence of judicial decisions may appear to be novel, even misguided, from the point of view of those who are concerned to explain and predict judicial outcomes. However, the analysis of texts and the identification of recurring themes and frameworks of justification has had an honourable part to play in the study of the tradition of political thought and may usefully be extended to another mode of decision-making, the common law, which also is attentive to tradition.

I will not review the rich and complex literature in the philosophy of law that has been generated around the issue of the justification of judicial decisions in terms of moral principle. My approach is pragmatic: judicial decisions, like public policies, are case-specific attempts to establish discursive guidelines for applications of the law and necessarily must appeal to some framework of justification and resolve the dilemmas posed by the confrontation of principle with fact. The emphasis will be on the reconciliation of principles and policies, what Daved Muttart called "modes of legal reasoning" in his survey of reported cases in the Supreme Court from 1950 to 2000.[14]

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[13] Macklem and Terry, *op. cit.*, p. 608.

[14] *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007), especially Chapter 9. Muttart's book surveys different types of judicial reasoning in order to test the empirical credibility of competing accounts of the decision-making process of adjudication in the philosophy

Analytical Issues:

In order to set the stage for what follows, it will be necessary to do a brief genealogy of some recent developments in political theory and political science. When Richard Bernstein declared that there had been a "linguistic turn" in social and political theory,[15] the innovations were limited to what were at the time *avant garde* research models: for example, the Cambridge school of historians of political thought;[16] some initiatives in social and cultural anthropology;[17] and experiments with the later work of Ludwig Wittgenstein. What they shared was a conviction that beliefs, narratives and paradigmatic knowledge frames[18] had been neglected in rational actor models which had treated interests as unimpeachable facts and institutions as no more than repositories of incontrovertible values. The new wave advocated a social constructivist epistemology that insisted on the necessity of seeing action as framed by discursive fields which can define and reconfigure interests and values as well as map the institutions which provide the resources and opportunities for political mobilisation.

The impact of these developments on empirical social science was a number of re-examinations of foundational assumptions in research models ranging from March and Olsen's "new institutionalism" in political science[19] to the agency-structure debate in sociology[20] and the discovery of what Stephen White has

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of law. My focus is on the discursive frameworks which legitimate or justify the different modes of reasoning.

[15] Richard J. Bernstein, *The Restructuring of Social and Political Theory* (New York: Harcourt Brace Jovanovich, 1976), Part III.

[16] See the review of work of prominent members of the School in Annabel Brett and James Tully, with Holly Hamilton-Bleakley, ed., *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006). The Cambridge School drew on post-war work in linguistics and philosophy to argue for the importance of reading early modern texts in their historical context, avoiding the anachronistic reconstruction of texts as no more than precursors of contemporary views.

[17] Clifford Geertz, "Blurred Genres: The Refiguration of Social Thought." *The American Scholar* XLIX:2 (1980), 165-179.

[18] See Thomas Kuhn, *The Structure of Scientific Revolutions*, Second edition (Chicago: University of Chicago Press, 1970) for a discussion of the role of paradigmatic knowledge frames in scientific research.

[19] James G. March and Johan P. Olsen, "The New Institutionalism: Organizational Factors in Political Life." *American Political Science Review* LXXVIII:3 (1984), 734-749.

[20] Nicos Mouzelis, "The Poverty of Sociological Theory." *Sociology* XXVII:4 (1993), 675-695.

called "weak ontology" in political theory.[21] What they shared was what some commentators have variously called a "discursive turn,"[22] "cultural turn,"[23] "cognitive turn,"[24] or "rhetorical" or "ideational turn"[25] in current research. What is surprising, then, is the lack of attention paid to how the alternative frames of reference embedded in competing constructions of a case in litigation and adjudication have played a part in the framing of the *Charter* discourse of the Supreme Court of Canada.

While useful work has been done on the play of interests and the policy implications of *Charter* cases,[26] there has been relatively little attention paid to how these decisions have been justified, with the exception of the literature which deals with the shift to contextual reasoning. Arguments from context are explicit attempts to tap into the larger matrix of ideas and values which animates both political and judicial discourse: "[n]o set of legal institutions or prescriptions," according to Robert Cover, "exists apart from the narratives that locate it and give it meaning." Cover goes on to say that

> For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.
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> In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose. . . . History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in

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[21] Stephen K. White, "Weak Ontology and Liberal Political Reflection." *Political Theory* XXV:4 (1997), 502-523.

[22] Vivien A. Schmidt, "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse." *Annual Review of Political Science* XI (2008), 303-326.

[23] Ron Eyerman, "Jeffrey Alexander and the Cultural Turn in Social Theory." *Thesis Eleven*, number 79 (November, 2004), 25-30.

[24] Frank Nullmeier, "The Cognitive Turn in Public Policy Analysis." GFORS Working Paper No. 4 (November, 2006), accessed from: http://g-ors.eu/fileadmin/download/papers/The_cognitive_turn_in_public_policy_analysis-end.pdf

[25] See Alan Finlayson, "Political Science, Political Ideas and Rhetoric." *Economy and Society* XXXIII:4 (2004), 528-549.

