TOWARDS A THEORY OF DEFERENCE
IN CANADIAN PROPORTIONALITY JURISPRUDENCE

by

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Abstract

This thesis develops a theory of curial deference in proportionality analysis under section 1 of the *Charter*, one of the most undertheorized and doctrinally confused areas of Canadian constitutional law. By drawing, among other things, on insights from Robert Alexy's theory of epistemic (knowledge-related) discretion, the work outlines the conceptual topology of deference, sketches out the ways in which deference ought to inform judicial review of the proportionality of legislatively chosen measures in achieving legislatively sought objectives, and offers a novel, rule-of-law-based theoretical justification for deference that departs in significant respects from existing justifications based on democratic legitimacy and institutional expertise.

In particular, the theory of deference proposed herein carries to a higher level of abstraction the rule of law's capacity to constrain the political nature of judicial function by fettering the excesses of epistemic discretion inherent in dispensing justice (as explored in the works of Joseph Raz and Judith Schklar, among others). In explaining why the rule-of-law rationale for curial restraint is normatively superior to traditional, competence-based rationales, this thesis re-situates the discussion on deference within the debate over the proper role of judiciary in reviewing the soundness of impugned policy measures. To this end, the work draws on the philosophical, normative, and institutional commitments of Hans Kelsen's theory of constitutional review and upgrades Kelsen's insights into the limits of judicial discretionary law-making with reference to modern formal notions of rule of law.

Having justified deference on normative and epistemic grounds, this dissertation shows how the doctrine can be brought to bear on the analytical framework for section 1 proportionality

reasoning. These proposals offer a course-correction away from currently flawed trends in deference jurisprudence and develop principled solutions to the epistemic difficulties in rights reasoning. Moreover, the suggested corrections incorporate awareness of institutional, doctrinal, and epistemic realities of adjudicating rights disputes under conditions of empirical and normative uncertainty.

Lay Summary

The rights and freedoms enshrined in the *Canadian Charter* are not absolute. They are subject to reasonable limitations under section 1. The legal test for a section 1 justification was articulated in the 1986 case of *R v Oakes* and is known as the proportionality test.

Under the original proportionality test, a set of evidentiary and justificatory bars to be met by the government was meant to be strict. Over the years, however, courts departed from this approach, holding that in certain circumstances (which have never been consistently or predictably identified) the test could be relaxed, so that it would be easier for governments to justify *Charter* breaches. This approach—known as the deference doctrine—has arguably constituted a blow to the integrity of *Charter* jurisprudence. Surprisingly, it has never been properly theorized. This dissertation seeks to remedy that, and to offer a coherent theory of deference in *Charter* adjudication.

Preface

This dissertation is original and independent work of the author, Iryna Ponomarenko. Portions of Chapters 1 and 2 have been published. Iryna Ponomarenko, “On the Limits of Proportionality” (2020) 24:2 Rev Const Stud 241-275.

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Introduction

Canadian jurisprudence under section 1 of the *Charter*[1] is replete with references to deference—a form of judicial restraint doctrinally fashioned with the putative aim of upholding the principle of separation of powers.[2] Courts deliberate, when conducting their section 1 proportionality analyses,[3] about whether the legislature or government actor responsible for limiting a *Charter* right or freedom, is "entitled to minimal deference"[4] or to "a greater degree of deference."[5] Commentators criticize the courts for affording *too much* deference to the legislator,[6] or for affording *too little*,[7] or for relying on deferential methods of judicial review *too often*.[8] Scholarly

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*]

[2] Cora Chan, "Deference and the Separation of Powers: An Assessment of the Court's Constitutional and Institutional Competences" (2011) 41:7 HKLJ 7 at 9.

[3] Throughout this thesis, I refer to "proportionality" in the sense of a constitutional law principle that structures the ways courts adjudicate conflicts between individual rights and collective interests. It is worth noting that the general notion of proportionality—the idea that the means should be commensurate to the ends and that the utility of any undertaking must be balanced against the damage it may inflict—is used in various legal contexts, including the use of force in armed conflicts in international law, the imposition of sentencing terms in criminal law, and even as part of the procedural requirements of civil litigation. For a thorough overview of the various doctrinal manifestations of the proportionality principle, see e.g. Beverley McLachlin, *Proportionality, Justification, Evidence and Deference: Perspectives from Canada* (Hong Kong Judicial Colloquium, 2015) at 1–5; Thomas Poole, "Proportionality in Perspective" (2010) 2010:II N Z Law Rev 369; Vicki C Jackson, "Constitutional Law in an Age of Proportionality" (2015) 124:8 Yale Law J 3094 at 3098;Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) at 175–177.

[4] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 81, LaForest J, 127 DLR (4th) 1 [*RJR-MacDonald*].

[5] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 994, 58 DLR (4th) 577 [*Irwin Toy*].

[6] See e.g. Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election Law Cases" (2014) 32 Nat'l J Const L 173.

[7] See e.g. Danielle Pinard, "Institutional Boundaries and Judicial Review: Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence" (2004) 25:1 SCLR 213.

[8] For instance, back in 1991, Don Stuart decried "a clear trend of judicial deference to legislative choices" (Don Stuart, "Will Section 1 Now Save Any *Charter* Violation? The *Chaulk* Effectiveness Test Is Improper" (1991) 2 CR 4th 107 at 108.) For an observation that there had been a "tendency" of increasing

discussions frequently turn on the inconsistency and unpredictability of judicial use of deference factors,[9] or on using the "wrong" factors, or on judges wielding the language of deference as an ideological tool for rationalizing their preferred policy outcomes.[10] A simple Westlaw search in the corpus of the Supreme Court of Canada's constitutional cases for the words "deference" together with "proportionality" yields hundreds of hits.

Surprisingly, despite the fact curial deference now occupies a near-central place in proportionality jurisprudence and can determine the outcome of a section 1 *Charter* case,[11] there has been almost no effort to theorize it within the fabric of Canadian rights review.[12]

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the level of judicial deference in resource allocation cases under the McLachlin Court, see Lawrence David, "Resource Allocation and Judicial Deference on *Charter* Review: The Price of Rights Protection according to the McLachlin Court" (2015) 73 Univ Tor Fac Law Rev 35 at 39. On the Court becoming more and more deferential in election law cases, see Dawood, "Democracy and Deference", *supra* note 6. On the general trends towards deference in *Charter* cases, see e.g. Christopher M Dassios & Clifton P Prophet, "Charter Section 1: The Decline of Grand Unified Theory and the Trend towards Deference in the Supreme Court of Canada" (1993) 15 Advocates Q 289; Leonid Sirota, "The Rule of Law All the Way Up" (2019) 92 SCLR (2nd) 79 at 87.

[9] For a taste of the general attitude towards this inconsistency, see e.g. Errol Mendes & Karima Karmali, "Are There Hierarchies of Rights and Vulnerabilities Emerging Due to Deference, Context and Burden of Proof Standards?" (2003) 15 Natl J Const L 107 at 108; Alyn James Johnson, "Abdicating Responsibility: The Unprincipled Use of Deference in *Lavoie v. Canada*" (2004) Alta Law Rev 561; Sujit Choudhry, "So What is the Real Legacy of *Oakes*?: Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34:1 SCLR (2nd) 501; Thomas MJ Bateman, "Legal Modesty and Political Boldness: The Supreme Court of Canada's Decision in *Chaoulli v. Quebec*" (2005) 11:2 Rev Const Stud 317; Dawood, "Democracy and Deference", *supra* note 6; Stuart, *supra* note 8.

[10] Guy Davidov, "The Paradox of Judicial Deference" (2001) 12:2 Natl J Const Law 133, Available at SSRN: https://ssrn.com/abstract=920607.

[11] As noted by Yasmin Dawood, in many section 1 cases "the Court's deference to the government's social science evidence is effectively determinative of its conclusion that the government has justified the rights infringement" (Dawood, "Democracy and Deference", *supra* note 6 at 185.) Similarly, as David Kenny observes, the power that norms about deference have in proportionality is so great that "the proportionality enquiry can be vastly changed (and even . . . circumvented) by these contested considerations" (David Kenny, "Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland" (2018) 66:3 Am J Comp Law 537 at 575.) For more accounts expressing the same sentiment, see also Davidov, *supra* note 10 at 5, 26 cited to SSRN Report; Dassios & Prophet, "Charter Section 1", *supra* note 8 at 290.

[12] For a voluminous criticism of the Court's failure to define the limits of the deference doctrine in any meaningful terms and for the proposition that deference has not met an adequate response from Canadian

Conceptually, to borrow from one commentator, deference remains "the darkest domain"[13] of constitutional adjudication—its ultimate black box. Judicial treatment of deference usually proceeds on the impressionistic[14]—"I know it when I see it"[15]—ground, and none of the stock justifications for its invocation (based on the comparative epistemic and democratic competences of various branches of government) has ever been satisfactorily defended or even elaborated upon.[16] By the same token, Canadian commentators express frequent disquiet concerning the inconsistent state of deference jurisprudence[17] and the lack of meaningful guidance from the Supreme Court.[18] Still, their lively academic debates, fraught with arguments about and

scholarly community, see e.g. Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press, 2017) at 126; Bateman, "Legal Modesty and Political Boldness", *supra* note 9 at 323–324; Barak, *supra* note 3 at 398–399; Peter Hogg, "Section 1 Revisited" (1992) 1 Natl J Const Law 1 at 22. For a rare exception to the general trend, and for an attempt to problematize the doctrine of deference in more precise terms, see e.g. Davidov, *supra* note 10.

[13] Daniel Solove, "The Darkest Domain: Deference, Judicial Review, and the Bill of Rights" (1999) 84 Iowa Law Rev 941.

[14] Petersen, *supra* note 12 at 127.

[15] In an American case *Jacobellis v Ohio*, Justice Potter Stewart famously opined on obscenity: "I know it when I see it" (*Jacobellis v Ohio*, (1964) 378 US 184 at 197, Stewart J concurring). For a criticism of the courts' predilections to deal with the deference doctrine on the "I know it when I see it" ground (albeit in the British constitutional law context), see Jeff King, "Institutional Approaches to Judicial Restraint" (2008) 28:3 Oxf J Leg Stud 409 at 411.

[16] David Wiseman, "Managing the Burden of Doubt: Social Science Evidence, the Institutional Competence of Courts and the Prospects for Anti-poverty 'Charter' Claims" (2014) 33:1 Natl J Const Law 1 at 13–14. While the doctrine of deference in rights review received scarce theoretical treatment in Canadian scholarly literature, there, admittedly, has been some sustained, though not always consistent, effort to discern the theoretical features of deference in other common law countries, particularly in Britain. I draw on, and provide extensive criticism of, some of this literature in this thesis.

[17] Errol Mendes, "Section 1 of the Charter after 30 years: The Soul or the Dagger at its Heart" in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedom*, 5th ed (Markham: LexisNexis) 293 at 296.

[18] *Ibid* at 299, para 25. Similarly, as Leonid Sirota observes with respect to the Supreme Court's jurisprudence, "it is sometimes difficult to say whether language pointing to deference really signals a deferential approach" (Sirota, "The Rule of Law", *supra* note 8 at 85.)

criticisms of deference,[19] offer little if anything in terms of diagnosis or cure.[20] Given this poverty of theoretical and conceptual understanding of deference,[21] judicial discussions tend to happen on shifting theoretical sand, so that even the most basic approaches to deference become conceptually impaired and practically unfitting. The result is to compromise the doctrinal integrity of section 1 proportionality jurisprudence as a stable and predictable way to resolve *Charter* disputes.

In the meantime, questions proliferate. If we talk about "too little" or "too much" deference, what does it mean to accord deference in "exactly the right amount"? How does the doctrine of deference fit into the larger landscape of the principles of Canadian constitutional law? We know, in the abstract, that section 1 deference is analytically tethered to notions of judicial restraint, separation of powers, intensity of judicial review, and evidentiary burden, but what exactly is the nature of these relationships? More important still, what *exactly is* deference? What is its scope? Its mechanics? Can the notion of deference meaningfully assist the judiciary in sustaining an institutional equilibrium under section 1 of the *Charter* without falling into the traps of either judicial policy-making or judicial surrender of constitutional rights to the

[19] For some powerful criticism of deference as a renunciation of judicial responsibility, see e.g. David Beatty, *The Ultimate Rule of Law* (Oxford, New York: Oxford University Press, 2004).

[20] Again, a notable exception to this unfortunate Canadian trend is commentary from other common law countries. See e.g. Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 184 at 188; King, *supra* note 15. Note, however, that the theory of, and the proposed framework for, deference developed in this thesis does not endorse any of the existing conceptual explications of deference, such as above.

[21] Admittedly, there is prodigious commentary, both scholarly and judicial, on specific applications of deference in various doctrinal contexts, e.g., deference in administrative law. However, this thesis ultimately finds them unsatisfactory, deviates from the existent literature on deference in important respects, and develops a theoretical framework of its own.

necessities of the state? Or is deference in rights reasoning, as some claim, an analytically barren and functionally otiose concept?[22]

These theoretical questions bridge into the realm of practice. Why do the courts, in adjudicating proportionality cases, invoke certain types of deference factors and not others? Why do these factors constantly change?[23] We know that the *Oakes* framework[24]—the canonical judicial formulation of the proportionality test—was developed as a uniform interpretive frame for section 1 reasoning without pre-ordained modulations of the intensity of review, so why did the Court feel the need to introduce deference as an ad-on to proportionality? Why did it feel that, under certain instances the proportionality test must be moderated by affording some latitude to the legislature and the executive? Why does the Supreme Court continue to revisit its own precedents on deference, and is there any logic to its revisions? Is it fair to say that, in light of the utter unpredictability of deference jurisprudence, the medicine of deference has been worse than the disease it purported to cure?[25]

This dissertation addresses the foregoing questions by developing and defending a novel and comprehensive theory of deference in Canadian proportionality adjudication. By situating the

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[22] See, e.g., an argument made by Allan: "A doctrine of deference is rendered otiose by application of the ordinary common law grounds of judicial review." (T R S Allan, "Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review" (2010) 60:1 Univ Tor Law J 41.)

[23] The Court's inconsistent approach to identifying deference factors in section 1 reasoning is a prime focus of Chapter 1 of this thesis.

[24] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*].

[25] As many commentators decry, considering the pervasive doctrinal inconsistency of deference jurisprudence, rights claimants are unable to properly structure their pleadings in the first stage of *Charter* review (Mendes, *supra* note 17 at 4, para 14.) and are otherwise placed "in a position of great uncertainty" that may dissuade them from seeking *Charter* redress (*ibid* at 6, para 25.) By the same token, crown counsel, who shoulder the burden of proof under section 1, cannot anticipate the intensity of scrutiny that would apply to their cases and cannot anticipate the quantity or type of evidence that they must marshal (*ibid*). The doctrinal reform is needed like never before.

role of rule of law in shaping section 1's doctrinal architecture, and by, among other things, drawing on insights from Robert Alexy's theory of epistemic (knowledge-related) discretion,[26] the thesis explains the conceptual topology of deference, sketches out the ways in which deference ought to inform judicial review of the proportionality of legislatively chosen measures in achieving legislatively sought objectives, and offers a novel, rule-of-law-based theoretical rationale for deference that departs in significant respects from existing competence-based justifications. In particular, the thesis shows why claims that the legislature possesses epistemic and democratic advantages over the judiciary in rights determination outruns its logical, empirical, and normative support.

Having justified deference on normative and epistemic grounds, I will show how the doctrine can be brought to bear on the analytical framework for section 1 reasoning. These proposals will offer a course-correction away from the current unsustainable trends in deference jurisprudence and develop principled solutions to the epistemic difficulties in rights reasoning, such as judicial accommodation of non-traditional types of evidence (e.g., common sense and reasoned apprehension of harm). Moreover, they will incorporate an awareness of institutional, doctrinal, and epistemic realities of adjudicating rights disputes under conditions of empirical and normative uncertainty. In sum, I argue that bringing the doctrine of curial deference into sharper conceptual relief is a crucial step towards building a defensible analytical foundation for section 1 reasoning, and therefore *Charter* adjudication writ large.

[26] Alexy classifies epistemic discretion into two kinds: (i) empirical epistemic discretion (judicial discretion related to contested factual assumptions that arise in the course of proportionality reasoning) and (ii) normative epistemic discretion (discretion associated with value-judgements underlying normative reasoning under the proportionality test). See Robert Alexy, *Law's Ideal Dimension* (Oxford, New York: Oxford University Press, 2021) at 184.

Although I will substantiate my claims by offering examples drawn primarily from the Supreme Court of Canada's proportionality jurisprudence, the theory of deference proposed herein is general in character and the theoretical implications of my approach, with some key context-specific distinctions, are transferable to other doctrinal milieus[27] where one encounters vertically- or chronologically-subordinated levels of decision-making under conditions of epistemic uncertainty (such as, for instance, deference to previous legal precedents, to trial judges, to juries, or to administrative tribunals). [28] The narrow focus on deference in proportionality reasoning is by design: it allows for a thematic unity and for a sharper focus on a more definable goal.

The idea of proportionality, as Beverley McLachlin, the former Chief Justice of Canada, describes it, is "central to the adjudication of rights in liberal democracies worldwide."[29] Like the ideals of constitutionalism or rule of law, it is one of the legal transplants on the world map that exhibits a "viral quality"[30] and provides an umbrella ground for examining the validity of governmental actions.[31] When the proportionality principle takes the form of a judicially

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[27] *Cf.* Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012) at 202. Daly proposes a theory of deference in administrative law which, according to him, would be different from the theory of deference in constitutional law.

[28] As will be explicated throughout this thesis, deference is always a process of reallocation of epistemic discretion from one decision-maker in a multi-layered decision-making process to another; it is always motivated, at least in part, by the rule-of-law ethos of creating consistent and predictable body of jurisprudence and, in so doing, curbing arbitrary and normatively problematic excesses of power. Grantly, what counts as an "excess of power" would be a domain-specific inquiry.

[29] Beverley McLachlin, "The Charter 25 Years Later: The Good, the Bad, and the Challenges" 45:2 Osgoode Hall Law J 15.

[30] Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Columbia J Transnatl Law 72 at 101.