[26] For example, Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004).

> experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.[27]

The analytical framework deployed in this paper is the result of an initial commitment to empirical political theory being chastened by poststructural critique of the universalising assumptions of empirical social science and enriched by the insights of a postmodern social science dealing with transformations in late modern society.[28] Over the last decade, it has struck me that many of the well established frameworks of analysis in political science of the activities and jurisprudence of the Supreme Court of Canada have been locked into forms of inquiry that are insufficiently responsive to the range of analytical experiments being conducted by the Court as it struggles with the task of providing rules of interpretation and case-specific meaning to the bare language of the *Charter of Rights and Freedoms*. The framework I have developed is therefore both interstitial, in the sense that it does not fit squarely within the boundaries of the established research models; and heretical, in that it frequently comes to conclusions about motives and contexts of justification for the Court's judgements that are at odds, both methodologically and substantively, with some existing work.

While some legal scholars have suggested that "[w]e need not look abroad to other jurisdictions or to academics for new epistemologies in order to fulfil the contextual turn . . .,[29] I will argue that contextual reasoning with respect to classical liberal rights and freedoms *should* be read in conjunction with recent developments in liberal political theory. There is an interesting parallel between this trend in the Supreme Court's jurisprudence and what one legal scholar has called the "contextual turn" in liberal political theory.[30]

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[27] "Forty-Ninth Parallel Constitutionalism: How Canadians Invoke American Constitutional Traditions." *Harvard Law Review* (2007), p. 1937.

[28] For a striking example, see Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999).

[29] Lorne Sossin and Colleen M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law." *University of Toronto Law Journal* LVII:2 (2007), p. 598.

[30] Sujit Choudhry, "National Minorities and Ethnic Immigrants: Liberalism's Political Sociology." *The Journal of Political Philosophy* X:1 (2002), p. 57.

The Contextual Turn in Liberal Political Theory

The shift toward a contextual reading of civil and political rights in liberal political theory was the product of a number of challenges to mainstream liberal political theory and practice. While there are important historical differences with respect to institutions and ideals among the European and Anglo-American democracies, James Tully has made a convincing case that the core principles of mainstream liberal theory have been institutionalised in what he calls a "modern liberal constitutionalism" which displays seven key features.[31] Tully's concern is with the suppression of "ancient" and "irregular" accommodations of indigenous populations in white settler societies, but his account of "imperial" constitutionalism captures both the political thrust and ideological power of the emancipatory promise of civil and human rights in liberal democratic societies.

The first feature involves a foundation myth, an account of how a people (or two founding peoples in the dualistic Canadian version) freely consented to a constitutional settlement which incorporated core commitments to what has become a valued tradition. The second feature emphasises the progressive nature of the settlement (as in Pierre Trudeau's conception of a new pan-Canadian citizenship grounded in the *Charter of Rights and Freedoms*).[32] The third feature is the contrast with an older, "irregular," constitutional regime. The patriation exercise, for example, was seen as both the entrenchment of what had only been customary rights affirmed in legislation (the *Canadian Bill of Rights*) and as the last act of emancipation from our colonial dependence on Britain.

Fourth, the waning force of custom in increasingly complex societies requires the creation of a new, universal, citizenship in place of traditional ranks and orders. Fifth, there is a movement toward the uniform application of what is perceived to be a culturally progressive convergence on such principles as the rule of law, free elections and an open civil society. The criteria for membership of new states set by existing partners in the European Union and NATO; and the Canadian debate over the application of the federal *Canadian Human Rights Act* to First Nations incorporate this notion of what constitutes a higher level of commitment to liberal and democratic principles.

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[31] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), pp. 62ff.

[32] Kelly, *op. cit.*, Chapter 2 provides a comprehensive account of the motives and aspirations of the participants in the patriation exercise.

Sixth, the constitutional settlement is seen as the initial moment in the creation of a new nation, an "imagined" community, whose members enjoy the benefits of an undifferentiated citizenship. Finally, there is the presumption that the founding of the nation incorporates a kind of wisdom, embedded in the constitutional settlement, which should be a binding contract for all time. Tully notes quite properly (p. 69) that this creates a paradox for liberal democracies inasmuch as the people were thought to be capable of freely constructing their constitutional regime only at the founding. Current debates over framers' intent in adjudication depend on differing views of this feature.

A number of challenges to modern liberal constitutionalism began to appear in the last quarter of the twentieth century. First of all, new social movements in the late 1960s began to question the restricted scope of civil and political liberties in the constitutional charters and political practices of the Anglo-American liberal democracies. The second-wave women's movement focussed on the relatively narrow range of what could be litigated or promoted in public and what had been sequestered in the private sphere. Their battle cry, "the personal is political," opened the door to other claims for the recognition of individuals and groups (such as aboriginal peoples and the disabled) who had been marginalised in liberal democratic societies.[33]

Secondly, post-structural critique and post-colonial revisions of the modernist myth of the cultural superiority of the West threw into doubt assumptions about the universality of rights and demonstrated their historical and cultural limitations.[34] In addition, a resurgent communalism of both the right[35] and the left[36] generated a critique of mainstream liberal theory which focussed on the abstract conception of unencumbered or disengaged selves who drop a "veil of ignorance" over their particularistic hopes and needs as a prerequisite to free and equal participation in an idealised public sphere.[37] What had been celebrated as

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[33] See Jane Jenson, "Naming Nations: Making Nationalist Claims in Canadian Public Discourse." *Canadian Review of Sociology and Anthropology* XXX:3 (1993), 337-358.

[34] Tully, for example, recommends a "post-imperial" constitutional process of recognition and accommodation as an alternative to modern liberal constitutionalism.

[35] Amitai Etzioni, "The Responsive Community: A Communitarian Perspective." *American Sociological Review* LXI:1 (1996), 1-11.

[36] William A. Galston, "Review Essay: Community, Democracy, Philosophy: The Political Thought of Michael Walzer." *Political Theory* XVII:1 (1989), 119-130.

[37] Michael J. Sandel, "The Procedural Republic and the Unencumbered Self." *Political Theory* XII:1 (1984), 81-96; and Iris Marion Young, *Justice and the Politics of Difference*

emancipation from solidaristic relationships in communities in the core principles of modern liberal constitutionalism was now seen as an erasure of much that was vital to individual self-esteem and an obstacle to a more inclusive and democratic politics.

The most attractive target was John Rawls' *Theory of Justice*.[38] Critics pointed out that the high level of abstraction in Rawls' idealised political community underestimated the importance of cultural requisites for effective democratic decision making and overestimated the degree of consensus that could be achieved in pluralistic societies.[39] Rawls' response was to limit the scope of his theory to societies that could sustain a supportive political culture, in other words, an appropriate context for his particular conception of public policy making.[40]

Thirdly, the social, economic and cultural changes associated with late modernity have weakened the consensus on what constitutes both core values and accepted modes of reasoning with respect to both scientific and moral issues.[41] The neo-kantian conviction that an idealised political community could be seen to be capable of coming to an agreement on a set of regulative ideals that meet the standard of justice as procedural fairness became less credible; and the insistence on a principled separation of citizenship from the diversity which exists in pluralistic societies made modern liberal constitutionalism an obstacle to formal recognition of new forms of citizenship.

If increasing diversity threatens the formal equality of citizenship rights, then one solution is to re-invent them. The patriation consultation process responded to many of the demands for recognition made by new social movements and other change agents, and the *Charter of Rights and Freedoms* eventually accommodated a variety of conceptions of citizenship rights in a parliamentary democracy. As a result, the statements of rights range from premodern

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(Princeton: Princeton University Press, 1990), p. 45.

[38] Cambridge, MA: Harvard University Press, 1971.

[39] Jocelyn Maclure, "On the Public Use of Practical Reason: Loosening the Grip of Neo-Kantianism." *Philosophy and Social Criticism* XXXII:1 (2006), 37-63.

[40] *Political Liberalism* (New York: Columbia University Press, 1996 [1993]).

[41] See Carole Smith, "The Sequestration of Experience: Rights Talk and Moral Thinking in 'Late Modernity.'" *Sociology* XXXVI:1 (2002), pp. 43-66; and Nikolas Rose, *op. cit.*, for an overview of transformations in late modern society.

conceptions of benefits, privileges and immunities[42] through proclamations of a commitment to particular constitutive principles and goals[43] to the traditional negative liberties and procedural guarantees that are guaranteed equally to all citizens or persons under the law.[44] The core guarantees of fundamental rights and freedoms (sections 2, 3, 6, and 7 through 14), have been interpreted by the Court as individual rights against arbitrary state interference; and although attempts have been made to read substantive guarantees into sections 7 and 15,[45] both the security guarantees of section 7 and the protection from discrimination in section 15 have remained negative liberties.

The Court, however, faces a recurring problem in fitting guarantees in the abstract to the nuances of particular cases. What adjudication on the basis of uniform guarantees of rights shares with liberal political theory is a growing concern with accommodation of diversity in increasingly pluralistic societies. The remedy in both cases is to turn to context, but there is more than one way to contextualise the traditional rights.

In what follows, I will be primarily concerned with Canadian contributions to the "contextual turn" in liberal political theory, joining most commentators in seeing Will Kymlicka's book, *Multicultural Citizenship: A Liberal Theory of Minority Rights*,[46] as the most widely known example of the approach. Kymlicka focuses on the problem of how one can honour the commitment to universal and equal rights while still accommodating two distinct types of claims for group-differentiated rights: the claims for self-government of indigenous populations and national minorities; and the claims for accommodation of distinctive practices by immigrant groups.

The solution for national minorities, at least in Canada, has been to exploit the possibilities of multi-level governance to ensure that those powers that are required to maintain group coherence and identity are divided in a federal structure or devolved as necessary.[47] The solution for immigrant groups is a

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[42] For example, sections 16 and 23 dealing with language rights and sections 25 and 35 dealing with aboriginal and treaty rights.

[43] For example, the commitment to regional equalisation in section 36 and affirmation of multicultural heritage in section 27.