[31] Mahendra P Singh, *German Administrative Law in Common Law Perspective* (Springer Science & Business Media, 2001) at 160.

enunciated doctrinal test, it is normally portrayed as a sequenced and structured approach that allows for particularized "weighing" of human rights against collective goals that might justify their limitation.[32]

As a "constitutional doctrine,"[33] proportionality was introduced to Canada in 1986 in the landmark case *R v Oakes*,[34] which has since become the "holy writ" of the Canadian constitutional rights tradition,[35] and also the "poster child" for furthering constitutional rights protections abroad.[36] While it is debatable whether there is a necessary connection between proportionality and constitutional rights in general (though some commentators argue there is),[37] it is commonly accepted that some sort of proportionality-based balancing is indispensable within a system of rights review which, like Canada's, creates distinct analyses for rights-definition and limitation.[38] In Canada, the textual basis for this two-stage approach can be found

[32] The nature and substance of the proportionality test is explicated in greater detail in Chapter 1 of this thesis.

[33] McLachlin, *supra* note 3 at 11.

[34] *Oakes*, *supra* note 24.

[35] Peter Hogg, *Constitutional Law of Canada*, loose-leaf (Scarborough, ON: Thomson Carswell) at 38–17.

[36] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 502. As Choudhry observes, the Oakes proportionality test has been cited by the courts in Antigua and Barbuda, Australia, Fiji, Hong Kong, Ireland, Israel, Jamaica, Namibia, South Africa, the United Kingdom, Vanuatu, and Zimbabwe.

[37] For an argument that proportionality analysis is a question of the nature of constitutional rights, as opposed to a question of constitutional interpretation (according to which the question of whether constitutional rights and proportionality are connected depends on what the framers of the constitution have decided, that is, on positive law), see Robert Alexy, "Constitutional Rights and Proportionality" (2014) 22 Revus 51.

[38] McLachlin, *supra* note 3 at 9; Cora Chan, "A Preliminary Framework for Measuring Deference in Rights Reasoning" (2016) 14:4 Int J Const Law 851 at 851; Kathleen Sullivan, "Post-Liberal Judging: The Roles of Categorization and Balancing" (1992) 63 Univ Colo Law Rev 293 at 293; Barak, *supra* note 3 at 502–509.

in the *Canadian Charter*, which, like many modern bills of rights,[39] contains a general limitation clause.

According to section 1 of the *Charter*, the rights and freedom guaranteed by the *Charter* are not absolute but must yield to reasonable limits prescribed by law that are capable of demonstrable justification. Pursuant to this approach, a court may "save" offending legislation from invalidation if a government demonstrates to it that the legislative restrictions on rights are justified—meaning that that there are "strong enough reasons"[40] to curb individual *Charter* protections. The *Oakes* proportionality test is the main doctrinal vehicle through which courts determine whether any such reasons have been established.

Pursuant to *Oakes*, rights-limitation inquiry is structured as a two-stage process. When government action (or "limits prescribed by law")[41] is challenged as contrary to the *Charter*, the first task incumbent upon the reviewing court is to interpret the right in question and establish the fact of the right-infringement.[42] After undertaking this initial assessment, the court is expected to proceed to the second stage of the analysis, whereby it reviews whether the government met its onus to show that the right-infringement is justified. According to this second step, as alluded to above, a four-prong balancing test is conducted to determine whether the means chosen by the government are proportionate to the burden on the *Charter* right of the claimant.

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[39] Jackson, *supra* note 3 at 3110-3113.

[40] *Ibid* at 3111.

[41] Charter, *supra* note 1.

[42] Instructive, in this connection, are the following observations: (i) the power of interpretation is vested in the reviewing court, not the legislature; (ii) the court typically adopts a generous approach to establishing the scope of the right in questions, thereby concluding that almost all activities that bear at least marginal nexus to the constitutional provision fall within its ambit; (iii) the onus is on the challenger to show a rights infringement.

Institutionally, courts performing proportionality analysis find themselves in a difficult position. It is incumbent on them to zealously guard constitutional primacy of individual rights by ensuring that the government discharges its argumentative burden[43] under section 1. Yet that necessarily entails a dramatic "expansion of judicial powers,"[44] and concomitant concern about the growing role of courts in shaping Canadian socio-economic policies. It is precisely the effort to navigate between these jurisprudential Scylla and Charybdis that has led the Supreme Court of Canada to the creation of the doctrine of curial deference, which has been described as a "crucial meditating concept" between the sovereignty of Parliament and the rights of individual citizens.[45]

The notion of deference —the doctrine that modulates the intensity of proportionality review conducted by the Court—was not featured in the original formulation of the *Oakes* test; however, it became a staple in section 1 opinions soon thereafter. In the decades following *Oakes*, the Court, seldom successfully and almost always inconsistently, [46] searched for criteria of deference, attempting to use bifurcated "factors" or "categories" of deference (such as, for instance, the presence or absence of a vulnerable group, polycentricity of the dispute etc.) in order to categorize cases where the attenuation of section 1 scrutiny was warranted and those

[43] Charles-Maxime Panaccio, "In Defence of Two-Step Balancing and Proportionality in Rights Adjudication" (2011) 24:1 Can J Law Jurisprud 109 at 121.

[44] Chan, *supra* note 38 at 852.

[45] Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference" in Nicholas Bamforth & Peter Leyland, eds, *Public Law Multi-Layer Const* (Oxford: Hart Publishing, 2003) 337 at 339.

[46] For instance, the Court has never provided a cogent and consistent guideline as to when, how, and why, in the course of section 1 justification, the legislature ought to be accorded different amounts of deference. See e.g. Errol Mendes, "The Crucible of the *Charter*: Judicial Principles v Judicial Deference in the Context of Section 1" (2005) 27 SCLR 2nd 47.

where it was not."[47] The implication of this doctrinal pursuit was a growing body of unpredictable and unprincipled deference jurisprudence. Commentators decried this unfortunate state of affairs, one describing it as "the dagger of judicial deference at the heart of the *Charter*."[48]

Prodigious but doctrinally unmoored, proportionality-based jurisprudence offers a perfect ground from which to launch a fruitful exploration of deference. First, the corpus of relevant case law is immense, which allows for an illuminating explorative dive into the nature of deference as a judge-made doctrine. Second, the structural features of proportionality magnify the doctrinal circumstances that give rise to deference in the first place, so to study deference in proportionality reasoning is to study deference under a magnifying glass. As will be explained later in this thesis, the primary doctrinal motivation for curial deference is the need to apportion the power of discretionary judgement over the epistemic (knowledge-related) uncertainty in adjudication. For proportionality, this uncertainty is usually higher than in other adjudication contexts because with proportionality judges must deal not only with adjudicative (historical) facts, but also with highly contestable legislative facts, which are inferred through broad normative assumptions and (almost inevitably) inconclusive social science evidence.[49] Furthermore, owing to proportionality's analytical structure, which puts the assessment of policy measures at the heart of its interest balancing, the proportionality test grants judges unparalleled

[47] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 503.

[48] Mendes, *supra* note 17 at 300, para 35.

[49] McLachlin, *supra* note 3 at 19, online: https://www.hkcfa.hk/filemanager/speech/en/upload/144/Proportionality,%20Justification,%20Evidence%20and%20Deference%20-%20Perspectives%20from%20Canada.pdf.

discretion over the handling of epistemically disputed facts and assumptions.[50] One more advantage of studying deference in Canadian section 1 reasoning is that the Canadian Supreme Court is somewhat of a trailblazer with respect to social science-based proportionality jurisprudence in general. Contrary to many other proportionality courts worldwide (such as, for instance, that of Germany or South Africa), it pays particular attention to, and thoroughly reflects upon, the social science implications of its constitutional decisions.[51] That makes its jurisprudence on empirical uncertainty in policy prognostication among the most developed in the world.[52]

Lastly, and on a more personal note, the focus on deference in proportionality reasoning mirrors my own journey of unravelling many an inconsistency and many a failure in the *Oakes*-based case law. When I started my PhD training (which was a continuation of my Master's research on proportionality), I saw that much was amiss with the *Oakes* proportionality jurisprudence, and an inquiry into the ever-changing intensity of section 1 standard as well as a somewhat byzantine journey into the nature of legal fact-finding all coalesced into my interest in the topics that form the basis of this research. Hence, I focus on untangling the Gordian knot of deference in Canadian proportionality jurisprudence because it is one of the most undertheorized and doctrinally confused areas of our constitutional reasoning. Thus, strategically, this thesis is a hopeful contribution to the scholarship on proportionality in Canadian constitutional law.

[50] Petersen, *supra* note 12 at 8.

[51] Niels Petersen, "Avoiding the Common Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication" (2011) 11:2 Int J Const Law 294 at 297.

[52] *Ibid*. See also Adam Dodek, "The Protea and the Maple Leaf: The Impact of the *Charter* on South African Constitutionalism" (2005) 17 NJCL 353 at 373.

In order to elicit the general contours of my theory of deference, I will proceed, in quite a Dworkinian manner,[53] to look for the set of principles and conceptually acceptable explanations that best *fit* the Supreme Court's jurisprudence on deference, while also *justifying* the doctrine of deference in its best normative light. Thus, methodologically, I will walk backwards to survey and discern patterns from the rich body of deference jurisprudence, but I will also look forward to paving the most normatively plausible way for the doctrine of deference to flourish. The arguments advanced in this thesis are therefore, again following Dworkin's methodology, both normative and descriptive.

The analytical starting point for the examination of the theory of deference in this dissertation, as stated above, is doctrinal analysis. By surveying the problems, patterns, and doctrinal trends in Canadian case law, I will seek to identify and catalogue the range of practices that the Supreme Court describes as instances of deference. This doctrinal method will be systematically interpretive and will aspire to cover enough curial and extra-curial commentary to warrant the proposed inductive generalizations. In order to imbue my definitional analysis of deference with added rigour, I will follow Aristotle's four-part methodological framework for a "genuine understanding of things"[54] as an interpretive lens through which to discern a conceptual topology of deference—which will, hopefully, act as an antidote to common practices of using deference as an obscure, "catch-all" term devoid of any meaningful precision.

[53] Dworkin famously fleshes out his interpretive methodology in *Law's Empire* (Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986).

[54] While it is conventional in the literature to refer to this as "four causes," many commentators claim it to be more correct to use the term "four explanations." For a fuller account, see e.g. Max Hocutt, "Aristotle's Four Becauses" (1974) 49:190 Philosophy 385 at 385.

Special consideration in my analysis will be given to the spectrum of judicial responses to institutional concerns raised in the aftermath of the decision in *Oakes*, each of which finds doctrinal (although not always explicit) support in the case law. In particular, I will canvass a host of bifurcated categories (factors) the Supreme Court resorted to over the years in an effort to identify cases where curial deference was warranted and those where it was not, as well as the Court's sporadic abandonment of this bifurcated approach in favour of what has been dubbed a flexible and contextual analysis.

It will be theorized that the emergence of these bifurcated factors of deference can be traced to the Court's reluctance to engage in probing scrutiny of epistemically difficult section 1 issues, the resolution of which might have attracted charges of judicial activism.[55] On this account, all "deference factors" employed by the Court can be viewed as conceptual proxies for what the court (erroneously) believes to be either epistemically compromised ("hard") or, alternatively, epistemically straightforward ("easy") proportionality cases. Against this background and drawing on the theory of epistemic discretion propounded by Robert Alexy (one of the most prominent advocates of the proportionality principle), the thesis will conceptualize curial deference as a doctrinal framework for, and an actual practice of, reallocation of epistemic (empirical and normative) discretion from the courts to the legislature that is achieved through the attenuation of the traditional proportionality's standard of review and standard of proof. In other words, deference is problematized here as a tool for managing risks associated with factual

[55] For a comprehensive overview of the Court's development of the doctrine of deference in response to the critics accusing the Court of judicial activism, see e.g. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001). For an analysis of the American development of the deference doctrine as a reaction to the activist years of "Lochner jurisprudence" see Solove, "The Darkest Domain", *supra* note 13.

and normative uncertainty in policy-laden section 1 adjudication. Deference determines who owns knowledge in epistemically suspect legal disputes.

Having neatly dissected the doctrinal parameters of deference, the debate will be shifted into a higher philosophical register by investigating the normative-theoretical properties of deference as a discrete constitutional doctrine. Specifically, I will look for the legal principles that best justify deference as an institutional practice in Canadian jurisprudence and explain its role within the larger theoretical framework of the system of separation of powers. I will begin this exploration by offering a sustained and critical examination of the traditional, competence-based justifications for deference put forward by proportionality courts (i.e., the arguments from institutional expertise and democratic legitimacy) and will explain why none of them can withstand close scrutiny. Having exposed the inadequacies of the existing justificatory accounts of deference, I will propose a novel, rule-of-law-focused theory of deference in proportionality adjudication.

The theory of deference proposed herein will carry to a higher level of abstraction the rule of law's capacity to constrain the otherwise political nature of judicial function by fettering the excesses of epistemic discretion inherent in dispensing justice (as explored in the works of Kelsen, Raz, and Schklar, among others). While there are differing conceptions of the rule of law (aligned primarily along the formal-substantive continuum),[56] the notion of the rule of law relied upon in this thesis is the formal conception at the heart of liberal legality. Having evolved in

[56] For a comprehensive overview of the differences between a formal and substantive conception of the rule of law, see e.g. T R S Allan, "The Rule of Law" in David Dyzenhaus & Malcolm Thorburn, eds, *Philos Found Const Law* (Oxford University Press, 2016) 201 at 202–205; Trevor Richard Allan, "Constitutional Rights and the Rule of Law" in Matthias Klatt, ed, *Institutionalized Reason Jurisprud Robert Alexy* (Oxford University Press, 2012) 132 at 137–142.

opposition to arbitrary governance, that conception of rule of law encompasses a cluster of formal attributes and institutional restraints that ensures official decisions—whatever their content—are not made on an *ad hoc* basis. Whilst complete banishment of judicial discretion is impossible (and I specifically address the theoretical accounts of the rule of law arguing otherwise),[57] in order for the law to rule, it must be able to limit discretionary excesses of power and make it possible for individuals to "foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[58] This normative ethos of the rule of law, on the alternative theory of deference developed here, brings together various disjointed angles of the doctrine of deference and unites them under a unified and legally cognizable theory: deference is understood as a desideratum of the rule of law that constrains discretionary excesses of judicial power in deliberating over epistemically problematic, policy-laden section 1 issues.

In explaining why the rule-of-law rationale for curial restraint is normatively superior to traditional, competence-based rationales, I will re-situate the discussion of deference within the debate over the proper scope of judicial review and the role of judges in reviewing the soundness of impugned policy measures. To this end, I will draw largely on the philosophical, normative, and institutional commitments of Kelsen's theory of constitutional review and will use it as a conceptual frame for theorizing the role of a reviewing court in proportionality reasoning. Contrary to the traditional justificatory accounts of deference that implicitly rely on the

[57] For a proposition that official discretion is inimical to the principle of the rule of law, see e.g. Albert Dicey, *Introduction to the Study of the Law of the Constitution* (London: McMillan and Co, 1982) online: http://files.libertyfund.org/files/1714/0125_Bk.pdf ; Friedrich Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1972).

[58] Hayek, *supra* note 57 at 54.

unsustainable Dworkinian distinction between principle and policy, Kelsen's analysis alerts us to the fact that judicial review is always a forum of *mixed* principle and policy, which means that constitutional review is always an act of law-making—there is simply no way around it.[59] If, as Kelsen explains, the discharge of judicial function inevitably endows judges with vast policy-making powers (largely by means of broadening their normative and empirical discretion in handling constitutional interest balancing), then there must be some doctrinal ways to curb these powers (or, in Kelsen's words, "to rein in the political character of the judicial role").[60] I propose that we see deference as one such doctrine.

Thus, in order to tease out the general contours of my rule-of-law-based theory of deference, I will upgrade Kelsen's insights into the limits of judicial discretionary law-making by using the modern formal notion of the rule of law, and by reconceptualizing Kelsen's account of constitutional adjudication in terms of epistemic optimization.[61] Kelsen's theory of judicial review is instructive for illuminating the problems and the nature of deference not only because it is institutionally sensitive, but also due to Kelsen's in-depth coverage of the role of interest balancing in constitutional adjudication and his extensive focus on German public law, from which the proportionality principle first emerged.

A careful articulation of the theory of deference is not a purely academic endeavour. It is of great import for the day-to-day operation of constitutional law. For instance, an application of the

[59] Kelsen's theory of judicial review and its relation to the theory of deference are explained in greater detail in Section 3.3.1 of this thesis.

[60] Hans Kelsen, "Who Ought to be the Guardian of the Constitution? (1931)" in *The Guardians of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law,* translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) at 193.

[61] Alexy, *supra* note 26 at 184.

theory proposed in this thesis suggests that the original *Oakes* proportionality test has been misinterpreted and misunderstood as being less deferential than it actually is, which has resulted in the (problematic) creation of an add-on deference doctrine.

Indeed, it is one of my central contentions that when, back in 1986, the Court introduced the *Oakes* test as an analytical vehicle for section 1 analysis, it had already made the test *moderately deferential*. On account of its relatively low standard of proof and owing to the balancing exercise which allows the government to control what can potentially count as a "greater public good", proportionality allows for a quite significant concentration of empirical and normative discretion in the hands of the legislative branch of government.

Once this point is properly appreciated, and as I argue throughout this thesis it should be, it becomes clear that, as a separate doctrinal methodology superimposed onto the traditional *Oakes* framework, deference is an otiose doctrine. Its role should be confined to being part of the conceptual vocabulary for understanding and managing epistemic uncertainty in proportionality reasoning, not something outside of it. The case law on deference started life as a mistake, which may help account for why it is so confused.

Two practical points flow from these observations. Any deference extended to the legislature in excess of "*Oakes* deference" results in what I call "super-deference"—the overly relaxed scrutiny which threatens to dilute *Charter* rights and, at its most extreme, functionally mimics non-justiciability.[62] The opposite holds true too. To the extent that judges refuse to conceptualize

[62] I do not want to be misunderstood on this last point. There is nothing in my analysis to suggest that the notions of "super-deference" or even "non-justiciability" have no rightful place in constitutional adjudication. If anything, there might well be good reasons for courts to leave the resolution of certain issues to the exclusive remit of the state. However, the core argument of this thesis is that, in exerting such utmost self-restraint, the Court would have to adjust the traditional set of functional and institutional

Oakes as a moderately deferential standard, they become prone to "overshooting" and disturbing the government's policy choices without extending any deference at all (for instance, by forcing the government to meet the standard of proof nearly resembling the criminal law standard).[63] Such unduly onerous scrutiny risks collapsing section 1 reasoning into merits review.

Hence, the main takeaway of this thesis is that, contrary to conventional wisdom, deference is not a corollary of the institutional shortcomings of the courts, but a desideratum of the rule of law. Moreover, in its current doctrinal manifestation, it is a redundant doctrine that duplicates existing *Oakes* features at best, and, at worst, injects inconsistent band-aid solutions to epistemic uncertainty into the courts' reasoning. The solution lies with resurrecting *Oakes*, as it was originally understood and intended to be. These arguments will be unpacked in four steps.

Chapter 1 offers a comprehensive overview of the application of deference by Canadian courts and explores the inconsistencies and paradoxes inherent in judicial reasoning. Following this exposition, Chapter 2 clarifies the meaning of the deference doctrine, particularly in the face of pervasive conceptual and methodological obscurity that attends its application. Chapter 3 teases out the individual nuances of existing rationales for deference and proposes a better justification of deference. Once deference is properly conceptualized, Chapter 4 demonstrates how all the functional requisites of deference have already been incorporated into the original *Oakes* test. As part of this explanation, I argue that much of the problem with section 1 cases—particularly the

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predicates for deference on which it normally relies. The rationales for the moderate levels of deference would no longer suffice in the context of extreme judicial self-restraint which borders on judicial abdication.

[63] For arguments to this extent, see e.g. Pinard, "Institutional Boundaries and Judicial Review", *supra* note 7; Kenny, "Proportionality and the Inevitability of the Local", *supra* note 11. Another example is the court offering overly capacious interpretations of *Charter* rights which stultify the government's ability to manage the affairs of the nation.

Court's inability to wrestle with non-traditional types of evidential material, such as common sense or reasoned apprehension of harm—stems from the fact the Court's reasoning about the mechanics of the civil standard of proof is conceptually confused. Accordingly, I propose ways to remedy this confusion. All in all, I show that the original *Oakes* framework can successfully deal with difficult epistemic issues inherent in section 1 reasoning and that, properly understood, it can respect and secure the sphere of decision-making authority enjoyed by both judicial and political branches of the state.

Chapter 1: Different Shades of Deference in Section 1 Cases

1.1 The Nature of the *Oakes* Test and the Reasons Behind Its Invocation

In every constitutional democracy, there exists a normative tension between constitutional commitments to protect individual rights and liberties and the need to impose special burdens or intrusions on the said rights in the furtherance of legitimate governmental objectives. Superficially at least, these two agendas seem to oppose each other, and the question of how to reconcile them inevitably becomes central. In 1986, the majority in *R v Oakes* answered that question with the rigorous proportionality test, which is a Canadian incarnation of the well-travelled principle of proportionality.

As the Supreme Court of Canada describes it, "there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right"[64] and also—as a result of a later gloss in the case of *Dagenais*[65]— balancing between the legislation's salutary effects and its deleterious effects. Underlying the latter normative exercise is the idea of "weigh[ing] the competing interests" or the requirement that "[a] balance between the two competing concerns must be found."[66] Many proportionality regimes, including *Oakes,* also embrace analyses of "fit" between legislative

[64] *Egan v Canada,* [1995] 2 SCR 513 at 605, 124 DLR (4th) 609. The notion of proportionality is articulated in a different way by McLachlin J (as she then was) in *RJR-MacDonald*: "Proportionality between the effects of the legislation and the objective," as she puts it, presupposes "balancing the negative effects of the infringement of rights against the positive benefits associated with the legislative goal" (*RJR-Macdonald Inc v Canada (Attorney General),* [1995] SCR 927 at para 175.)

[65] *Dagenais v Canadian Broadcasting Corp,* [1994] 3 SCR 835, 120 DLR (4th) 12.

[66] *R v Jones,* [1986] 2 SCR 284, 31 DLR (4th) 569.

objectives and legislative means as precursors to the weighing of effects against objectives. From a methodological standpoint, fit and balancing complement each other and are intrinsically connected. Fit ensures that a piece of legislation is designed to achieve its declared objective (or, in *Oakes*' parlance, that there is "a rational connection between the basic fact and the presumed fact" on which the legislative scheme is predicated), and without unnecessary limitations on right. Indeed, prior to balancing the importance of a law's objective as well as positive effects for collective interests against its negative impact on individual rights, it appears logical to demand that there be the requisite "fit."

Despite differences in rigor, style, and terminology, the proportionality formulas articulated by constitutional tribunals in different jurisdictions have much in common.[67] Comparative analysis reveals that in most jurisdictions, proportionality tests are constituted by 4-limb frames for norm-based argumentation, which differ primarily in terms of the intensity of review and the level of scrutiny set out by each proportionality sub-test.[68] While not without differences, in its fully developed form[69] the four inquiries are as follows:[70]

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[67] As argued by Alec Stone Sweet and Jud Mathews, by the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of proportionality analysis (Sweet & Mathews, *supra* note 30 at 74.) For instance, proportionality principled is utilized by constitutional regimes in Israel, South Africa, Ireland, Australia, New Zealand, EU, and WTO.

[68] For pertinent examples see, e.g., the Israeli case of *United Mizrahi Bank Ltd, et al v Migdal Cooperative Village, et al* (1995) 49 PD 221, the South African case of *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, the Irish case of *Blascaod Mor Teoranta v Commissioners of Public Works in Ireland,* [1998] IEHC 38, and the Australian case of *Mulholland v Australian Electoral Commission,* [2004] HCA 41.

[69] Sweet & Mathews, *supra* note 30 at 73. Cf. Jonas Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (BRILL, 2009) at 33. (where the author speaks of "[t]he traditional three tiered proportionality test").

[70] Michael Fordham & Thomas de la Mare, "Identifying the Principles of Proportionality" in Jeffrey Jowell & Jonathan Cooper, eds, *Underst Hum Rights Princ* (Hart Publishing, 2001) 27 at 28.

Q1 Legitimacy. Is the measure adopted to pursue a legitimate aim?

Q2 Suitability. Can it serve to further that aim?

Q3 Necessity. Is it the least restrictive way of doing so?

Q4 Balancing. Viewed overall, do the ends outweigh the means?

In Canada, *Oakes* articulates a multi-part sequenced set of questions along these exact lines. As Dickson CJ describes it:[71]

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom." The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question." Third, there

[71] *Oakes*, *supra* note 22 at para 69-70 citations omitted.

> must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."

It is worth mentioning that interest balancing in *Charter* adjudication—indeed, in any adjudication—contemplates that determination be made of the weight (importance) of the objects to be balanced. At what stage of *Charter* analysis does this determination happen pursuant to *Oakes*? The concrete weight of the infringed right (or, in the parlance of the Supreme Court, the deleterious effects of the impugned legislation on the right in question) is determined (at least in theory) at the rights-interpretation stage of the analysis.[72] The actual weight of the legislation's benefits (or the salutary effects of the proposed governmental measures) is analyzed at the limitation stage under sub-inquiries 1, 2, and 3 of the *Oakes* test (parenthetically, that is where all measuring and fact-finding takes place).[73] The test's fourth inquiry—balancing—is meant to provide the forum for the two to, so to say, "meet" and be scrutinized in tandem. This is the only

[72] Admittedly, the analytical rigour of this step has been diluted over time, so that today much of the analysis dealing with the deleterious effects of the limitations (i.e. assessment of the "concrete" weight of the *Charter* right) often happen within the "contextual analysis" precursor to the proportionality analysis. This trend is especially pronounced in the context of section 2(b) jurisprudence.

[73] Importantly, the established "weight" or "scope" of the right in question should have no bearing on the determination under steps 1, 2, and 3 of the *Oakes* test. As MacLachlin J (as she then was) admonished in her dissent *in R v Lucas*, [1998] 1 SCR 439 at 115, 157 DLR (4th) 423:

> To allow the perceived low value of the expression to lower the bar of justification from the outset of the section 1 analysis is to run the risk that a judge's subjective conclusion that the expression at issue is of little worth may undermine the intellectual rigour of the *Oakes* test.

She further added that:

> Instead of insisting that limiting the right is justified due to a pressing concern that is rationally connected to the objective, and thus appropriately restrained, the judge might instead reason that any defects on these points should be resolved in favour of justification by the low value of a *Charter* protected activity such as expression. The initial conclusion that it is of low value may thus dictate the conclusion of the subsequent steps in a circular fashion.

stage of analysis wherein the *Charter* right and the right-infringing measure should conceptually intersect and, in light of their determined relative weight, be balanced against each other.

It is worthwhile to mention that commentators who are skeptical about the *Oakes* test have sound and well-founded reasons for their concerns. Despite the elaborateness of the proportionality doctrine, the text of section 1 of the *Canadian Charter of Rights and Freedoms* envisages no multi-pronged formula, nor does it even hint at proportionality's formulaic style. Moreover, as Grégoire Webber rightfully observes, almost no human rights bill does: "[w]ith few exceptions, State constitutions and international conventions do not make any reference to the principle of proportionality or to balancing."[74] When enunciating the proportionality test as part of his landmark judgment in 1986, Dickson CJ did not make any reference to the constitutional material he drew his inspiration from: the test came into being fully formed and doctrinally emancipated. The issue is brought into sharp relief once we recall that section 1 of the *Charter* is a general one-sentence provision and the *Oakes* test is a stringent four-pronged doctrinal algorithm. As Joel Bakan puts it, "it is not clear why the four criteria in the *Oakes* (1986) test constitute a uniquely correct interpretation of section 1. The words 'reasonable limit' and 'demonstrably justified in a free and democratic society' do not necessarily, or even obviously, translate into the Court's four-step test."[75] Alec Stone Sweet and Jud Mathews point out that "reasonable limits ... as can be demonstrably justified in a free and democratic society" could be interpreted to mean "proportional limits," but that reading is not compelled by the text. The

[74] Grégoire C N Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23:1 Can J Law Jurisprud 179 at 201.

[75] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, 1997) at 28.

language of section 1 seems equally open to a more relaxed “reasonableness" or “rational basis” standard.”[76]

What also bears notice is that the semantic properties of section 1 *per se* are not sufficient to warrant the invocation of the complex proportionality algorithm: for instance, the limitation clauses in the *European Convention on Human Rights*[77] and the Canadian *Charter* are expressed in strikingly similar terms, however, the proportionality tests developed by both courts in Canada and in Europe are dramatically different.[78]

1.2 The Normative Justifications of Proportionality[79]

[76] Sweet & Mathews, *supra* note 30 at 115.

[77] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [ECHR] (commonly known as the *European Convention on Human Rights*). Although the Strasbourg Convention does not contain a general limitations clause, certain rights (for instance, freedom of expression and the right to private life) are subject to a limitation clause that closely resembles section 1 of the Charter, both in conception and wording.

[78] While most constitutional tribunals, including Canadian, adhere to the strict-vertical, rigorous 4-component proportionality template, the ECtHR, unlike its counterparts, replaces the usual hierarchically ordered test with a flexible horizontal test. It does not, consequently, make proportionality dependent on fulfillment of one legal requirement after the other. It does not even require all four traditional sub-tests of proportionality – proper purpose, rational connection, minimum impairment, and proportionality *stricto sensu* – to be applied in a particular case. A characteristic example is the minimum impairment test which is often deprived by the ECtHR of the status of an independent legal criterion of proportionality. Similarly, more often than not the ECtHR’s “proportionality test” does not contain the requirement that, in order for there to be a rational connection between the means and the ends of the impugned legislation, the statute at issue should pass a strict – premised on the evidence – constitutional master, that is, supported with facts.

[79] This Section is adapted from Iryna Ponomarenko, “On the Limits of Proportionality” 24:2 Rev Const Stud 241 at 248–253.

Since, as explained above, there are no plausible textual justifications for the invocation of a four-prong doctrinal framework of proportionality, the justification for the practice of proportionality, if there is one, must be normative. If proportionality offers the best means to reach certain normative goals in a manner that accommodates other constitutional meta-principles, then its application in a putative legal system is justified. Thus, in the words of Luc Tremblay, our analytical point of departure here should be an inquiry into proportionality's purpose: "[w]hat values, if any, does its model serve?"[80]

While opinions on this issue vary,[81] there are certain normative goals (meta-values) that appear to gain the support of an overlapping scholarly and curial consensus. Robert Alexy, one of the most prominent advocates of proportionality, postulates that proportionality can be derived from the claim to correctness; more specifically, he argues that "the test produces effects that are intrinsically rational and prevent the sacrifice of fundamental rights."[82] A helpful explication of the same ideas can be found in the works of Bernardo Pulido. As the author observes, the abstract justification of the use of proportionality is normally associated "with the possibility of

[80] Luc Tremblay et al, "Le Fondement Normatif du Principe de Proportionnalité en Théorie Constitutionnelle" in *La limitation des droits de la Charte : essais critiques sur l'arrêt R. c. Oakes / The limitation of Charter rights : critical essays on R. v. Oakes* (Montréal: Thémis, 2009) 77 at 87.

[81] Tremblay himself, for instance, seeks to anchor the normative justification for proportionality in the idea of "moral equality of persons in the context of pluralism and cultural diversity," see Luc B Tremblay, "An Egalitarian Defense of Proportionality-Based Balancing" (2014) 12:4 Int J Const Law 864 at 865. Others sometimes justify proportionality as one of the necessary incidents of the culture of justification, see Kai Möller, "Justifying the Culture of Justification." (2019) 17:4 Intl J Const L 1078. Stephen Gardbaum offers a democratic justification for proportionality, see Stephen Gardbaum, "A Democratic Defense of Constitutional Balancing" (2010) 4:1 Law Ethics Hum Rights 79.

[82] João Andrade Neto, *Borrowing Justification for Proportionality: On the Influence of the Principles Theory in Brazil,* Ius Gentium: Comparative Perspectives on Law and Justice (Springer International Publishing, 2018) at 67–68. Similarly, Alec Stone Sweet and Jud Mathews argue that "[t]he duty of a constitutional court is to maximize the effectiveness of the charter of rights," see Sweet & Mathews, *supra* note 30 at 31.

giving a positive answer to three questions: rationality, legitimacy and priority."[83] As Pulido explains, from a theoretical perspective we can justify the use of proportionality "if there can be a rational and legitimate way of applying this standard which simultaneously preserves the priority of constitutional rights."[84] The remainder of this section will seek to put some theoretical flesh on the conceptual bones of Pulido's approach to proportionality review.

1.2.1 Rationality

Perhaps the most common argument invoked as part of the doctrinal defense of proportionality is that it helps to structure and rationalize otherwise opaque deliberation about constitutional rights. Proportionality, its defenders maintain, assists in translating otherwise cumbersome constitutional provisions—"what does it mean for a right limitation to be reasonable?"—into a clear, transparent, and impartial analysis. Simply put, proportionality is supposed to enhance the rationality of constitutional argumentation.

The logical corollary of this proposition is that, by structuring the judicial reasoning and channeling the ultimate interest balancing into the last stage of the review process, proportionality is supposed to reduce arbitrariness and human bias, hence reaffirming and amplifying the common perception that the courts' decisions are made according to the rule of law, and not its antithesis—the rule of men.

[83] Carlos Bernal Pulido, "The Migration of Proportionality Across Europe" 11:3 N Z J Public Int Law 483 at 486.

[84] *Ibid*.

Furthermore, as Mattias Kumm observes, by focusing public actors on the elements of proportionality review, the test can have a "disciplining effect on public authorities and help foster an attitude of civilian confidence among citizens."[85] Indeed, by pushing public authorities to constantly justify their actions under the constitution—the process Kumm famously terms "Socratic contestation"—proportionality is destined to improve the outcomes of constitutional adjudication "because such contestation effectively addresses a number of political pathologies that even legislation in mature democracies are not immune from."[86]

These disciplining properties are achieved not only through a more coherent approach to individual rights cases, but also through bringing together aspects of the current multiple analytical approaches in a way that allows full consideration of both the individual rights and the social values present in each and every case.[87] In any particular instance, it may or may not lead to a different outcome than the currently used tests, such as reasonableness or categorization. But it avoids significant interests downplayed, if not ignored, by the tests.

This leads me to the main functional virtue of proportionality: its ability to enhance the transparency of the major trade-off the court is making as part of its right limitation assessment. As Matthias Klatt and Moritz Meister posit, proportionality "clearly lays open the moral discourse indispensable in balancing, and shows us which propositions exactly a court has to justify in order to arrive at a rational judgment."[88] Even more powerfully, Stavros Tsakyrakis

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[85] Mattias Kumm, "Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review" (2007) 4:2 Eur J Leg Stud 142 at 170.

[86] *Ibid.*

[87] Donald Beschle, "No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases" (2018) 38:2 Pace Law Rev 384 at 385.

[88] Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) at 55.

suggests that the reasoning of a court is clearer "the more explicit the moral considerations of a case are made."[89] Importantly, this is achieved through moving otherwise opaque interest balancing to the last prong of the proportionality test.

Implicit in this observation is yet another quality of proportionality that elevates it above all other frameworks for constitutional adjudication such as American categorization or administrative law reasonableness: once the infringement of the right has been established, proportionality can shift the burden of producing evidence from the claimant to the state. As Aharon Barak emphasizes, if we are interested in providing constitutional rights "with the proper treatment," it is "necessary" that the state that has limited the constitutional right shoulders the burden of proof.[90] This is because "the state enjoys much better access to the information that any party claiming that their right has been limited."[91]

Of course, the claim that proportionality *enhances* rationality of constitutional decision-making does not mean that proportionality somehow renders the process completely neutral and devoid of any human element whatsoever. Indeed, as Matthias Jestaed opines, "[t]he precision of the balancing process, as well as our ability to render it logical, are highly limited. These limits are obscured rather than illuminated by the balancing formula."[92] Thus, the tenable proposition — the one this paper endorses — is that, rather than turning constitutional adjudication into a quasi-

[89] Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla" (2010) 8:2 Intl J Const L 307 at 310.

[90] Barak, *supra* note 3 at 447.

[91] *Ibid* at 448.

[92] Matthias Jestaedt, "The Doctrine of Balancing — Its Strengths and Weaknesses"" in Matthias Klatt, ed, *Institutionalized Reason Jurisprud Robert Alexy* (Oxford: Oxford University Press, 2012) 152 at 163.

computerized exercise, proportionality works to enhance the rationality of judicial decision-making as compared to other types of constitutional doctrines.

1.2.2 Legitimacy

As much as rationality is a desired condition, reason alone, as Ely aptly reminds us, "can't tell you anything: it can only connect premises to conclusion."[93] Thus, my second preoccupation shall be with the constitutional foundation which legitimize proportionality as a constitutional doctrine.