[44] Sections 2 and 7 through 15.

[45] For example, in *Gosselin v. Quebec (Attorney General)*: Neutral citation 2002 SCC 84.

[46] Oxford: Clarendon Press, 1995.

[47] Alan Patten, "Liberal Citizenship in Multinational Societies," in Alain-G. Gagnon and

quasi-Aristotelian form of practical reasoning. Assuming that the liberal rights to be protected are the ideally best one could hope for, and taking into account the practical needs of different groups, how can one develop a policy solution which is ideally the best under the contextual circumstances? The result is a form of accommodation which avoids constitutional challenge by remaining below the radar of formal recognition, with the additional flexibility of being a policy solution which can easily be adjusted rather than a judicial remedy which must be applied uniformly across the court's jurisdiction.[48]

A prominent legal scholar, however, has taken Kymlicka to task on a number of issues and, for our purposes, most interestingly for his failure to give priority to the ideals of liberal citizenship:

> . . . Kymlicka's impressive attempt to provide workable and practical policies that grow out of, and build upon, current political practices, expectations and institutional capacities clearly represents a heartfelt desire that political philosophers contribute to political discourse in a way that is both useful and responsible, by steering clear of the dangers of irrelevance and intellectual imperialism.
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> My quarrel with Kymlicka is not with the idea that context and facts should count in political philosophy. . . . Rather, my concern is that, in the argument from political sociology, he does not count context and facts in the right way. As we strive for relevance, we must avoid the temptation to bend our theories around political realities, for if we do, political philosophy surrenders its critical stance. Without our ideals, we lack the ability to appreciate what is lost when public policies fall short of principle.[49]

On the other hand, the Supreme Court must deal with cases where some accommodation between principles and facts is required, and in the last section of this paper we will review some other ways of reconciling rights and policy

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James Tully, ed., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001), pp. 279-298. "Civic nationalism," focussed on citizenship rights entrenched in the *Charter*, is meant to provide what Kymlicka (*op. cit.*, Chapter 9) calls "the ties that bind" in a federal state which allows provincial variations in recognition of some types of diversity as constitutionally protected difference. Devolution is the strategy which is bringing the northern territories closer to provincial status under federal jurisdiction.

[48] Kymlicka notes the exemption from compulsory school attendance for some religious minorities. We could add what was a policy exemption for Hutterites in Alberta from having photographs on driver's licences that was subject to a recent *Charter* challenge when the Government of Alberta chose to enforce the requirement uniformly [*Hutterian Brethren of Wilson Colony v. Alberta*, 2007 Alberta Court of Appeal 160].

[49] Choudhry, *op. cit.*, p. 78.

objectives that draw on both liberal political theory and the jurisprudence of the Supreme Court.

The *Oakes* Test and Section 1 Tests of Charter Violations:

R. v. Oakes (1986) was not the first *Charter* case, but Chief Justice Dickson decided on this occasion to introduce a more formal test of legislation that violated a *Charter* right or freedom. The Court's decision established that in cases where Charter rights were impaired, but an argument could be made by the Crown to justify the limit, a rather different kind of judicial reasoning would come into play:

> Section 1 of the Charter has two functions: First, it guarantees the rights and freedoms set out in the provisions which follow it; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitutional Act, 1982) against which limitations on those rights and freedoms may be measured.
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> The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. . . . Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. . . . Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.[50]

The *Oakes* test took many commentators by surprise and it soon became apparent that it did not enjoy the whole-hearted support of some of the puisne judges. There was considerable speculation as to whether the rigour of the original test could stand up to the factual complexity of cases before the bar[51]

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[50] *R.* v. *Oakes*, [1986] 1 S.C.R., 105-106.

[51] See Wilson J.'s concurring opinion, which explicitly called for a rather different kind of contextual analysis, in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R.

and whether the test created an almost insurmountable challenge to the agent responsible for the legislation under review.[52]

If rights or freedoms are defined in the abstract as universals[53] how can any restriction be justified? When rights are defined (as they were in the early freedom of expression cases)[54] as in the first instance absolute and without limit, then the move toward permissible limits in other *Charter* cases where the challenge failed required, even if implicitly, a contextualisation and reading down of the freedom or right to match the policy objectives.[55] If universal principles logically trump factual claims one solution is to contextualise the principles, shifting the analysis away from ideals to ethical calculations.

The outcome is a move away from what Iacobucci J. has termed *reconciliation*, which attempts to preserve the essence of the principle given certain factual constraints,[56] toward a *balancing* of the interests of the parties in the case at bar. Rights are contextualised with reference to contending claims and a situational or case-specific weighing of the interests embodied in the claims takes place. As McLachlin J. put it, dissenting in *Keegstra*:

> The task which judges are required to perform under s. 1 is essentially one of balancing. On the one hand lies a violation or limitation of a fundamental right or freedom. On the other lies a conflicting objective which the state asserts is of greater importance than the full exercise of the right or freedom, of sufficient importance that it is reasonable and "demonstrably justified" that the limitation should be imposed. The exercise is one of great difficulty, requiring the judge to make value judgments. In this task logic and precedent are but of limited assistance. What must be determinative in the end is the court's judgment, based on an

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[52] Macklem and Terry, p. 578.