Proportionality can be legitimately applied by a constitutional tribunal if its application would normatively cohere with other meta-principles of constitutional law, such as of constitutionalism, the rule of law, democracy, and the separation of powers (in other words, if proportionality would fit within a particular normative arrangement in a constitutional system). João Andrade Neto captures this idea even more aptly: the adoption of proportionality is justified once it is demonstrated that, as far as a putative jurisdiction is concerned, proportionality is "non-prohibited."[94] In other words, instead of looking into positive reasons militating *in favour of* proportionality—like we did with the 'rationality' justification—this argument seeks to make sure that no major reasons can be summoned counselling *against* it.

[93] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980) at 56.

[94] Neto, *supra* note 82 at 16.

Thus, to the extent proportionality is to be 'non-prohibited,' it should not undermine or frustrate other meta-principles of constitutional law. Again, it is logical to surmise that if *any* derivative or non-interpretive legal doctrine defeats or significantly compromises any of these principles, it would be *illegitimate.*

1.2.3 Priority

Lastly, and related to the above, any plausible justification of proportionality must enhance, or at least not erode, the effectiveness of constitutional rights.[95] Indeed, it is a commonsensical proposition that an acceptable model of constitutional adjudication cannot obviate the normative force of constitutional guarantees. Thus, the use of proportionality as a standard of review can only be justified if, in the words of Bernardo Pulido, it "enables courts to preserve the priority of constitutional rights within the legal system."[96]

Notably, the requirement of the rights priority doubles as a functional twin of the requirement of legitimacy. The latter suggests that the adoption of a legal doctrine is justified only if it is found to be not prohibited by other constitutional meta-principles, such as, for instance, the principle of constitutionalism. In a system genuinely committed to the principle of constitutionalism, constitutional rights should normally assume priority over other policy considerations not only

[95] *Ibid* at 23.

[96] Pulido, *supra* note 83 at 486.For an explanation of why in a liberal democracy rights should have lexical priority over all other values, see e.g. John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971).

by virtue of their superior normative status, but also due to their higher status in the hierarchy of legal norms in the legal system. As Francisco J. Urbina explains:

> Human rights are commonly enshrined in norms of the highest legal hierarchy, as in a written constitution or in a norm of constitutional status. As such they enjoy a specifically legal priority over most other requirements imposed by the legal system, and this priority is commonly *strict*. Different jurisdictions have different ways of ensuring that this kind of priority is respected in the day-to-day operation of the legal system. Some legal systems are more aggressive in their methods for ensuring that this priority is respected, some are less.[97]

Thus, the use of proportionality in rights reasoning in normatively justified because, among other things, proportionality ensures that individual rights enjoy *prima facie* priority over other, non-rights considerations and only allows for rights to be limited in limited circumstances outlined in the proportionality test itself.

1.3 The Original *Oakes* Justificatory Standard

Section 1 of the *Charter*, which serves as a textual springboard for the Canadian proportionality test, has always been an embodiment of, and a rejoinder to, the normative and institutional misgivings about implementation of constitutional rights in Canada: the fear of activist courts thwarting legislative agendas,[13] the recognition that a justification for infringing rights would need actual evidence, and the general conviction that any infringement of the enumerated rights

[97] Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 225 [emphasis in original}.

must flow from an express provision. According to section 1, the rights and freedoms set out in the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[98]

As explained in the previous sections, the "operational heuristic"[99] for testing whether the *prima facie* breach of the *Charter* can be justified under section 1 has been laid out in the now-orthodox framework in *Oakes*. Pursuant to *Oakes*, to assess the justification of the infringement, the court must follow a four-part sequenced set of questions known as proportionality analysis.

From the doctrinal standpoint, the heaviness of the justificatory burden imposed on the government by the proportionality test is determined by two parameters. The first one, as Cora Chan explains, is the standard of review—"the question of law the government must prove to pass constitutional muster."[100] This would pertain to the analytical structure of the proportionality test and its individual steps. For instance, the court could require the government to pass a rigorous four-part test, or it could dilute or modify some stages of the test by, say, lowering the degree of cogency of argument required from the government.[101]

The second parameter that may modulate the heaviness of the justificatory burden carried by the government is the standard of proof.[102] In particular, even when the standard of review is fixed, the court could make it harder or easier for the government to discharge its onus under section 1

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[98] *Charter, supra* note 1.

[99] Daniel Weinstock, "Philosophical Reflections on the *Oakes* Test" in *Limit Droits Charte Essais Crit Sur L'arrêt R C Oakes Limit Chart Rights Crit Essays R V Oakes* (Montréal: Thémis, 2009) 115 at 118.

[100] Chan, *supra* note 38 at 858.

[101] *Ibid.*

[102] *Ibid.*

by raising or lowering the standard of proof on questions of fact. For instance, the court may require the government to conclusively demonstrates that its rights-infringing measures are guaranteed to achieve their stated objectives. Alternatively, the evidentiary bar can be lowered so that the government would be only required to demonstrate that its factual assumptions are supported by some evidence. Finally, the court may attenuate the standard of proof even further and only ask the government to demonstrate that the attainment of its stated goals is at least a theoretical option. Together, this gamut of analytical possibilities determines how easy or how hard it would be for the government to justify a *Charter* breach.

In its original iteration, the justificatory burden which the government had to discharge under *Oakes* was supposed to be uniform, and it was supposed to be high, meaning that the courts were expected to be fairly interventionist in judicially reviewing legislative action.[103] Importantly, the articulation of the *Oakes* test by the Supreme Court did not envision the possibility that the standard of review could be potentially relaxed later. As Chief Justice Dickson, who delivered the judgement, put it:[104]

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

[103] Dassios & Prophet, "Charter Section 1", *supra* note 8 at 289.

[104] *Oakes*, *supra* note 24 at para 66.

The rigour of the original justificatory burden under *Oakes* has been described by Christopher Dassios and Clifton Prophet as follows:[105]

> The criteria for s. 1 justification established in *Oakes* and the strict approach to their application created significant challenges for parties obliged to defend measures which infringed *Charter* guarantees. Legislative action was to be tested strictly against judicial reason.

Consider, for instance, the standard of proof. The allocation of the burden of proof in the *Oakes* inquiry unfolds this way: first, the onus is on the claimant to demonstrate a right infringement, after which it shifts to the party seeking to uphold such infringement under section 1. The standard of proof is a traditional civil standard—proof by a preponderance of probability.[106]

The standard is a civil standard of proof because it is supposed to strike a middle ground between what was considered to be an "unduly onerous" criminal standard (the textual cues from section 1—"reasonableness," "justifiability," and "free and democratic society"—all pointed away from it) and the overly deferential no-proof regime. The civil standard of proof, however, was to be applied in a peculiar manner: according to the *Oakes* court, "the preponderance of probability test must be applied rigorously",[107] having regard to the specific nature of the case.[108] Elsewhere the court clarified that, in its view, a *Charter* version of preponderance of probability was actually closer to "a very high degree of probability":[109] "Where evidence is required in order to

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[105] *Ibid.*

[106] *Oakes*, *supra* note 24 at para 67.

[107] *Oakes*, *supra* note 24.

[108] *Ibid.*

[109] *Ibid.*

prove the constituent elements of a s.1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit."[110]

Such conceptualization of section 1 inquiry makes it a "factual"[111] and a "rigorous" one. Some—such as David Beatty—even argue that therein lies the main *Oakes*' appeal: its factual focus is conducive to objectivity and predictability of the *Charter* inquiry.[112]

While the extent to which the fact-oriented nature of proportionality may confer benefits to the integrity of rights reasoning is up for debate, it is incontrovertible that, as Cora Chan observes, "proportionality is a question of law, the resolution of which sometimes depends on assessments of fact."[113] Indeed, it becomes apparent on closer examination that at most of the stages of the *Oakes* analysis, the court must proceed on the basis of specific (often highly contentious) factual and normative assumptions.[114]

For example, an assessment of the constitutionality of the ban on advertising tobacco products, like in the case of *RJR-MacDonald*, may ultimately hinge on the question of whether, and to what extent, advertising actually affects tobacco consumption.[115] By the same token, an

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[110] *Ibid.* Note, however, the court's caveat, pursuant to which "there may be cases where certain elements of the s.1 analysis are obvious or self-evident."

[111] Joel Bakan, Robin M Elliot & Constitutional Law Group, *Canadian Constitutional Law* (Emond Montgomery, 2003) at 762.

[112] Beatty, *supra* note 19.

[113] Chan, *supra* note 38 at 858.

[114] For a thorough overview of the fact-sensitive nature of proportionality analysis, as well as identification of the role of legislative prognoses in rights reasoning, see e.g. Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9.

[115] *RJR-MacDonald*, *supra* note 4.

evaluation of a constitutional claim under the proportionality framework may require courts to determine, like in *Sauvé,* whether denying inmates the right to vote would be conducive to enhancing respect for the law.[116] It is worth noting that the role of empirical premises in the judicial reasoning process over the merits of the case is especially pronounced at the rational connection and minimal impairment stages of *Oakes*. Ultimately, a determination of whether impugned law is constitutional necessarily involves considerations related to the reliability of empirical assumptions on which the government relies in justifying its policy choices.

1.4 The Erosion of the Original Standard: Death by the Thousand Cuts

While, as described above, the *Oakes* analysis was envisioned as a uniform and stringent frame for rights reasoning, almost from the very beginning it became apparent that *Oakes'* original promise to be a "rigorous, systematic, and objective test"[117] based on "empirical data"[118] was, in the words of Danielle Pinard, a promise "impossible to keep."[119] For instance, when assessing whether the requisite justificatory standard under section 1 has been satisfied, judges quickly

[116] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé*].

[117] Danielle Pinard, "La Promesse Brisée de *Oakes*" in Luc B Tremblay & Grégoire Webber, eds, *Limit Droits Charte Essais Crit Sur L'arrêt R C Oakes Limit Chart Rights Crit Essays R V Oakes"* (Montréal: Thémis, 2009) 131 at 132.

[118] Section 1 inquiry, as initially conceived, was supposed to be something of a rigorous "factual test" (Bakan, Elliot & Group, *supra* note 111 at 762.) Similarly, according to Danielle Pinard, in *Oakes*, the Court prescribed an "essentially empirical approach to constitutional jurisprudence, enjoining parties who question the consti- tutional validity of statutes to provide facts to support their claims, and Parliament to rely on explicit factual foundations for legislative choices that are likely to infringe upon rights and freedoms" (Pinard, "Institutional Boundaries and Judicial Review", *supra* note 7 at 217.)

[119] Pinard, "Institutional Boundaries and Judicial Review", *supra* note 7 at 217.

realized that they were presented with a seemingly impossible task of reconciling the legal need for proof to justify *Charter* breaches with the political realities of drafting and implementing public policies under conditions of empirical and normative uncertainty.

In particular, it soon became apparent that in some cases the effectiveness of legislative solutions implicated in *Charter* disputes could not be easily, if at all, translated into traditional evidentiary terms, meaning that judges would have to make do with estimates, guesses, conjectures, and value judgements.[120] This, of course, posed some intractable dilemmas from the doctrinal standpoint. Furthermore, this has fueled concerns about the limits to the judicial role in a democracy. Some feared that judicial oversight of the rationality of legislative prognosis would give judges *carte blanche* to intrude into issues that they lack the expertise or legitimacy to decide.

As a result, in applying the proportionality test judges sometimes became more "forgiving"[121] of the government's arguments and lowered the legal standard that the government had to satisfy.[122] Many commentators observed that this metamorphosis has been set in motion the same year *Oakes* itself was decided.[123] Already in *Edwards Books,*[124] the Court was avowedly "prepared to maintain the *Oakes* rhetoric and yet at the same time analyze a statute in such a way as to make it clear that the burden on the state under section 1 is weak or nonexistent."[125]

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[120] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9.

[121] Chan, *supra* note 38 at 857.

[122] Dassios & Prophet, "Charter Section 1", *supra* note 8 at 290.

[123] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9.

[124] *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1 [*Edwards Books*].

[125] Andrew Petter & Patrick J Monahan, "Developments in Constitutional Law: The 1986-87 Term" (1988) 10 Supreme Court Law Rev 61 at 94–95.

In *Edwards Books*, at issue was the constitutionality of a Sunday closing law which was challenged as an alleged violation of freedom of religion.[126] Some shopkeepers, whose faith made them observe another day as a day of rest, argued that compliance with the impugned law imposed on them an unreasonable burden.

Having established a *prima facie* infringement of religious freedom, the court had to assess whether the limitation was demonstrably justified pursuant to the *Oakes* test. The problem was that, in presenting its case, the Crown did not lead any compelling evidence to support its position (which the court explicitly acknowledged).[127] Arguably, this evidentiary deficiency would have been fatal to the government's case under the original principles enunciated in *Oakes*.[128] However, the *Edwards Books* court decided to go down a different route and to apply proportionality reasoning flexibly.

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[126] *Edwards Books*, *supra* note 124.

[127] Chief Justice Dickson (as he then was) described the paucity and the problematic nature of the evidentiary record as follows:

> In the present appeals, the only evidence available to the Court which relates to s. 1 of the *Charter* is the Report on Sunday Observance Legislation (1970). It would have been preferable to have had more recent evidence, and, indeed, the Crown filed notice, less than a week before the hearing, of a motion to adduce additional evidence. Apparently this evidence included attitudinal surveys or public opinion polls, and also various submissions to a provincial task force looking into Sunday-closing laws. Crown counsel conceded the evidence was not essential to her s. 1 submissions. Counsel for the retailers objected vigorously to the timing of the motion. The motion was denied in view of the possible prejudicial consequences of admitting it into evidence at the eleventh hour.
>
> I am conscious of the possibility that some of the statistical evidence contained in the Report has been rendered less helpful by the passage of time.

Ibid at paras 123-124.

[128] Petter & Monahan, "Developments in Constitutional Law", *supra* note 125 at 66.

For instance, instead of requiring the government to demonstrate that no less rights-impairing means of achieving the stated objectives could be identified (meaning that the impugned measures were the "least intrusive"), the Court only looked into whether the measures abridged the right "as little as is reasonably possible."[129] This rearticulation of the minimal impairment limb of *Oakes* meant that the government could now save a right-infringing law from invalidation if it could demonstrate that the measures chosen to advance the law's objectives were within a range of reasonable options. Furthermore, in *Edwards Books* the Court did not subject the government's arguments to probing scrutiny at the very last, balancing, stage of *Oakes* and never asked the government to explain how the benefits of the impugned law outweighed its harms, which resulted in a relaxation of the justificatory standard which the government had to discharge.[130]

As years went by, the deferential trend continued. Eventually, the Court's approach to proportionality analysis became so "forgiving" that, as a growing chorus of commentators point out, the modern version of the *Oakes* test has more to do with a "general reasonableness weighing"[131] as opposed to a "strict set of evidentiary bars to be met by government."[132] Indeed, the evisceration of the original standard through a series of subtle doctrinal modifications became so pronounced that many commentators asked themselves (not without reason) whether the invocation of the *Oakes* test in judicial decisions currently amounts to anything more than

[129] *Edwards Books, supra* note 124 at para 131.

[130] Chan, *supra* note 38 at 859.

[131] Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests" (1999) 62 Sask Law Rev 543.

[132] Richard Jochelson, "Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference" (2009) 13:2 Rev Const Stud 209 at 225.

"ritualistic" bow.[133] It is often believed that some other (unacknowledged) considerations actually guide the court's section 1 analysis.[134]

Over the years, this judicial capitulation, ostensibly motivated by the desire to deflect charges of judicial activism,[135] has taken various shapes and forms, with the evidentiary standard sustaining probably the strongest doctrinal blow. For instance, the original standard of proof has been transformed from a preponderance of evidence with a "high degree of probability"[136] to the frequent acceptance that, for the purposes of upholding the rights limitation, self-evidence might be sufficient[137] (note that according to *Oakes*, self-evidence as a justificatory element was not meant to be adopted in a routine manner; instead, it was supposed to be a rare exception to the general rule requiring "cogent and persuasive" evidence.)[138] Curiously, in other situations where the court was committed to striking the law down, it tended to succumb to the other extreme,

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[133] Dassios & Prophet, "Charter Section 1", *supra* note 8 at 290..

[134] Davidov, *supra* note 10.

[135] For an early analysis of this phenomenon, see e.g. Dassios & Prophet, "Charter Section 1", *supra* note 8.

[136] *Oakes*, *supra* note 24 at para 68. Elsewhere the court uses the term "preponderance of probability "applied rigorously" (*ibid* at para 67).

[137] *Ibid; Edwards Books*, *supra* note 124; For a more thorough version of this argument, see Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9; Robin M Elliot, "The Supreme Court of Canada and Section 1 - The Erosion of the Common Front" (1987) 12 Queens Law J 277; Petter & Monahan, "Developments in Constitutional Law", *supra* note 125.

[138] As stated by the Court:

> Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. . . . A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s.1 analysis are obvious or self-evident (*R v Oakes*, supra note 22 at para 68, citations omitted.)

demanding that the government meet such an exacting burden of proof that it almost approximated the criminal standard.[139]

All in all, many commentators astutely observed that the Court tends to apply the stringent evidentiary test "any time that the Court wants to strike down a law", but when "dealing with a law with which they are relatively sympathetic, the Court is able to step aside and basically allow the legislature to do what it wants."[140] Indeed, it would be impossible to summon any other explanation of why "[s]ometimes even on the same issue, the Court at one time demands factual proof of effects, where at another time it is unperturbed by the absence of such proof."[141]

One of the major conceptual vehicles—or, in the words of Danielle Pinard, "rhetorical veils"[142]— that the court used in facilitating its circumvention of the original standard in *Oakes* was the notion of curial deference.[143] The actual strategies of deference varied, yet no single step

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[139] See e.g. *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*]. See also the relevant discussion in Kenny, "Proportionality and the Inevitability of the Local", *supra* note 11 at 566; Pinard, "Institutional Boundaries and Judicial Review", *supra* note 7 at 221.

[140] Petter & Monahan, "Developments in Constitutional Law", *supra* note 125 at 95. Admittedly, as has been suggested by commentators, the correlation is not as black-and-white as may appear at first blush. In *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at 966, 159 DLR (4th) 385,. for instance, the court maintained that the impugned legislation was entitled to zero deference, yet was nonetheless invalid. On this, see also the discussion Kenny, "Proportionality and the Inevitability of the Local", *supra* note 11 at 574, FN 144.