[53] What McLachlin J. once characterised as "Platonic ideals" (dissenting in *Keegstra*: see passage quoted below). Recall Choudhry's insistence (*supra*) that "our ideals" take priority.

[54] *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; and *Edmonton Journal*.

[55] V. Macklem and Terry's review of the *Edwards Books* case [*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713], pp. 627-628.

[56] Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights." *Supreme Court Law Review*, second series XX (2003), p. 141. Reconciliation may also include what is conventionally called "definitional balancing" (p. 162).

> understanding of the values our society is built on and the interests at stake in the particular case. As Wilson J. has pointed out in *Edmonton Journal, supra*, this judgment cannot be made in the abstract. *Rather than speak of values as though they were Platonic ideals, the judge must situate the analysis in the facts of the particular case, weighing the different values represented in that context*.[57]

Macklem and Terry see McLachlin J.'s position as establishing an alternative to the rigorous form of the *Oakes* test in the Court's judgements, noting that "[i]n recent years, the members of the Court, particularly La Forest J., have become more alive to the issue of whether the justificatory process should take place in the definition of the right or under section 1.[58]

There has been considerable speculation in the academic literature as to the nature and reasons for what appears to be a reluctance to apply the rigorous form of the *Oakes* test, and interest in the direction that the Court is likely to take in the future. According to Jamie Cameron, in one of the early reviews of section 1 analysis, the "bifurcation of rights and limitations" in the *Charter* was intended to avoid the smuggling in of policy considerations by judges in the rights jurisprudence of the American Court. However, the *Charter* still required the Canadian Court to choose between a definitional and a literal interpretation of the text. The former would require re-defining the guarantee in context, the latter would allow an expanded conception of the guarantee and shift the focus to justification under section 1.[59] Cameron notes that the majority decision in *Irwin Toy* failed to respect the distinction between how one understands the violation or breach of a right or freedom and what steps must be taken to assess the policy justification:

> *Irwin Toy* is troubling because it fails to respect the structural integrity of the *Charter*. The Court appeared unaware of the need to distinguish between breach and justification, or to preserve the functional role of section 1. . . . Both conceptually and structurally, the problem with imposing definitional limitations on freedom of expression is that the right cannot be defined in the abstract, without a contextual assessment of its surrounding circumstances.

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[57] *R. v. Keegstra* [1990] 3 SCR 892 at 922 (emphasis added).

[58] *Ibid.*, p. 586.

[59] Jamie Cameron, "The Original Conception of Section 1 and Its Demise: A Comment on *Irwin Toy Ltd. v. Attorney-General of Quebec*." *McGill Law Journal* XXV:1 (1989), 253-277.

> Because that assessment must be experiential, it cannot be reduced to an abstract definition.

In other words, some sense of how the breach of a right or freedom is to be understood with reference to policy objectives is crucial. The question then is whether the context is considered in the definition of the *Charter* right or freedom, or in the section 1 analysis, According to Cameron,

> An assessment which is inescapably contextual and justificatory should be conducted under section 1. By doing otherwise, *Irwin Toy* has introduced a confusing doctrinal solution which attempts to bifurcate the issue of permissible limitations, *addressing it under both s.2(b) and section 1*.[60]

Toward the end of the decade when contextual analysis was seen to be displacing the rigorous form of the *Oakes* test, Shalin Sugunasiri published an extended review of the jurisprudence, focussing on the issue of legal indeterminacy in adjudication that had been raised by postmodern legal theorists.[61] Contextual reasoning is seen to be inevitable given the fact that legislation in late modern society cannot rest on a consensus on moral principles, leaving courts with few generally agreed upon guidelines for assessing both facts and values. The Court, faced with the challenge of applying law in the abstract to the facts of cases can always draw on some traditional modes of contextual reasoning, including reasoning from case history and evaluating legislative intent, quite independently of the requirements for *Charter* adjudication.[62] *Charter* contextualism also can be seen as an extension of what may be seen as a "conversation" about the scope and nature of rights and freedoms: "contextualist decision-making is about conversations--it is about the conversations judges have with themselves, the conversations they have with each other, and the conversations they have with the parties, the legislators, and always, in one way or another, with the general public."[63] The shift to contextual analysis is an indication that the Court is alert to competing points of view and sensitive to the need to develop a justification for its choice which goes beyond

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[60] *Ibid.*, p. 274 (emphasis added).

[61] Sugunasiri, *op. cit.*

[62] *Ibid.*, p. 154n.

[63] *Ibid.*, p. 175n.

the letter of the law and engages a wider range of discourses or "conversations" about values and legal principles.