[141] Kenny, "Proportionality and the Inevitability of the Local", *supra* note 11 at 567. See also Pinard, "Institutional Boundaries and Judicial Review", *supra* note 7 at 219,. who compares judicial approach to the standard of proof in two cases dealing with election regulation: while in *Mackay v Manitoba*, [1989] 2 SCR 357, 61 DLR (4th) 385. the Court admonished the practice of deciding *Charter* cases without solid empirical evidence, in *Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912, 227 DLR (4th) 1., supposedly, it proceeded to deal with a *Charter* limitation without considering any solid evidentiary foundation.

[142] Pinard, "Institutional Boundaries and Judicial Review", *supra* note 7.

[143] It is of important note that this paper focuses exclusively on the deferential posture by the courts within the context of the *Oakes* test and does not capture the deferential trends in section 1 analysis of administrative actions most prominently exemplified by the *Doré* line of cases.

of the *Oakes* test has mitigated its effects.[144] For instance, as Sujit Choudhry has pointedly observed, there has been a clear, albeit not always explicit, trend in the steady relaxation of the first two steps of *Oakes*.[145] Conversely, the departure from the strictness of *Oakes* in the context of the third step—the minimal impairment inquiry—has been more explicit, yet less uniform.

In particular, the court has developed a series of often inconsistent and overlapping[146] bifurcated categories in order to identify the doctrinal context in which a deferential approach to the government's arguments was warranted and those in which it was not.[147] Because this judicial mistreatment of *Oakes* had a rather limited repertoire, it may be worthwhile to reproduce all of these categories below.

[144] For a discussion on whether the effects of difference should, in theory, extend to all steps of the Oakes test - or only the minimal impairment component - see e.g. the majority and the dissent opinions in *RJR-Macdonald Inc v Canada (Attorney General)*, *supra* note 64.

[145] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 509. For a more detailed analysis, see e.g. Dassios & Prophet, "Charter Section 1", *supra* note 8 at 292–301.

[146] As Soujit Choudhry maintains, the diverse set of criteria the court used to identify cases in which it should defer under section 1 "often overlapped in individual cases, providing multiple grounds for deference" (Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 511.)

[147] Again, a caveat is in order: while the deference framework was most aggressively applied in the context of the minimal impairment leg of *Oakes,* no single step of *Oakes* avoided its residual (or no so residual effect), in one form or another.

1.5 *When* to Defer to the Legislature: The Search for Contextual Criteria

1.5.1 The "Competing Interests at Stake" Approach

One of the first contextual touchstones the Court singled out in looking for the sound criteria of deference in section 1 cases was "the range and relative weight of different interests" at stake in each particular case where the policy measure has been impugned as contrary to the *Charter*.[148] On this account, the court had to differentiate between cases where, like in the criminal law context implicating sections 7-14 of the *Charter*, the state acted as "the singular antagonist" of the rights-claimant "on behalf of the whole community"[149] and cases where the court had to balance the interests of competing groups.

Because the issues involved in these latter cases, owing to the complexity and delicacy of the balance to be struck, are said to fall within the purview of heightened governmental expertise,[150] such cases are believed to attract curial deference,[151] whilst the former, due to the court's

[148] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 512.

[149] *Irwin Toy*, *supra* note 5. See also Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 512. For some examples of criminal files that did not attract any deference on the part of the court, see e.g. *Canada (Attorney General) v Chambre des Notaires du Québec*, 2016 SCC 20 ; *R v Safarzadeh-Markhali*, 2016 SCC 14 , 2016 SCC 14.

[150] "Issues which concern the process of justice or some other subject concerning which courts feel uniquely well qualified may provide the impetus for a stricter and more activist approach to s. 1 justification." (Dassios & Prophet, "Charter Section 1", *supra* note 8 at 291.) See also David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51:3 McGill Law J 503.

[151] Note that Soujit Choudhry, in his analysis of various deferential categories developed by court, differentiates between what he calls the "comparative institutional advantage" strategy for identifying a category and a "competing interests at stake" strategy (Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 512.). However, it is hard to draw the line between these categories to the satisfaction of all parties; if anything, it looks like one category serves as a normative foundation for the other. For an analysis that blends these approaches, see e.g. Lorraine Weinrib, "Canada's Charter of Rights: Paradigm Lost?" (2002) 6 Rev Const Stud 119 at 165.

"accumulated experience"[152] of working in the criminal justice context,[153] have to be adjudicated according to the original *Oakes* standard.[154] Parallel to competence concerns run concerns about the courts' perceived lack of legitimacy to referee polycentric constitutional claims.[155] Because, the argument goes, judges lack the requisite democratic credentials to remap the contested normative landscape of high-stakes constitutional demands, a vigorous probing of group-mediating social policies falls outside the constitutional remit of the courts. As noted by LaForest J in the context of one such group-mediating case, "a legislative attempt to avoid economic coercion of one religious group may result in economic coercion of another religious group. How is a court able to second-guess the Legislature on such issues?"[156]

The first appearance of the "competing interests" approach, according to which deference should be afforded in polycentric interest-balancing cases but not in bipolar criminal law cases, can arguably[157] be found in *Edwards Books*,[158] described above. In the case probing the constitutionality of a Sunday observance law (which was ultimately upheld), the Supreme Court

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[152] *Irwin Toy*, *supra* note 5 at 994. See also Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150.

[153] The rationale here has been forcefully articulated in the case of *R v Sullivan*, 2020 ONCA 333 at para 232, 387 CCC (3d) 304:

> The court must respect the core competencies to which Karakatsanis J. referred in CLAO. Criminalizing socially harmful conduct is a core competency conferred on Parliament: Constitution Act, 1867, s. 91. This is where the democratic principle has its greatest force. The Criminal Code embodies Parliament's primacy in creating criminal offences; the court is prohibited from creating both common law criminal offences and new common law defences that would be inconsistent with the Code's provisions: ss. 8(3), 9.

[154] Recall that *Oakes* itself was a criminal law case.

[155] On a very thorough analysis of polycentricity as a conceptual bright-line test for determining the degree of deference in public adjudication, see e.g. Jeff King, "The Pervasiveness of Polycentricity" (2008) PL 101.

[156] Justice LaForest, delivering the separate judgement in *Irwin Toy*, *supra* note 5 at para 185.

[157] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 512.

[158] *Edwards Books*, *supra* note 124.

of Canada has stated that the nature of the proportionality test would "vary depending on the circumstances"[159] and that the courts should be "careful to avoid the rigid and inflexible standards" because they are "not called upon to substitute judicial opinions for legislative ones."[160] In the case at bar, the "flexibility" alluded to by the Court manifested itself in both the relaxation of the standard of review (e.g., instead of inquiring, as part of the third limb of the original proportionality test, whether the policy measure chosen by the government was the least intrusive one available, the court instead reasoned that the impugned measure need only impair *Charter* rights "as little as *reasonably* possible")[161] as well as in lowering the standard of proof (the original preponderance of probabilities standard gave way, as commentators decried, to something approximating unquestionable acceptance of the government's factual record).[162] As many speculated, such emphatic judicial self-restraint in the face of inconclusive evidence can be

[159] *Ibid.*

[160] *Ibid* at 782.

[161] *Ibid* at 772. Among other instances of the said relaxation was the Court altering the "pressing and substantial objective" test, which now morphed into something approximating the "sufficiently important" standard. Moreover, in Edward Books itself, it was not clear whether the purpose of giving workers a uniform day of rest was a purpose that can be tethered to the values of a "free and democratic society." Such an idea of uniformity, especially in the face of the abridged constitutional rights, rather partakes of the unfree and autocratic regimes.

[162] Indeed, as many grieved at the time, "the only evidence which the court had before them to justify the Sunday closing law was a Law Reform Commission report which was 15 years old" (Petter & Monahan, "Developments in Constitutional Law", *supra* note 125 at 94.)

Indeed, in the Court's own words, the evidence tendered by the government was less than ideal. As Dickson CJ, speaking for the majority, observed:

> I am conscious of the possibility that some of the statistical evidence contained in the Report has been rendered less helpful by the passage of time. Nevertheless, it is the only evidence before the Court and I have considered the age of the materials in assessing its weight" (*Edwards Books, supra* note 124 at para 124.)

Note that in the decision itself, the court insisted that the requisite standard of proof was still "the civil standard, proof by a preponderance of probabilities" (*ibid* at para 121).

viewed as the court paying homage to the state's attempt to balance the interests of multiple groups where there were no clear winners or losers.[163]

It was not until *Irwin Toy,*[164] though, that the notion of deference became firmly entrenched as a permanent fixture of Canadian constitutional fabric. At issue was the competence of the Court to mediate between the constitutional interests of (ostensibly better-situated)[165] claimants whose *Charter* rights to commercially advertise were truncated and young vulnerable children in need of protection whose interests operated as a constitutional counterweight to the claimant's section 2(b) rights. Proceeding on the premise that "where the legislature mediates between the competing claims of different groups in the community," the legislature's "estimate" as to where to properly draw the line is as good as any,[166] the *Irwin Toy* court employed the doctrine of deference openly, using it as a methodological tool to develop a more relaxed minimal impairment prong of *Oakes*[167] and to shift the focus of judicial scrutiny to the subjective point of view of the legislature, meaning that as long as the latter acted in good faith and genuinely believed that it afforded due regard to both right and countervailing interests at stake (which, as

[163] Others theorized that the standard in *Edward Books* was significantly lower than that in *Oakes* because "the stakes were somewhat lower" as the case arose outside of the criminal context. (Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 509.) For a similar theory, see e.g. Petter & Monahan, "Developments in Constitutional Law", *supra* note 125 at 68–69. Importantly, in *Edwards Books,* the court has never explicitly acknowledged its reasons behind the departure from *Oakes.*

[164] *Irwin Toy, supra* note 5.

[165] *Ibid* at 993.

[166] *Ibid.*

[167] *Ibid* at 989-990.

numerous commentators admonish, is always presumably the case),[168] its position would be unlikely to fail.[169]

Over the years, the *Irwin Toy* framework has assumed multiple forms, with the "competing interests" strategy sometimes being referred to as the cases involving "polycentric issues",[170] macro-economic policies,[171] "allocation of scarce resources"[172] and so forth. Furthermore, the bifurcated "either-or" approach (whereby the state is either a singular antagonist of the claimant or a social mediator) has undergone considerable gerrymandering. Among other things, the court reasoned that even within the "socio-economic" category of cases, there was a room for something resembling a sliding scale: the margin of appreciation afforded to the polycentric policy choices would have to vary depending on "the scale of the financial challenge confronting a government and the size of the expenditure required to avoid a *Charter* infringement in relation to the financial challenge."[173]

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[168] Kirsty Sheila McLean, *Constitutional Deference, Courts and Socio-economic Rights in South Africa* (PULP, 2009) at 32.

[169] Davidov, *supra* note 10 at 8 cited to SSRN Report. David Wiseman goes even further so as to suggest that the invocation of deference in *Irwin Toy* meant the displacement of the onerous *Oakes* standard with what he calls the "reasonable basis" standard of review: "By virtue of this standard, the government does not need to prove that a limiting measure is, for instance, rationally connected or minimally impairing. Rather, it merely needs to establish that it had a reasonable basis for believing that it was (Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 515.)

[170] *Irwin Toy*, *supra* note 5 at 993–994; *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22, 81 DLR (4th) 358; *RJR-MacDonald*, *supra* note 4 at 331 per McLachlin J; *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at 876, 133 DLR (4th) 1.

[171] For instance, Guy Davidov maintains that the "allocation of scarce resources" criteria for deference is just one of the articulations of the larger "balancing between different groups of society" strategy (Davidov, *supra* note 10 at 23, cited to SSRN Report.)

[172] See e.g. *Mckinney v University of Guelph*, [1990] 3 SCR 229 at 304–305, 76 DLR (4th) 545; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 85, 151 DLR (4th) 577; *PSAC v Canada*, [1987] 1 SCR 424 at 442, 38 DLR (4th) 249.

[173] *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 6 at para 84, per Binnie J, [2004] 3 SCR 381.

Notably, the operation of the *singular antagonist* vs *competing interests* distinction has not been without practical or theoretical difficulties; neither has it been free of criticism. Apart from being normatively suspect,[174] the distinction has been argued to be taxonomically problematic because not every case could be comfortably shoehorned into one preconceived slot or another.[175] For instance, "even where the state could be properly portrayed as the singular antagonist, their antagonism could be framed as a function of their protecting 'vulnerable groups'",[176] meaning that, for all intents and purposes, criminal cases could be as structurally polycentric and group-mediating[177] as social-policy cases.[178] Indeed, as Jeff King has thoroughly demonstrated in his powerful theoretical analysis, virtually *all* legal cases exhibit, to one degree or another, structural

[174] As Lorrain Weinrib observes, the criminal/private divide originated in *Irwin Toy* "Charter rights outside the criminal context possess no distinctive normative character" (Weinrib, "Canada's Charter of Rights", *supra* note 151 at 163.)

[175] In fact the court itself subsequently recognized that "it is difficult to draw a sharp distinction between legislation in which the state is the antagonist of the individual, and that in which it is acting as a mediator between different groups." (*Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 90.) See also *RJR-MacDonald, supra* note 4 at para 135. For academic arguments to the same effect, see e.g. Kent Roach & David Schneiderman, "Freedom of Expression in Canada" (2013) 61 SCLR 2nd 429 at 443; Jamie Cameron, "The Past, Present, and Future of Expressive Freedom under the *Charter*" (1997) 35 Osgoode Hall LJ 1.

[176] Michael Johnston, "Section 1 and the Oakes Test: A Critical Analysis" (2009) 26 Natl J Const Law 85 at 92–93. Similarly, as Guy Davidov observes, "legislation *always* balances between different groups of society" (Davidov, *supra* note 10 at 24, cited to SSRN Report emphasis in the original. For specific examples, see e.g. *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449; *R v Keegstra,* [1990] 3 SCR 697, [1990] SCJ No 131 (QL); *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 274–275, 83 DLR (4th) 193.

[177] David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 622.

[178] Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 521. See, e.g., the case of *RJR-MacDonald, supra* note 4,. in which criminal penalties were used for the purposes of protecting various groups and for advancing important social values.

polycentricity.[179] Thus, because "polycentricity", according to King, is a property of issues and not areas of law:[180]

> The idea of polycentricity cannot presently be relied upon without serious contradiction to justify judicial restraint in public law. Judges and scholars will need either to abandon the doctrine, recast it in a more defensible form, or radically change the role of adjudication in contemporary legal practice.[181]

The decision in *R v KRJ*[182] affords a good example. Despite being a clear-cut individually antagonistic criminal law case (at issue was a retrospective operation of criminal punishment in the context of incest and child pornography), it also sought to protect, in the court's own words, "some of the most vulnerable members of our society."[183] Which category of cases does *KRJ* fall into? Does the state represent, under the stated conditions, a "singular antagonist" of the claimant (like in the *Oakes* case) or a protector of vulnerable children in the context of a polycentric dispute (*sensu Irwin Toy*)? While the Court did not explicitly acknowledge the normative dilemma at hand, it nonetheless proceeded to exercise significant restraint, noting that striking down the retrospective legislation at the minimal impairment leg of *Oakes* "would fail to accord sufficient deference, at this stage of the analysis, to the government's choice of legislative means."[184]

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[179] King, *supra* note 155.

[180] *Ibid* at 42.

[181] *Ibid* at 43.

[182] *R v KRJ*, 2016 SCC 31, [2016] 1 SCR 906.

[183] *Ibid* at para 113.

[184] *Ibid* at para 75. Among other criminal law cases that implicated the interests of vulnerable groups that, either explicitly or implicitly, led to the court affording deference to the legislative choices are *R v*

Parallel to the said taxonomic concerns ran misgivings about the validity of assumptions underpinning the dichotomous view of institutional competence in constitutional decision-making. As many remarked, the competence boundaries between the legislative and judicial power cannot be drawn, to the satisfaction of all parties, along the bright line between socio-economic policies (which allegedly fall outside the special expertise of the court) and criminal policies (to which the presumption of the special expertise attaches). Not only can judges lack any pre-bench experience in the criminal law matters (hence rebutting the presumption of any special expertise),[185] but epistemic uncertainty in criminal law-making can reach the same order of magnitude as that in social-policy law-making.[186] This means that any assumptions about the relative institutional advantages of the courts vis-à-vis the legislature in the criminal justice sphere are, at the very least, premature.[187]

The reviewing courts—alive to the fact that the whole criminal versus social policy dichotomy was methodologically unsustainable[188]—frequently diverged from the *Irwin Toy* framework, which only contributed to the confused state of the deference doctrine. For instance, criminal files, which were supposed to be prime examples of cases wherein the state would be a "singular

Sharpe, 2001 SCC 2 [*Sharpe*] (children); *R. v. Keegstra*, *supra* note 176 (racial and religious minorities) .and *R. v. Butler*, *supra* note 176 (women).

[185] Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 521.

[186] Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 9.

[187] Sanjeev Anand, "The Truth About Canadian Judicial Activism" (2006) 15:1, 2 & 3 Const Forum Forum Const 87 at 88.

[188] Among other things, this dichotomy has been described by the Court as "crude" (*M v H*, [1999] 2 SCR 3 at para 295, 171 DLR (4th) 577.) and "not always easy to apply" (*RJR-MacDonald*, *supra* note 4 at para 135.)

antagonist" of the claimant, attracted deference (whether explicitly[189] or implicitly[190]) no less frequently than cases of resource allocation.[191] Indeed, as Lorain Weinrib observes, "perhaps *the most* deferential reformulation of the *Oakes* test occurred in the context of a garden variety criminal case."[192]

Economically driven disputes have undergone similar metamorphosis.[193] Originally, the *Irwin Toy* framework stipulated that they should attract presumptive deference. However, in some

[189] For instance, in the following criminal law cases the court adopted a deferential approach to the government's position: *United States of America v Cotroni; United States of America v El Zein*, [1989] 1 SCR 1469, 48 CCC (3d) 193; *R v Chaulk*, [1990] 3 SCR 1303, 62 CCC (3d) 193; *R. v. Butler*, *supra* note 176; *R v Laba*, [1994] 3 SCR 965, 120 DLR (4th) 175; *R. v. Seaboyer; R. v. Gayme*, *supra* note 176; *R v Downey*, [1992] 2 SCR 10, 90 DLR (4th) 449 [*Downey*].

[190] See e.g. *R v Whyte*, [1988] 2 SCR 3, 51 DLR (4th) 481;

R. v. Thomsen, [1988] 1 S.C.R. 640, 63 C.R. (3d) 1; *R. v. Hufsky*, [1988] 1 S.C.R. 621, 63 C.R. (3d) 1, 4 M.V.R. (2d) 170; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, 77.