Trakman, Cole-Hamilton and Gatien were less accepting of the shift to contextual analysis in the 1990s.[64] They also were concerned with the logical problem of where and how to assess the *Charter* breach:

> In effect, as it rarely resorted to the objective and rational connection tests, the Supreme Court of Canada avoided questioning government policy in its application of section 1. It relied almost exclusively upon the minimal impairment test. . . . In relying upon a minimal impairment test that evaluated, primarily, whether the government could have achieved its objective by a less intrusive means, the Supreme Court accepted, as its primary norm, that the legislature's law-making authority determined the scope of *Charter* rights. It did not evaluate whether the norms or values underlying the legislation themselves violated Charter rights or freedoms. The result was that the Supreme Court avoided articulating values that are *necessarily* engaged by a section 1 inquiry. This restricted evaluation of policy choices was possible only by neglecting Dickson C.J.'s ultimate standard [reading the freedom or right in the context of other *Charter* values]."[65]

Bredt and Dodek[66] claim that ". . . as it became clear that a strict application of *Oakes* would make it difficult to uphold any breach, the Court developed techniques to dilute the test. Thus, outside of section 2(b), section 1 is being eclipsed by the development of internal balancing tests. When the section 1 stage is reached, the Court continues to pay homage to *Oakes*, but its application is more result-oriented than principled."[67] One of the more dramatic examples would be *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*[68] where the Court re-worked section 7 guarantees of security of the person for children in the light of case law, common law conceptions of the legal status of dependent children and a traditional state concern to protect the best interests of the child in order to justify a *Criminal Code* provision that

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[64] Leon E. Trakman, William Cole-Hamilton and Sean Gatien, "*R. v. Oakes* 1986-1997: Back to the Drawing Board." *Osgoode Hall Law Journal* XXXVI:1 (1998), 83-149.

[65] *Ibid.*, pp. 106-107 (emphasis in original).

[66] Christopher Bredt and Adam M. Dodek, "The Increasing Irrelevance of Section 1 of the Charter." *Supreme Court Law Review*, second series XIV (2001), 175-188.

[67] *Ibid.*, p. 180.

[68] Neutral citation: 2004 SCC 4.

exempted parents and those who stood in the place of parents from prosecution for assault when "correcting" a child. Bredt and Dodek claim that definitional balancing with respect to context ". . . reduces adjudication to a highly subjective exercise with little predictability. The *Oakes* test was intended to provide a degree of objective analysis and predictability; in contrast, extensive emphasis on context undermines the rule of law."[69] Their preferred solution is to construct "a fresh set of rights-specific section 1 tests to suit the context of various rights in the Charter."[70]

Jamie Cameron returned to the issue of section 1 tests in a comment on what were two recent freedom of expression cases, suggesting that the contextual approach favoured by the Court in the *Harper* decision[71] led to a contradiction:

> On one hand, according to *Irwin Toy c. Québec (Proceureur général)*, freedom of expression is based on a principle of content neutrality. In other words, all expressive activity--whether offensive or not and whether valuable or not--is protected by section 2(b) of the *Charter*. On the other hand, the content of expression can and should be treated differently under section 1. The suggestion that not all expressive activities are equal first found voice in the proposal to apply a contextual approach in balancing values under section 1. Before long that innovation added a step to the *Oakes* test which allowed the judges to assess the relative value of the expression. "Core values" analysis was a device that enabled the Court to attenuate the standard of justification when it deemed the content of a message to be of low value. In function and result, the contextual approach's values analysis legitimized the kinds of content distinctions section 2(b)'s neutrality principle was designed to avoid.[72]

How one assesses the shift to contextual analysis will include some speculation as to motivation, and James Kelly makes a case for a changing set of relationships between the Court and the executive agencies of government which has facilitated a "coordinate constitutionalism" which respects the primacy of Parliament in the protection of rights and freedoms. Both the court and the

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[69] Bredt and Dodek, p. 185.

[70] *Ibid.*, p. 188.

[71] *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33.

[72] Jamie Cameron, "Governance and Anarchy in the S. 2(b) Jurisprudence: A Comment on *Vancouver Sun* and *Harper v. Canada*." *National Journal of Constitutional Law* XVII (2006), pp. 83-84.

legislative agents responsible for drafting legislation are seen to have become more attentive to the rights culture at the core of the *Charter*, leading to a greater number of cases being resolved without engaging a section 1 analysis:

> Rarely does the court refuse to accept that legislative objectives are pressing and substantial, and most failed section 1 defences result because of the lack of proportionality between the objectives and the legislative instruments chosen by the responsible cabinet.[73] This contextual approach has allowed the Supreme Court to guard an essential element of the constitution, but not at the expense of parliamentary democracy.[74]

Finally, Sujit Choudhry in his recent review of section 1 analysis suggests that the dominant narrative of the legacy of *Oakes* is the rise and collapse of simple, dichotomous, classifications meant to help the Court "calibrate the degree of deference [to the legislature] according to the particular features of each case."[75] Choudhry singles out cases where the "counter-narrative" of contextualisation that "made *empirics* central to every stage" of the analysis appeared (p. 522). The problem, in his view, is that legislation invariably rests on factual assumptions about competing and conflicting interests which will rarely be capable of definitive proof, leaving the Court with the very difficult task of determining how best to assess the facts:

> For the last two decades, the Court has struggled to come to terms with the institutional task it set itself in *Oakes*. In response to the question of who bears the risk of empirical uncertainty with respect to government activity that infringes Charter rights, the rights-claimant or the government, the answer has been, in effect, both. But even though the Court has agreed on this compromise, deep disagreements persist along its ragged edges. The Court has yet to work out under what circumstances it will use common sense, reason or logic to bridge an absence of evidence, and to delineate when it will allow inferences to be drawn from inconclusive social science evidence.[76]

Kelly and Choudhry focus on the dynamics of rights protection in a society that is undergoing changes in its perceptions of individual-state and interpersonal

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[73] See Trakman, *et al.*, above on the increasing reliance on the minimal impairment test.

[74] Kelly, *op. cit.*, p. 176 and Chapter 5, *passim*.

[75] "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1," pp. 520-521.

[76] *Ibid.*, p. 530.

relationships that are driven in part by what appear to be opportunities opened up by the *Charter* and are also shaped by the ongoing institutional changes of late modern society: what is often seen as legal indeterminacy should be seen against the backdrop of a declining consensus on the *grands narratifs* and moral codes of modernity. There can be no doubt that "empirics," testing the facts of cases, has been an ongoing problem; but generating plausible reasons for the Court's decisions is a rather different issue which continues to divide the Court.

Deschamps J., dissenting in part in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*,[77] summed up what she considered to be the definitive work on the contextual approach to section 1 analysis that had been done by Bastarache J. in a trilogy of cases.[78] The Court in *Health Services* had decided on relatively narrow grounds that the section 2(d) protection of freedom of association can be extended to collective bargaining when an existing contract is unilaterally modified by the employer without consultation; but Deschamps J. objected to the majority's approach to section 1, noting that Bastarache J. had worked through a particular understanding of contextual analysis which emphasised the importance, in the first instance, of a contextual understanding of the *Charter* right being reviewed:

> The analysis under s. 1 of the Charter must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right.[79]

Deschamps J. goes on to object to the way that the contextual approach had been applied by the majority in *Health Services*:

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[77] 2007 SCC 27 (paragraphs 190-213).

[78] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Harper v. Canada (Attorney General)*; and *R. v. Bryan*, 2007 SCC 12.

[79] *Ibid*., para 191 (quoting Bastarache J. in *Thomson Newspapers*) at paras. 87-88.

> While the majority agree that a contextual approach to s. 1 is appropriate, they do not apply it in their justification analysis. In my view, the majority do not give context the importance it deserves. Instead, my colleagues adopt an axiological approach that does not lend itself to the justification analysis: see, e.g., S. Bernatchez, "La procéduralisation contextuelle et systémique du contrôle de constitutionnalité à la lumière de l'affaire Sauvé" (2006), 20 *N.J.C.L.* 73, at pp. 87-90. This is apparent from their sweeping statements concerning possible justification claims, such as the following (at para. 108):
>
> > Even where a s. 2(d) violation is established, that is not the end of the matter; limitations of s. 2(d) may be justified under s. 1 of the Charter, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis. [Emphasis added.]
>
> With respect, it is my view that these statements prejudge the s. 1 analysis by limiting justification to exceptional and temporary measures. This is inconsistent with the Court's s. 1 jurisprudence. It is the first time that a standard of exceptional and temporary circumstances has been applied to justification.[80]

An "axiological" analysis is based on a hierarchy of values which must be respected, and decides cases with reference to the privileged values rather than situating them in their factual context. Deschamps J.'s criticism of the "axiological" approach may be a caricature of what is involved in the rigorous form of the *Oakes* test, but it confirms that the Court has not settled on a consistent set of rules for section 1 analyses. Clearly the Court remains divided over the appropriate context of justification when principles come into conflict with policies, and in the final section of this paper we will review attempts to bridge the gap in liberal political theory.

Varieties of Accommodation of Principles and Policies:

Up to this point we have seen only three different techniques for reconciling principles and policies. Will Kymlicka's pragmatic accommodation was joined by two different approaches to testing policy justifications for *Charter* violations. The

[80] *Ibid.*, para. 196.

first, "axiological," approach carefully separates definitions of *Charter* principles from policy interests; while the contextual approach recommends situating the right in a case-specific context, effectively transforming a moral imperative into an ethical injunction.

Liberal political theory has also struggled with the problem of reconciling universal principles with case-specific diversity, and a number of strategies have appeared in the literature that promotes contextual analysis. Jacob T. Levy claims that some consideration of "conditions and circumstances" has always been part of the tradition of political thought:

> To the degree that we have lost sight of contextualism's pedigree, this may simply be because of the primacy of neo-Kantianism and, later, neo-Hegelianism in the revitalization of political theory brought about by the publication of *A Theory of Justice*. To the degree that attention to multiculturalism has increased the prominence of contextualism and constitutionalism in liberal thought, it has been a restoration rather than a revolution.[81]

Levy suggests that the recent popularity of arguments from context raises at least two rather different sets of questions: ". . . when a political theorist invokes a particular social and political context, is it for the purpose of *illustrating the application* of an already in-hand theory? Or is it that context somehow relevant for *determining the content* of the theory."[82]

Levy's distinction between the two strategies for dealing with context corresponds to the division that we have seen in the Supreme Court's jurisprudence. In the first instance, the "axiological" theory or principle remains intact and "reconciliation" with the factual context occurs in the section 1 analysis. In the second instance, the principle itself is contextualised, either with reference to *Charter* values or with reference to the circumstances of the case. There may, however, be other options which have circulated in liberal political theory and are reflected in some Supreme Court judgements.