[191] As Kent Roach observes, over the years the court "has given the legislature the greater margin of deference not only with respect to social policies . . . but in much of criminal law" (Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, 2nd ed (Toronto: Irwin Law, 2006). For an observation to the same effect, see, e.g., Christopher M Dassios & Clifton P Prophet, "Charter Section 1: The Decline of Grand Unified Theory and the Trend towards Deference in the Supreme Court of Canada" (1993) 15 Advocates Q 289 at 304. Davidov, *supra* note 10 at 20 cited to SSRN Report.

[192] Weinrib, "Canada's Charter of Rights", *supra* note 151 at 165–166 [emphasis added].

[193] At the same time, in many cases where the government was balancing the interests of different groups in a society, or dealing with conflicting economic interests, the court nonetheless held that deference was not warranted. See, e.g., *M. v. H.*, *supra* note 188; *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 81 DLR (4th) 545 per La Forest J;*Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693. Also see *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385; and *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 61. In the latter, the Court decided against according any deference to the government's choices because, in the Court's words, there were "less drastic means of pursuing the same identified objectives."

See also some law of democracy cases which, according to the *Irwin Toy* framework, would have to attract a high degree of deference, but which, in reality resulted in a non-deferential judicial treatment: *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158, 81 DLR (4th) 16; *Sauvé*, *supra* note 116; *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, 105 DLR (4th) 577; *Figueroa v. Canada (Attorney General)*, *supra* note 141.

instances (especially in the realm of labour disputes)[194] the Court did a 180 degree turn and adopted a non-deferential stance in clearly polycentric allocative cases holding that "the courts should not rely on deference to narrow the meaning of *Charter* rights."[195]

Ultimately, the difficulty of casting criminal law cases in opposition to social policy cases became so acute that, in *Thomson Newspapers*, the Court decided to abandon the distinction altogether, holding that it can no longer be doctrinally sustained.[196] Notwithstanding the *Thomson Newspapers* prescription, however, the distinction continued to resurface in the subsequent cases,[197] most notably in the various iterations of the *Thomson Newspaper*'s "contextual approach" itself,[198] suggesting that the court is still willing to take it off the dusty doctrinal shelf whenever expedient or "strategically useful."[199]

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[194] As observed by Rostein J, writing in dissent in *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 220:

> For nearly twenty years between the Trilogy and Health Services, a majority of this Court was consistently of the view that judges should defer to legislators on labour relations matters. As discussed by LeBel J. at paras. 156-62 of Advance Cutting & Coring, this position stemmed from a recognition that the management of labour relations requires a delicate exercise in reconciling conflicting values and interests and that the political, social and economic considerations that this exercise raises lie largely beyond the expertise of the courts" (at para 220).

[195] *Ibid* at para 79.

[196] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 90, Bastarache J..

[197] See e.g. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 . At para 37, the Court held that "[w]here a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused." See also cases such as *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61 at para 23. And *R v St-Onge Lamoureux*, 2012 SCC 57 : "penal legislation that directly threatens a person's liberty will be assessed differently than a complex regulatory response to a social problem" (at para 39, citing *Alberta v. Hutterian Brethren, supra)*.

Lower courts also followed suit. See e.g. *R. v. Sullivan*, *supra* note 153 at para 222-233.

[198] See, e.g., a subsequent reading of Bastarache J's "contextual factors" by the minority judges in *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989. that only buttresses this conclusion.

[199] Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 12.

1.5.2 Vulnerable Group Approach

Another important reference point for determining the degree of deference accorded to Parliament's choices was the presence or absence of the interests of vulnerable groups. The Court held, for example, that the invocation of the interests of children,[200] women,[201] cigarette smokers,[202] consumers of dental services[203] or other vulnerable populations militates in favour of a less exacting justificatory burden for the government to surmount. Sometimes the Court defines the notion of a vulnerable group situationally, so that the same group, depending on the adjudicative context, could be found vulnerable in some cases and non-vulnerable in others.[204]

The long line of authorities, beginning with *Irwin Toy*, found the "vulnerable group" framework doctrinally attractive because it draws on, and promises solutions for, an array of institutional concerns attending epistemically complex section 1 reasoning. From an institutional competence standpoint, this approach holds that cases implicating vulnerable groups are so epistemically problematic that it is better to leave them to more competent governments to wade through.[205] On the legitimacy front, this approach suggests that the government is better positioned to protect, or give appropriate weight to, the interests of those worse-off by virtue of its unique

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[200] *Sharpe*, *supra* note 184.

[201] *R. v. Butler*, *supra* note 176.

[202] *RJR-MacDonald*, *supra* note 4.

[203] *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, 71 DLR (4th) 68.

[204] The Canadian electorate affords a good example. It was held to be a vulnerable group in some cases (*Harper v Canada (Attorney General)*, [2000] 2 SCR 764 [*Harper*].) but not the others (*Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140.), depending on the factual matrix in which the dispute occurred.

[205] Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 10.

democratic credentials. The "vulnerable groups" framework also relies on the normative rationale. The claim here, informed by the common criticism of the human rights movement in general,[206] is that *Charter* grievances attract a disproportionate amount of institutional energy and resources, which can have negative consequences for other emancipatory projects that cannot avail themselves of *Charter* protections. Conceptualized this way, the interest of vulnerable groups would be a "legitimate counter-weight to the rights of *Charter* claimants."[207]

Unfortunately, just like with the previous deference-according categories, here, too, taxonomical concerns reign. "The idea of a vulnerable group", as David Wiseman aptly observes, "is not self-defining",[208] so over the years the courts struggled with identifying a principled approach to defining vulnerability that would not be so flexible as to be useless.[209] For instance, are RCMP officers that go on strike a group of vulnerable employees (given that their employer is a quasi-military institution), or a ransom-seeking organisation that refuses to take care of other vulnerable populations (e.g., disenfranchised persons that would otherwise be susceptible to crime and violence)?[210] What about other public sector unions? Legal commentators highlight that the issue is not as straightforward as it appears.[211]

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[206] Duncan Kennedy, "The International Human Rights Movement: Part of the Problem" in Michael Freeman, ed, *Lloyds Inrtroduction Jurisprud*, 9th ed (Sweet & Maxwell, 2014) 1348.

[207] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 512.

[208] Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 15.

[209] *Ibid* at 16.

[210] *Delisle v. Canada (Deputy Attorney General)*, *supra* note 198. (the majority held that RCMP officers are not a vulnerable group, while the dissent held otherwise). But *cf. Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1., wherein the majority recognised RCMP officers as "disadvantaged" and "vulnerable" population.

[211] For a cogent take on the "imbalance of bargaining power" myth and the claim that civil servants' unions are not vulnerable groups, or "discrete and insular minorities," see e.g. Leonid Sirota, "Laboured

Furthermore, critics call into question the very assumption that governments "know best"[212] when it comes to protection of vulnerable populations. What if, as David Wiseman puts it, the legislation is *being challenged by* a vulnerable group?[213] Wouldn't allowing the government to meet a lower standard of justification under section 1 (i.e deference) work against the interests of such a vulnerable group to begin with?[214] The same concern informs another line of critique: that an overly elastic—and, hence, unpredictable—approach to defining vulnerability would thwart emancipatory possibilities of the very groups it purports to serve because many vulnerable persons would be dissuaded from raising *Charter* grievances in an unpredictable doctrinal environment.

Last, but certainly not least, the idea according to which the presence of vulnerable groups bears on the justificatory standard under section 1 raises a bevy of conceptual concerns. It is worth recalling that, as part of the last prong of the *Oakes* test, the Court is to assess whether the deleterious effects of the right-infringement are proportionate to the salutary effects of achieving the governmental measures.[215] These salutary effects, at least from the conceptual standpoint, include amelioration of the standing of vulnerable groups. However, the effects of taking the interests of vulnerable groups into account at the earlier stages of the *Oakes* test are, too, to "make it easier for governments to justify limitations when those limitations are aimed at protection of the interests of vulnerable groups."[216] This results in a scenario under which the

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Thoughts", (4 February 2015), online: *Double Asp* <https://doubleaspect.blog/2015/02/04/laboured-thoughts/>.

[212] The institutional competence argument is one of the most frequently invoked in these types of cases.

[213] Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 10.

[214] *Ibid* at 9.

[215] *Dagenais v Canadian Broadcasting Corp.*, *supra* note 65.

[216] Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 533.

interests of vulnerable groups are being factored into analysis twice: when relaxing a justificatory standard under *Oakes* and at the level of determining the salutary effects of the right infringement as part of proportionality of effects. Such double-counting brings nothing more than conceptual confusion and conceptual corruption of the test.

1.5.3 Epistemic Uncertainty Approach

Notwithstanding the foregoing categories of deference, the key battleground for dealing with competency and legitimacy concerns in section 1 jurisprudence has always been what I call the "epistemic uncertainty" argument. Despite assuming various rhetorical guises and disguises, its gist always remained the same: the Court reasons that deference to Parliament's and legislature's choices is counseled in cases afflicted by considerable uncertainty about the truth value of their underlying premises.

The majority in *Irwin Toy*, for instance, speaks about extending deference to authorities on matters requiring "an assessment of conflicting scientific evidence."[217] In *RJR-MacDonald*,[218] Justice McLachlin (as she then was) posits that "the degree of deference that the courts accord to Parliament or the Legislature" may be affected by "[t]he difficulty of devising legislative solutions to social problems which may be only incompletely understood."[219] The majority in

[217] *Irwin Toy*, *supra* note 5 at para 74.

[218] *RJR-MacDonald*, *supra* note 4.

[219] She emphasized, however, that this does not diminish the usual standard of proof required under s. 1, simply that that standard might be satisfied in different ways depending on the nature of the legislative objective (*Ibid* at para 137]:

> As the s. 1 jurisprudence has established, the civil standard of proof on a balance of probabilities at all stages of the proportionality analysis is more appropriate: Oakes, supra, at p. 137; Irwin Toy, supra, at

Butler ties a lower justificatory standard under section 1 to "the inability to measure scientifically a particular harm in question."[220]

It is worth noting that the "epistemic uncertainty" argument is not exclusive to Canadian jurisprudence. For instance, in the case law of the European Court of Justice a lack of scientific consensus is a ground for enhancing discretion of national authorities related to the proportionality test.[221] Methodologically, as commentators observe, deference on epistemic grounds is most apparent in the court's assessment of the choice of legislative means,[222] but the actual extension of the margin of appreciation can happen at any stage of the section 1 reasoning.

The "epistemic uncertainty" approach stands out among other deference categories for a number of reasons. First, it is unique because it acts both as a stand-alone ground for deference, but also, as will be enlarged upon in Chapter 2, as an underlying rationale for other deference categories. On this reading, such deference-according factors as the "polycentric nature of the dispute" or "non-criminal proceeding" can be construed as conceptual proxies for what the court is really trying to say: that its ability to ascertain the truth value of highly contested empirical and normative allegations in "hard" section 1 cases is limited[223] and that letting the judiciary have

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> p. 992. . . . Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view: see Snell v. Farrell, [1990] 2 S.C.R. 311. [Emphasis added.]

[220] *R. v. Butler*, *supra* note 176 at 502.

[221] Matthias Klatt & Johannes Schmidt, "Epistemic Discretion in Constitutional Law" (2012) 10:1 Int J Const Law 69 at 70.

[222] Sirota, "The Rule of Law", *supra* note 8 at 85.

[223] For a statement to that effect, see e.g.*Irwin Toy*, *supra* note 5 at 993–94: "When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence."

"the last guess" in cases where meaningful evidentiary support is not available means transferring to the judiciary too great a power.

Second, flagging section 1 issues as epistemically compromised has, to date, been particularly consequential for the outcomes of *Charter* disputes. As David Wiseman puts it, "assessment of social science and legislative fact evidence remain[s] a key ground for debate and disagreement among members of the Supreme Court of Canada",[224] and, in the apt observation of Niels Petersen, the "treatment of uncertainty and the lack of sufficient evidence" is often the "dividing line" between the majority of the court and the dissenting judges in the most controversial Court's decisions.[225]

Conceptual shortcomings of the "epistemic uncertainty" approach will be discussed in greater detail in Section 1.6, Section 2.4, and Section 4.3 of this thesis. For now, I only wish to point out that the practical application of this deference-according factor has been uneven. For instance, there has been no judicial consensus on what it takes for an issue to become "epistemically problematic." Even the same issues have been characterized as relatively epistemically certain in some cases and epistemically uncertain in others.[226]

[224] Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 21.

[225] Petersen, *supra* note 12 at 123. The same sentiment is expressed by David Wiseman who remarks that judicial conclusions on the degree of epistemic uncertainty in each particular case normally mirror differences in holdings as to the justifiability of rights limitations (Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 20.)

[226] The cases dealing with the third-party spending limits in democratic representation cases afford a good example. In *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385. the law was struck down. Then in *Harper, supra* note 204,. it was upheld. And then in *BC Freedom of Information and Privacy Association v British Columbia (Attorney General)*, 2017 SCC 6 . the law was upheld again.

1.5.4 The "Nature of the Right's Infringement" Approach

Perhaps less consequential, but no less enduring, has been the practice of predicating the intensity of proportionality review on the nature of the putative right-infringement.[227] On this approach, usually invoked in the context of section 2(b) grievances, the protected interests that are located "far from the 'core'"[228] of the impugned rights (such as commercial expression)[229] deserve a less probing scrutiny. Conversely, if the normative weight of protected interests is relatively significant (for instance, the way the political nature of the expressive activity lies at the core,[230] as opposed to the periphery, of the teleology of section 2(b)[231]), the government's argument warrants no deference.[232] The conceptual rationale here, perhaps most evocatively expressed by Justice Bastarache in *Thomson Newspapers*, is that "the low value of the expression may be more easily outweighed by the government objective", and *vice versa*.[233]

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[227] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 91; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1355–1356, 64 DLR (4th) 577; *Rocket v Royal College of Dental Surgeons of Ontario*, 2000 SCC 57 at 246–247, 71 DLR (4th) 68; *R. v. Keegstra*, *supra* note 176 at 760; *RJR-MacDonald*, *supra* note 4 at paras 71-73, 132; *Libman v. Quebec (Attorney General)*, *supra* note 226 at para 60.

[228] *RJR-MacDonald*, *supra* note 4.

[229] *Ibid.*

[230] The underlying purposes of s.2(b): speech involved in a democratic system, the promotion of truth, and self-realization and individual autonomy" *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at 765, 54 DLR (4th) 577. See also Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 514–515: "the search for the truth, participation in social and political decision-making, and individual self-fulfillment."

[231] See also *Edmonton Journal v. Alberta (Attorney General)*, *supra* note 227 at 1355–1356; *R v Zundel*, [1992] 2 SCR 731 at 752–753, 95 DLR (4th) 202; *Libman v. Quebec (Attorney General)*, *supra* note 226 at para 29.

[232] Roach & Schneiderman, *supra* note 175 at 435.

[233] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 91.

The application of this approach, according to which not all expression is created equal and some of expressive activities merit more constitutional protection than others,[234] gave rise to a bevy of practical and theoretical problems.

Methodologically, it runs afoul of the traditional logic of proportionality according to which all steps of the *Oakes* inquiry should be held analytically separate[235] and interest balancing should not enter judicial analysis until the very last step of the *Oakes* test—proportionality of effects (or proportionality *stricto sensu*).[236] Indeed, the proposition that "peripheral" expressive freedoms require a less solicitous protection even at the early stages of *Oakes* suggest that, as part of the "nature of the right" approach, interest balancing ends up being effectuated *twice*: first, when the court, on account of the relatively "low value of the expression",[237] tilts the scales of proportionality in the government's favour during the *minimal impairment stage*[238] and, second,

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[234] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 514.

[235] E.g., Aharon Barak maintains that the minimal impairment prong of proportionality is bound by "the need to realize" the legislative objective, whilst the last balancing component is meant to examine "whether the realization of this proper objective is commensurate with the deleterious effect upon the human right." See Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57:2 Univ Tor Law J 369 at 374.

Similarly, according to Dieter Grimm, "[t]he disciplining and rationalizing effect, which is a significant advantage of the proportionality test over a mere test of reasonableness or a more or less free balancing, as in many US cases, is reduced when the four stages are not clearly separated. Each step requires a certain assessment. The next step can be taken only if the law that is challenged has not failed on the previous step. A confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable." See Dieter Grimm, "Proportionality in Canadian and Geraman Constitutional Jurisprudence" (2007) 57:2 Univ Tor Law J 383 at 395.

[236] Marcus Moore, "*R. v. K.R.J.*: Shifting the Balance of the Oakes Test from Minimal Impairment to Proportionality of Effects" (2018) 82 Supreme Court Law Rev (2nd) 143 at 153–158.

[237] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at par 91.

[238] In *Ross*, the Court confirmed that "…when the form of expression allegedly impinged lies further from the "core" values of freedom of expression, a lower standard of justification under s.1 has been applied." *Ross v. New Brunswick School District No. 15*, *supra* note 170 at 876–877. The same point was made in *R. v. Keegstra*, *supra* note 176 at 765.

when the same proportionality scales are being tilted in the government's favour as part of *proportionality of effects*, also on account of the "low value of the expression." It goes without saying that such double-counting does an appreciable disservice to the integrity of the *Oakes* analysis[239] and, potentially, to the sturdiness of the *Charter* safeguards themselves. As authoritatively stated by the Court in *Canadian Broadcasting Corp v Canada (Attorney General)*:

> The first three stages of the *Oakes* analysis are anchored in the assessment of the impugned law's purpose. Only the fourth branch takes full account of the 'severity of the deleterious effects of a measure on individuals or groups."[240]

Compounding this methodological problem, the "sliding scale" approach to determining the value of the expression has proven to be practically untenable. First, the good old taxonomical issues remained: in many a case it was argued that some ostensibly "fringed" expression (such as, e.g., sexually explicit expression[241] or even hate speech[242]) was thoroughly political in nature[243] thereby counselling a robust section 1 protection.[244] Second, even if one accounts for

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[239] On why it is important not to conflate the work all proportionality sub-steps are meant to do and not to move "the heavy conceptual lifting and balancing" from its proper analytical locus—proportionality of effects—to the preceding elements of the analysis, see *KRJ*, *supra* note 182 at para 78; *Alberta v. Hutterian Brethren of Wilson Colony*, *supra* note 197 at para 149.

[240] *Canadian Broadcasting Corp v Canada (Attorney General)*, [2011] 1 SCR 19 at para 87 [reference omitted].

[241] *R. v. Butler*, *supra* note 176.

[242] *R. v. Keegstra*, *supra* note 176.