First of all, the Court could resort to utilitarian or consequentialist justification. In *Ford v. Quebec*, the Court ruled that the need to maintain the survival of the French language and the *visage linguistique* of Quebec warranted some, but not

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[81] "Contextualism, constitutionalism, and *modus vivendi* approaches," in Anthony Simon Laden and David Owen, ed., *Multiculturalism and Political Theory* (Cambridge: Cambridge University Press, 2007), p. 197.

[82] *Ibid.*, p. 175.

a complete, restriction of the right to use languages other than French in commercial signage.[83] What constitutes the greatest good for the greatest number tends to be calculated in terms of interests, not principles, and the balancing of interests resembles the rationale for McLachlin J.'s dissent in *Keegstra* (quoted above).

Secondly, there is some evidence that the Court's "large and liberal" or purposive reading of texts and political history has led to rules of interpretation with respect to core "*Charter* values" that will serve as regulative ideals in their judgements: defining as they do in liberal constitutionalism the boundaries of acceptable claims and criteria for participation in constitutional debate.[84]

Thirdly, while the Court has been under some pressure to read section 52 of the *Constitution Act, 1982* to include all activities regulated by statute or the common or civil law, the decision to restrict the application of the *Charter* to state activity mirrors the public/private partitioning strategy in liberal political theory and practice. The creation of a boundary or partition between the state and the private activities of individuals was the basis of Wilson J.'s concurring opinion in *Morgentaler*[85] and the reading down of some provisions of the Criminal Code provisions with respect to obscenity and pornography in *Sharpe*.[86] The Court is not prepared to tolerate *Charter* violations that are the product of vague or overbroad legislation, and the decision frequently draws on conceptions of freedom of conscience and privacy that are widely accepted in liberal cultures.

Fourthly, the Court's developing jurisprudence on reasonable accommodation does not correspond to either of the generally recognised options in the *Oakes* test. As McIntyre J. put it for the Court in a decision that laid the foundation for reasonable accommodation in 1985,

> While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it. In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the

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[83] (1988) 2 SCR 712 at para. 73.

[84] See the discussion of the "four foundational constitutional principles" in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 48ff.

[85] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at para 224.

[86] *R. v. Sharpe*, Neutral citation: 2001 SCC 2. at para 75.

> interest of preserving a social structure in which each right may receive protection without undue interference with others.[87]

While common law conceptions of the reciprocal responsibilities of parties to a (social) contract could justify this decision, the Court is closer to the position taken by some liberal political theorists.[88] Basic notions of trust and civility (respect for others) must be widely shared if a political community aspires to fairness in everyday life.[89]

Fifthly, yet another way to read Kymlicka's policy solutions to the problem of group differentiated rights would be to see them as one-time remedies that honour liberal principles such as equal treatment without directly engaging them in a *Charter* case. The Ontario Court of Appeal recently provided the male parent of the child of a woman in a same-sex relationship, and the woman's partner, with all the legal rights of adoptive parents through a creative reading of legislative intent that did not read down or invalidate the two-parent rule in the *Children's Law Reform Act*.[90]

Finally, the Court has occasionally taken the high road where principles trump policies, most notably in the rejection of restrictions on prisoners' right to vote in *Sauvé* (1993)[91] and *Sauvé* (2002).[92]

Conclusion:

The debate on the scope and acceptability of contextual analysis in the *Charter* jurisprudence of the Supreme Court of Canada has tended to obscure the deployment of a much more diversified set of arguments from principle. The Court has gone beyond the rigorous form of the *Oakes* test on a number of occasions in order to honour the common law traditions of adjudication with respect to both equity and the facts of the case.

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[87] *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 22.

[88] For example, Robert D. Putnam, "Bowling Alone: America's Declining Social Capital." *Journal of Democracy* VI:1 (1995), 65-78.

[89] This is what Kelly, *op. cit.*, calls a rights culture.

[90] *A.A. v. B.B.*, 2007 Ontario Court of Appeal 2.

[91] *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438

[92] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68

As many commentators pointed out, the rigorous form of the *Oakes* test, where rights take priority over policy objectives, was more likely to be followed in freedom of expression and criminal procedure cases where the issue clearly involved state interference with the rights of the plaintiff or defendant. In cases where the legislation itself involved balancing the conflicting rights and interests of potential beneficiaries and victims (such as collective bargaining), the Court has experimented with a number of different rationales, in addition to contextual analysis, in the justification of its decisions.

Constitutional review with respect to rights claims has taken decades to achieve a measure of stability in the American jurisprudence--it is likely that additional time will be required for the bare text of the Canadian *Charter* to be filled out with a relatively stable set of precedents.