[243] See e.g. Justice McLachlin's dissenting comment in*Ibid* at 842., arguing that "in actual cases in may be difficult to draw the line between speech which has value to democracy or social issues and speech and which does not."

[244] For a thorough overview of this phenomenon, see e.g. Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 517.

the issue of classification, the Court never ended up following its own categories and frameworks. For instance, the commercial nature of the expression has not always paved the way to a less stringent application of the justificatory standard under section 1: the Court refused to adopt a deferential stance in the context of commercial or otherwise economically motivated expression,[245] especially in the labour relations context.[246] Conversely, it held that even the expression that lies at the heart of section 2(b) (i.e. political expression) can be scrutinised pursuant to a deferential framework if the countervailing public interests are democratically important.[247] This latter approach is puzzling not only because it goes against the well-established precedent on the issue, but also because it is hard to envision the scenario under which the interests to be balanced against the right to political expression would be "democratically unimportant." Would such interests even pass the constitutional muster under the "pressing and substantial objective" leg of the *Oakes* test to begin with?

Furthermore, even when the court, at least in theory, subjected the measures trespassing on political expression to the most probing scrutiny, the actual application of such scrutiny was often deferential in practice. For instance, in the case of *Toronto Stars Newspaper*,[248] the court approached its "minimal impairment" analysis with the caveat that, in assessing the actual effects

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[245] *Ibid* at 517-518.

[246] *Ibid* at 518.

[247] Such as, for instance, the attainment of "referendum fairness." As court explained in *Libman*, "while the impugned provisions do in a way restrict one of the most basic forms of expression, namely political expression, the legislature must be accorded a certain deference to enable it to arbitrate between the democratic values of freedom of expression and referendum fairness." See *Libman v. Quebec (Attorney General)*, *supra* note 226 at para 61.

For the proposition that "[t]he political speech cases confirm that even expression lying at the core of the guarantee is far from absolutely protected in Canada," see e.g. Roach & Schneiderman, *supra* note 175 at 475.

[248] *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 .

of the impugned measure, "the court must consider the nature of the expression at issue."[249] Since the expression at issue—the ability of the press to disseminate the information regarding the bail hearings—is closer to the core of the freedom of speech, the court purportedly held the government to the highest degree of scrutiny: the question posed was "whether the limit impairs a right as little as possible."[250] The practical application of such seemingly stringent standards, however, proved to be exceedingly relaxed, with the Court finding that the government easily met its standard. However, as emphasised by the dissent, there was a bevy of less restrictive measures available to the government,[251] not to mention the fact that the factual inferences themselves were underpinned by what Abella J, in dissent, described as "speculation."[252] Similarly, in *Harper*, a third-party election spending case, Justice Bastarache conceded that democratic participation was at the core of the section 2(b) right, yet nonetheless held that under some (unspecified) circumstances "third party advertising will be less deserving of constitutional protection."[253]

Perhaps in the natural progression of this logic, the Court eventually adopted an across-the-board doctrinal capitulation in political speech cases in the context of election law. Pursuant to the decision in *Bryan*, courts now "ought to take a natural attitude of deference toward Parliament when dealing with election laws,"[254] despite the dissent's vocal retort that the form of expression

[249] *Ibid.*

[250] *Ibid* at para 35.

[251] *Ibid* at para 72.

[252] *Ibid* at para 72

[253] *Harper*, *supra* note 204 at para 85.

[254] *R v Bryan*, 2007 SCC 12 at para 9.

implicated in *Bryan* lies at the conceptual core of the values sought to be protected by section 2(b).[255]

The "nature of the right infringement" approach has also given rise to a number of doctrinal spin-offs. Originally, the court held that the intensity of judicial scrutiny under *Oakes* can hinge on the nature of the activity protected by the *Charter*. Now, like in the decision of *BC FIPA,* the Court holds that the level of deference to the legislature may be predicated on "the scope of the infringement" as well.[256] When the latter in "minimal",[257] meaning that the rights are only infringed *a little*, the court should, as a result, extend "minimal deference."[258] This means that deference, as well as the amount thereof, can be accorded not only based on the nature of the protected activity, but also based on the "scope" of its infringement (which is qualitatively different from the analytical work done as part of the minimal impairment leg of Oakes). To alleviate all misgivings, the abstract value of the protected activity and the actual degree of the right infringement are, albeit closely related, two independent analytical considerations. In Alexy's famous formula of proportionality, they even constitute two independent variables to be "fed" into the proportionality equation.[259]

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[255] *Ibid* at para 98. See also *ibid* at para 99: "The onus on the government under s. 1, therefore, is to demonstrate that it is justified in infringing a form of expression that is at the heart of the constitutional right."

[256] *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, *supra* note 226 at para 58.

[257] *Ibid.*

[258] *Ibid.*

[259] Robert Alexy, "On Balancing and Subsumption. A Structural Comparison" (2003) 16:4 Ratio Juris 433; Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16:2 Ratio Juris 131; Klatt & Schmidt, *supra* note 221.

1.5.5 The "Complex Regulatory Response vs Blanket Ban/Exclusion" Approach

Another strategy for demarcating degrees of deference to be accorded to the legislature was to look at the legislative solution to the particular policy problem. For instance, as emphasized in *Hutterian Brethren*, a "'complex regulatory response' to a social ill will garner a high degree of deference",[260] while a blanket ban, "with no attempt to draw up a more nuanced system of regulation in response to a societal problem",[261] will be entitled to only a modicum of deference.[262]

The idea to tie the justificatory standard under *Oakes* to the nature of the government's ban can be traced back to the decision in *RJR-MacDonald*, where the court refused to proceed on the government's "say-so," reasoning that where the government had tendered no evidence and implemented a complete, rather than a partial, ban concerning a *Charter*-protected activity, the extension of deference would not be justified.[263]

The underlying logic behind this approach has been enlarged upon in *Quebec v A*,[264] where the Court explained its "antipathy towards complete exclusions"[265] by the justificatory needs of the section 1 framework itself, holding that it may be difficult to "explain why a significantly less

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[260] *Alberta v. Hutterian Brethren of Wilson Colony*, *supra* note 197.

[261] Kenny, "Proportionality and the Inevitability of the Local", *supra* note 11 at 560. See also *R. v. Safarzadeh-Markhali*, *supra* note 149 at para 57.)

[262] *Carter*, *supra* note 139 at para 98.

[263] Roach & Schneiderman, *supra* note 175 at 86.

[264] *Quebec (Attorney General) v A*, 2013 SCC 5 at para 362.

[265] *Ibid.*

intrusive and equally effective measure was not chosen"[266] when "a group has been entirely left out of access to a remedial scheme."[267] A takeaway from this reasoning is that the Court normally treats blanket bans as epistemically straightforward, suggesting that their resolution is within the traditional purview of judicial expertise. Conversely, the more individuated partial bans are deemed to be sufficiently epistemically nuanced so as to call into question the democratic and epistemic competence of the courts to parse them through.

The *Carter* case provides a fine illustration.[268] According to the *Carter* court, even though physician-assisted death involves "a number of competing societal values",[269] an absolute prohibition could not be described as a "complex regulatory response", which means that the degree of deference owed to Parliament, while high, was "accordingly reduced."[270]In *Tétreault-Gadoury*,[271] the Court asserted that, even allowing for "a healthy measure of flexibility . . ., the complete denial of unemployment benefits [was] not an acceptable method of achieving any of the government objectives."[272] And in *Vriend* v. Alberta, [1998] 1 S.C.R. 493,[273] the Court found that "the call for judicial deference [was] inappropriate" having regard to the total exclusion of sexual orientation from the protection of human rights instruments.[274] Similarly, in *Martin*, the court held that, despite the scarcity of evidence before it, the blanket exclusion from

[266] *RJR-MacDonald, supra* note 4 at para 160.

[267]*Quebec (Attorney General) v. A, supra* note 264 at para 362..

[268] *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*].

[269] *Ibid* at para 98.

[270] *Ibid.*

[271] *Tétreault-Gadoury v. Canada (Employment and Immigration Commission), supra* note 170.

[272] *Ibid* at para 47.

[273] *Vriend v. Alberta, supra* note 193.

[274] *Ibid* at para 127.

the impugned compensation scheme lacked the necessary correspondence to the special needs and actual capacities of the claimants.[275] Thus, the court concluded that the blanket exclusion was deemed sufficient to conclude that the government failed to meet the minimal impairment leg of the limitation analysis under *Oakes*.[276] As Danielle Pinard emphasises, the *Martin* court "maintained the apparent requirement of a factual foundation for constitutional challenges, but in reality found ways to settle the issue despite the lack of necessary information.

Deference based on drawing distinctions between "complex regulatory responses" and "blanket exclusions" is suspect on several grounds. First, not all societal issues are amenable to assessment along those lines. As David Kenny observes, "in certain contexts a blanket ban *is* a complex regulatory response, not a blunt and overbroad measure."[277] For instance, in the case of assisted dying, "there is a stark difference between a blanket ban and the next step down" because the liberalized regime would necessarily "have to include more ambiguous cases [than that of the claimant at bar]."[278] This sentiment has been implicitly acknowledged by the Court in the case of *Toronto Star Newspapers*,[279] whereby it has been held that "the publication ban" was only "one part of a whole", and thus its assessment could not "be limited to the ban itself."[280]

Yet another salient example of this taxonomical predicament comes from the decision in *Thomson Newspapers*.[281] In that case, the government sought to justify the prohibition of

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[275] Pinard, "Institutional Boundaries and Judicial Review", *supra* note 7 at 230.

[276] Ibid.

[277] Kenny, "Proportionality and the Inevitability of the Local", *supra* note 11 at 564–565.

[278] *Ibid* at 564.

[279] *Toronto Star Newspapers Ltd. v. Ontario*, *supra* note 248.

[280] *Ibid.*

[281] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140.

broadcasting, publication, and dissemination of the results of the opinion surveys during the final three days of the federal election. However, can a ban over a three-day period be properly described as a "complete ban" *sensu Hutterian Brethren* (given that it is a "complete blackout" that concerns all opinion surveys results, no matter whether they are accompanied by methodological data that buttresses their accuracy or not)?[282] Or does it constitute a "partial ban" given that the prohibition goes into effect only 3 days before the election, meaning that the poll results can be published *any time* except for this carefully chosen period? The Court itself admitted that it was not sure, and that the distinction was rather a "subtle point."[283]

Second, it is not clear why the Court's "antipathy towards complete exclusions" should underlie the creation of the stand-alone deference category in the first place. Consider that even the more stringent justificatory standard of *Oakes* allows for the Court's sentiments to be factored in not only at the minimal impairment stage of the analysis (by anchoring the analysis in the complex factual matrix involving the complete ban), but also during the "proportionality of effects" component (by holding that blanket bans increase the deleterious effects of the impugned governmental measures). Thus, just like with the previous deference-according category, this one allows for the demarcating deference factor to affect proportionality analysis twice: at the level of determining the weight of interests to be balanced against each other and at the level of establishing the justificatory standard to be adopted in each putative case.

[282] *Ibid* at para 119-120.

[283] *Ibid* at para 120.

1.5.6 The Thomson Newspapers Contextual Approach, or "The Rose Under Any Other Name"

After unsuccessfully struggling with numerous strategies of calibrating deference based on bifurcated categories, the Court tried to experiment with a more holistic approach according to which the degree of deference would be driven by an assemblage of variables at once. This new—"contextual"—approach to deference, most comprehensively articulated by Justice Bastarache in *Thomson Newspapers* but technically dating as far as the decision in *RJR-MacDonald*, recast the old *categories* of deference as deference *factors* (which "direct, but do not determine, the judicial approach in individual cases"[284]) and amalgamated these factors into a flexible framework.

As the Court explained, in order to determine whether the legislature is owed curial deference in each putative case, the contextual surroundings of the case must be appraised, looking for specific clues which may counsel curial restraint at one or more stages of the proportionality test. While the actual repertoire of these "clues" has never been fixed once and for all,[285] in *Thomson Newspapers* itself Justice Bastarache identified at least four such contextual factors: (i) the

[284] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 521.

[285] David Wiseman provides a good summary of Bastarache J's augmented approach to section 1 justification analysis (with three new contextual factors added:

> First, he [Bastarache J] identified the representativeness of the process giving rise to the decision being challenged as a relevant factor, with the argument being that the less representative the process the greater should be the rigour of the section 1 analysis. The second factor he identified was the sensitivity of the moral judgments embodied in the decision, with the argument being that the more sensitive or, more accurately, the more controversial they were, the more forgiving would be the section 1 analysis. Finally, Justice Bastarache identified the factor of the polycentricity or complexity of the situation from which the claim arose as relevant, with the argument being that the more complex the situation, the more circumspect the court needed to be with any intervention.

Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 535.

legislation seeks to protect a vulnerable group;[286] (ii) the group's subjective fear or apprehension of harm;[287] (iii) the fact that the harm in question or the efficaciousness of a remedy are difficult, or even impossible, to measure scientifically, so that the contested arguments can be buttressed by other means, for instance, by the "reasonable apprehension of harm" test;[288] and (iv) the activity suppressed by the legislation has a low social value.[289] While being open-minded to the potential introduction of new deference factors, Justice Bastarache nonetheless decided to conclusively discredit the *Irwin Toy* deference category that relied on the distinction between the issues of criminal justice and social policy.[290] Also of note is that the *Thomson Newspapers* court, despite identifying the deference-according factors themselves, never really engaged in their detailed analysis, nor—surprisingly—did it find them applicable to the case at hand.[291]

As will be shortly explained, Justice Bastarache's majority opinion created not only a doctrinal change, but also confusion. For instance, it gives lower courts mixed signals on what "analytical job" the four contextual factors should actually perform. Justice Bastarache himself heavily

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[286] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at paras 90, 112.

[287] *Ibid* at paras 90, 115.

[288] *Ibid* at paras 90, 115-116.

[289] *Ibid* at para 91. *Delisle v. Canada (Deputy Attorney General)*, *supra* note 198 at para 127, Iacobucci J, dissenting.

[290] *Irwin Toy*, *supra* note 5 at para 90:

> I agree with McLachlin J.'s remarks in *RJR-MacDonald* that it is difficult to draw a sharp distinction between legislation in which the state is the antagonist of the individual, and that in which it is acting as a mediator between different groups. Indeed, nothing in these cases suggests that there is one category of cases in which a low standard of justification under s. 1 is applied, and another category in which a higher standard is applied.

[291] After engaging in a comprehensive "contextual analysis" of the case, the Court nonetheless found the four contextual factors not applicable to the case at hand; deference to the government was not extended and the *Charter* violation was not saved under section 1.

obscured things by referring to his "contextual approach" in two functionally distinct ways: as a way to appreciate and accommodate non-traditional types of evidence (whilst preserving the justificatory rigour of *Oakes*)[292] *and* as a way to attenuate the standard of proportionality review under section 1. Yet which one is it? Commentators quickly picked up that something was amiss: "Justice Bastarache was uncomfortable either with the language of deference, or with the idea that there were only two standards of section 1 review (rigorous or deferential), or both."[293]

Indeed, in the introductory part of his section 1 reasoning, Justice Bastarache posited, in consonance with the original *Oakes,* that his contextual factors are not meant to affect the intensity of review under section 1; rather, they are heuristic tools meant to assist the judge in calibrating the real scope of salutary and deleterious effects of the right-infringing measure within a framework that is not divorced from the actual factual settings in which section 1 questions arose—i.e. a framework that manifests a "close attention to context."[294] Simply put, his was an approach that sought to avoid considering section 1 questions in the abstract. According to Justice Bastarache,

> nothing in [the preceding case law] suggests that there is one category of cases in which a low standard of justification under s. 1 is applied, and another category in which a higher standard is applied. In my view, these cases further the contextual approach to s. 1. . . *The [contextual factors] do not represent categories of standard of proof which the*

[292] As Justice Bastarache explained: "Characterizing the context of the impugned provision is also important in order to determine the type of proof which a court can demand of the legislator to justify its measures under s.1." *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 88.

[293] Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 532.

[294] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 87.

> *government must satisfy*, but are rather factors which go to the question of whether there has been a demonstrable justification.[295]

The same logic was applied to the analysis of the fourth *Thomson Newspapers* contextual factor that focused on the nature of the activity that was infringed. Specifically, it was stated that:

> The degree of constitutional protection may vary depending on the nature of the expression at issue. . . . *This is not because a lower standard is applied*, but because the low value of the expression may be more easily outweighed by the government objective.[296]

Consider also this quote from *Bryan*, authored by Justice Bastarache:

> [I]n my view the concept of deference is [. . .] best understood as being about "the nature and sufficiency of the evidence required for the Attorney General to demonstrate that the limits imposed on freedom of expression are reasonable and justifiable in a free and democratic society": *Harper*, at para. 75. *What is referred to in Harper and Thomson Newspapers as a "deferential approach" is best seen as an approach which accepts that traditional forms of evidence (or ideas about their sufficiency) may be unavailable in a given case* and that to require such evidence in those circumstances would be inappropriate."[297]

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[295] *Ibid* at para 90 [references omitted; emphasis added].

[296] *Ibid a*t para 91 [references omitted; emphasis added].

[297] *R. v. Bryan, supra* note 254 at para 28.[emphasis added]. See also *ibid* at para 43: "deference in this context does not mean that Parliament's decisions will be approved by this Court without scrutiny; rather, the contextual approach to s. 1 suggests that in some cases logic and reason will constitute appropriate supplements to what evidence there is."

On this reading of *Thomson Newspapers* (also supported by academic commentary),[298] the whole deference rhetoric serves as a proxy for the underlying discussion about the admissibility of various forms of evidence. So understood, the invocation of various deference factors not so much lowers the justificatory standard the government needs to satisfy, but instead points to the possibility of admitting the alternative forms of empirical material, such as "common sense"[299] or "reasoned apprehension of harm."[300]

For what it's worth, this interpretation is conceptually attractive. The problem, however, is that the actual judicial application of the contextual approach does not bear it out. One can see on closer scrutiny that the new "contextual analysis" was not simply a gloss on the existing contextual reasoning *a la Dagenais* with an added consideration for the type of admissible evidence. Instead, as Jamie Cameron aptly observes, it completely modified the conceptual framework under section 1[301] and resulted in "the relaxation of review."[302]

Indeed, in *Thomson Newspapers* itself, Justice Bastarache's theoretical exposition of the contextual factors is quickly followed by reference to contextual factors as "deference" factors[303]

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[298] See e.g. Wayne MacKay & Victoria Young, "Justice Bastarache, the Charter and Judging: Principled Pragmatism and the Centrality of Equality" in Nicolas Lambert, ed, *Forefr Duality Essays Honour Michel Bastarache* (Cowansville: Éditions Yvon Blais, 2011) 165. (at 54, cited to the SSRN version available online: https://ssrn.com/abstract=2127325); Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 532–533; *R. v. Bryan*, *supra* note 254 at para 16.

[299] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 116.

[300] See e.h. *R. v. Butler*, *supra* note 176; *R. v. Keegstra*, *supra* note 176.

[301] Jamie Cameron, "Judicial Accountability, Michel Bastarache and the Charter's Fundamental Freedoms" (2009) 47:2 Supreme Court Law Rev 323 at 330–331..

[302] *Ibid* at 332.

[303] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 11: "These contextual factors bear on the degree of deference which a court should accord to the particular means chosen to implement a legislative purpose." See also Justice Bastarache's discussion at paras 112-113, 118.

that affect the degree of scrutiny applied, particularly in the way the minimal impairment component of *Oakes* is administered. For instance, after initially averring that contextual factors do not affect the standard of proof (they "are all factors of which the court must take account in assessing whether a limit has been demonstrably justified *according to the civil standard of proof*"[304]), Justice Bastarache does a 180 degree turn and, just a few paragraphs later, proposes that his four contextual factors affect not only the "*methods*" of proof in the case involving the evaluation of social science evidence—but also the "*standard*" of proof.[305] He further holds that they "bear on the degree of deference which a court should accord to the particular means chosen to implement a legislative purpose."[306] How are the lower courts supposed to follow such self-contradictory signals?

Perhaps not surprisingly, the subsequent case law erased even the subtle distinction Justice Bastarache sought to draw between "contextual factors" and "deference factors", according to which the satisfaction of the section 1 standard with non-social science arguments pursuant to the contextual analysis "did not necessarily entail deference"[307] and only suggested "an appreciation of context."[308] Just to be clear, there may be good reasons to revise the traditional doctrinal canons related to the *types* of proof sufficient for the satisfaction of the civil standard of proof under section 1. However, as will be explained in the chapters to follow, such types—or, in Justice Bastarache's parlance, *methods*[309]—of furnishing proof have nothing to do (conceptually

[304] *Ibid* at para 90.[emphasis added].

[305] *Ibid* at para 111.

[306] *Ibid.*

[307] Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 533.

[308] *Ibid.*

[309] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 111.

or otherwise) with the doctrine of curial deference; nor can these "methods" be tied to the predetermined demarcation categories. No matter how you slice it, the *Thomson Newspapers* conceptual approach simply does not work.

Its hollowness is tied to several other reasons as well. For instance, it has never been suggested whether any hierarchy (or relative priority) of *Thomson Newspapers* factors exists[310] and, correspondingly, what happens if two or more contextual factors found in one case point in the opposite directions. Consider a criminal law case where the government tries to protect a vulnerable group by limiting politically motivated expression. What is the protocol for working in various deference factors into the *Oakes* analysis under such case-specific configuration of facts?

In light of these observations, it has been suggested that the highly context-driven inquiry under *Thomson Newspapers* is so malleable that it can accommodate any agenda-driven outcome and support any doctrinal politics whatsoever. Indeed, because the relationship between factors has never been fully explained, it is impossible to expose any reasoning that relies on these factors as faulty. It would simply be non-falsifiable. Even Justice Bastarache—the prime champion of contextual factors—has used them inconsistently and in a contradictory manner.[311]

For an example of how a deference framework that depends on an assemblage of non-hierarchical factors is bound to fail, one need look no further than the administrative law context. There, the Supreme Court struggled with the four-part contextual analysis for deference for

[310] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 521.

[311] Cameron, *supra* note 301 at 323.

years[312] and explicitly admitted that any such unstructured framework is not doctrinally sustainable.[313] Indeed, a system that does not ascribe weight or relative priority to the deferential factors essentially provides a *carte blanche* for the courts to twist the direction of the outcome in any direction they wish. By the same token, Guy Davidov argues that the reasons the Court has struggled so much with trying to identify the criteria of deference—which eventually resulted in the Court adopting a highly malleable and mercurial "contextual" approach— is because "there is no way of determining *when*—in which cases—the court is going to invoke deference."[314] Furthermore, such overly opaque and flexible approach has "an equally obvious Kafkaesque undertone"[315] and "shifts to the back door what ought to be considered at the front door."[316]

Underneath the more obvious difficulties with the contextual approach lies a deeper methodological problem: upon closer inspection, the "contextual approach" enunciated by Justice Bastarache appears to be strikingly *acontextual*. As Trevor Allan explains (albeit in the context of English law), any search for clear-cut "deference factors" in rights reasoning inevitably relies on external summary generalizations that "are either rhetorical, having little bearing on the court's conclusions, or else seek a short-cut solution to questions of judgment that actually depend on detailed scrutiny of all the relevant features of the particular case."[317] This

[312] *Dunsmuir v New Brunswick*, 2008 SCC 9 . The four-factor standard in *Dunsmuir* had long been a landmark framework for deciding the proper standard of review (and the attendant level of deference) in overseeing tribunal decisions. Although the decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 . technically constitutes an overhaul of the *Dunsmuir* framework, it *de facto* recycles the same contextual factors.

[313] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *supra* note 312.

[314] Davidov, *supra* note 10 at 20, cited to SSRN Report [emphasis in original].

[315] *Ibid*. See also King, *supra* note 15 at 411.

[316] *Ibid* at 412.

[317] T R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65:3 Camb Law J 671 at 674.

means that any "contextual" analysis that relies on 4, 5 or any other pre-established number of deference factors does so at the expense of artificially excluding all the other salient considerations.[318] For instance, under the *Thomson Newspapers* framework, a highly complex matrix of normative and factual components of the putative case is being squeezed through the Procrustean bed of four semi-arbitrary deference factors,[319] suggesting that even the *Dagenais* version of *Oakes* is more context-sensitive and context-dependent than Justice Bastarche's "contextual approach" because it does not rely on a series of enumerated factors and is not unnecessarily reductive.

Related to the above is the fact that the Court never clearly articulated the operative principles behind singling out the factors that demand deference. Simply put, why these factors and not others? Indeed, when it repackaged the unworkable deference categories as deference *factors* the problems that inhered in the categories did not go away.[320]

Overall, the difficulty is that no single distinction between demarcation factors that counsel deference and factors that don't, can ever be sustainable. Every factor or category of such sort would inevitably be premised on the simplistic assumptions about the nature of epistemic uncertainty inherent in constitutional adjudication. As will be explained in the upcoming sections, hidden under the mantle of "deference factors" are specific assumptions about the dichotomous nature of the epistemic reality in which constitutional disputes arise. On this

[318] For a similar take on Allan's critique of deference according to which deference doctrines "approach human rights adjudication in a non-contextual manner" see e.g. Alison L Young, "In Defence of Due Deference" (2009) 72:4 Mod Law Rev 554 at 574..

[319] I use the term "semi-arbitrary" because the Court almost never explains its choices of "deference categories" and almost as easily changes them over time.

[320] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 517.

account, all cases can be divided into cases of low epistemic uncertainty and high epistemic uncertainty. For instance, cases involving conflicting scientific evidence and conflicting claims by various vulnerable groups are flagged as cases of high empirical and normative uncertainty, thereby counseling the invocation of the attenuated *Oakes* standard on account of the special epistemic reality in which these cases arise. Conversely, cases in which the state is a singular antagonist of the rights claimant and in which evidence is relatively straightforward, should be subjected to a more stringent standard of review. The problem is, there are no constitutional cases with low epistemic uncertainty. Hence, because the state of normative and empirical determinacy can never be secured, the formal conditions for non-deferential analysis would never arise. This obviates the very possibility of non-deferential analysis, which contradicts not only the basic tenets of the *Oakes* conceptual framework, but also, as I argue further below, the foremost conceptual pillars of our constitutional system of the liberal democracy.

It is important to note that the erstwhile *Thomson Newspaper* framework has been contested by other judges in the subsequent case law.[321] While some cases indeed followed *Thomson Newspaper*'s lead, it appeared that these cases (such as *Harper* or *Bryan*) were authored by Justice Bastarache, the same judge who wrote the Court's decision in *Thomson Newspapers*. Furthermore, even under the authorship of Bastarache J, it appears that the framework was applied in a radically different manner.[322]

[321] Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 534. See also more recent section 1 cases which did not follow the contextual approach, e.g. *Toronto Star Newspapers Ltd. v. Ontario*, *supra* note 248; *Ontario (Attorney General) v G*, 2020 SCC 38 .

[322] See e.g. Cameron, *supra* note 301.

In the final analysis, it appears that the "empirical uncertainty" factor is among the most frequently invoked in post-*Bryan j*urisprudence. As the Court consistently emphasises, "[d]eference may be appropriate in the case of a complex regulatory response or a decision involving competing social and political policies."[323] Another prominent avenue of development is that in more and more cases, the Court does not invoke deference factors at all, no matter the factual or normative matrix of the case, making some sweeping statements instead according to which "[i]n assessing the proportionality of a law, a degree of deference is required"[324] full stop.

1.6 Paradoxes of Canadian Deference

When the theoretical framework for deference is mapped onto the actual jurisprudence of Canadian courts, a bevy of paradoxes and anomalies emerge. In what follows, I will discuss two crucial paradoxes in the operationalization of deference by the Supreme Court of Canada, with a view to reviving the debate about the conceptual underpinnings for deference and re-examining its respective role and functions in the subsequent chapters.

Paradox No 1. The Less Reliable the Evidence Tendered by the Government, the More Weight the Court is Willing to Give to the Government's Argument

Recall that pursuant to the doctrine of curial deference, under certain, usually bifurcated, conditions, the otherwise rigorous section 1 standard can be applied in a less exacting and solicitous matter, on account of the institutional concerns arising from the principle of the separation of powers. Most of the current deference factors converge on the idea that a posture of

[323] *Frank v Canada (Attorney General)*, [2019] 1 SCR 3 at para 43.

[324] *KRJ*, *supra* note 182 at para 67.

deferential restraint is counseled in situations of empirical uncertainty—situations wherein social or scientific evidence conflict and there is "room for debate about what will work and what will not."[325] The implications of this approach is that the less reliable factual hypotheses offered by the government are, the more judges are willing to attenuate the justificatory standard under section 1 and, consequently, the more likely the government is to win the dispute. Simply put, it is commonly accepted that evidentiary difficulties compel acceptance of the Crown's claim.

As alluded to throughout this paper, the test of proportionality is a *sui generis* constitutional doctrine because it concerns the optimization of *normative* data relative to *factual* possibilities.[326] In other words, as famously stated in the case of *Dagenais*, the proportionality court does not simply balance the infringed right against the impugned law "viewed in the abstract";[327] instead, it weighs the *actual* (fact-laden) salutary effects of the impugned law against the latter's *actual* deleterious effects on *Charter* rights.[328] In the parlance of Robert Alexy, who has famously instantiated the same idea in his "Weight Formula", the court's role is to balance the *concrete* (as opposed to abstract) weight of the infringed right versus the *concrete* weight of the impugned law.[329]

Because the assessment of the *concrete* (fact-laden) weight of normative concerns ineluctably hinges on factual insights which to one degree or another are hopelessly elusive and

[325] *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 41.

[326] Barak, *supra* note 3 at 420. As Daniel Solove emphasises, at its very foundation "judicial balancing is an approach to judicial review that emphasizes the importance of factual and empirical data" (Solove, "The Darkest Domain", *supra* note 13 at 955.) See also Alexy, *supra* note 37 at 54.

[327] *Dagenais v Canadian Broadcasting Corp.*, *supra* note 65 at 889.

[328] *Ibid.*

[329] Alexy, *supra* note 37 at 55.

speculative,[330] constitutional tribunals around the globe have been experiencing ever-growing difficulties "in grappling with the complex relationship between facts and law"[331] in their rights jurisprudence. In the apt summary of Soujit Choudhry, the "central question" of proportionality jurisprudence today is "how the Court should allocate the risk of factual uncertainty when governments legislate under conditions of imperfect information."[332]

Alexy famously proposed to grapple with the problem of empirical uncertainty in constitutional reasoning by incorporating the degree of reliability of the empirical assumptions[333] on which constitutional arguments hinge into what is known as the "Weight Formula."[334] Such degree of reliability, according to Alexy, would have to be assessed on a triadic scale, ranging from the light (*l*) to moderate (*m*) and, ultimately, serious (*s*) reliability. On this account, the concrete (fact-laden) weight of the normative standard furthered by the impugned policy would be directly proportionate to the degree of certainty of empirical assumptions on which the effectuation of such a policy relies. In *Dagenais* parlance, the less reliable the empirical data tendered by the government in support of its proposed policy, the less certain the salutary effects of such a policy are, and, consequently, the less weight should be accorded to the government's position, and *vice versa*.

Apart from being logically sound on its face, Alexy's approach that emphasizes the import of empirical insight in proportionality reasoning is congruent with the general sentiment animating

[330] Klatt & Schmidt, *supra* note 221.

[331] Solove, "The Darkest Domain", *supra* note 13 at 948.

[332] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 503–504.

[333] Alexy, *supra* note 37 at 54.

[334] *Ibid.*

the text of section 1 of the *Charter*: the idea that any limitation of a constitutional freedom is to be *demonstrably justified*.[335] As Chief Justice McLachlin (as she then was) posited in *RJR-MacDonald*, teleological propositions that underlie section 1 analysis must be empirically vindicated:

> The choice of the word "demonstrably" [in the text of section 1] is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of *rational inference from evidence or established truths*.[336]

The logical result of this emphasis on demonstrable justification is that the lower the reliability of the evidence tendered by the government (i.e. the less reasonable justification is proffered in the case), the weaker the position of the government is, and, consequently, the harder it should be for the government's policy to outweigh the constitutional right. It stands to reason that if the factual uncertainty pertaining to the impugned policy is so high that it would be virtually impossible for the government to adduce evidence meeting the civil standard of proof mandated by *Oakes*[337] (or, *a fortiori*, if the causal hypothesis relied upon by the government is simply

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[335] The Supreme Court has famously established in *Oakes* that the use of the words "demonstrably justified" in the text of section 1 of the *Charter* signals the standard of proof which would be the preponderance of probability test "applied rigorously" (*Oakes*, *supra* note 24 at para 67.). Indeed, as emphasised by the judges, "Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit" (*ibid* at para 68).

[336] *Ibid* at para 128.[emphasis added].

[337] With the exception of cases where, pursuant to *Oakes*, "certain elements of the s. 1 analysis are obvious or self-evident") (*Ibid* at para 68.)

unprovable[338] or non-falsifiable),[339] the government's position must yield to the Constitution. The idea, which seems beyond reproach, is that constitutional rights should not be limited based on mere speculations, projections, or assumptions that cannot be empirically vindicated.[340] As Chief Justice McLachlin (as she then was) forcefully remarked in *Sauvé*, evidentiary rationales behind rights violations should be clear because "people should not be left guessing about why their *Charter* rights have been infringed."[341]

Paradoxically, however, the Supreme Court of Canada appears to have adopted a counterintuitive (direct opposite to Alexy's) approach to managing empirical uncertainty in section 1 cases. For the last three decades, the reigning dictum of the Court has been that the less reliable the empirical assumptions underlying the impugned policy, the more likely such policy is to be

[338] For a rigorous discussion on whether philosophical, political, or social considerations "which are not capable of "scientific proof" can serve as a ground for limiting *Charter* rights, see the majority and dissenting opinions in the case of *Sauvé*, *supra* note 116.

[339] According to Popper, if the hypothesis does not have testable implications, it cannot be considered scientific in the proper sense of the word: Stephen Thornton, "Karl Popper" in Edward N Zalta, ed, *Stanf Encycl Philos*, fall 2021 ed (Metaphysics Research Lab, Stanford University, 2021). The principle of falsifiability as a gatekeeper of admissible scientific evidence has been adopted in the American case of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). For an extensive discussion of the application of the principle of falsifiability in American jurisprudence, see e.g. DH Kaye, "On 'Falsification' and 'Falsifiability': The First Daubert Factor and the Philosophy of Science" (2005) 45:4 Jurimetrics 473. *Cf.* Brian Leiter, "The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence" (1997) Brigh Young Univ Law Rev 803.

[340] As the Supreme Court stressed in *Mackay v. Manitoba*, *supra* note 141 at 361–362:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. ... *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

For a similar sentiment, see also, *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086.

[341] *Sauvé*, *supra* note 116 at para 23.

deferred to by the Court and, consequently, upheld. Let us zoom in on the doctrinal dimension of this argument.

Practically speaking, affording deference to institutional actors amounts to "placing a thumb on the scale"[342] in their favour. Albeit not "complete abdication",[343] deference still results in a consequential reallocation of normative weight between the individual's and the government's arguments,[344] most often through the loosening of the evidentiary burden which the government must satisfy.[345] Hence, adopting a deferential posture in the face of conflicting or uncertain empirical evidence effectively amounts to ceding constitutional ground to a thinly justified governmental position. It effectively affords the most weight to the least justified arguments. If admission of a fact without evidentiary testing is dispositive of a case, the effect is to tip the scales in favour of the party who adduced the fact.

It is therefore disconcerting that a steady flow of academic work supports such an empirically minimalist conception of deference, one that effectively creates a presumption of constitutionality in areas of flagrant empirical uncertainty, often to the detriment of the least

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[342] Solove, "The Darkest Domain", *supra* note 13.

[343] "Deference does not mean simply rubber stamping laws." (McLachlin, *supra* note 29 at 369.)

[344] As Guy Davidov explains, when courts apply deference, "a lower level of constitutional review (rather than the normal one) is used to decide whether a law or some other act of government is constitutional or not" (Davidov, *supra* note 10 at 133.)

[345] For instance, as Jula Hughes and Vanessa MacDonnell observe, whenever the court "concludes that deference is owed because of empirical uncertainty, the government may satisfy its burden of proof (at least in part) using legal arguments about what 'common sense, reason, or logic' requires" (Jula Hughes & Vanessa MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32:1 NJCL 23 at 37.)

As such, the deferential court may suggest that where it is "not possible" to prove the rational connection limb of *Oakes* by way of adducing social science evidence, the connection may be established "on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective" (*RJR-MacDonald*, *supra* note 4 at para 154.

protected groups of society. For example, Jula Hughes and Vanessa MacDonnell advocate an inversely proportionate approach to determining the intrusiveness of judicial scrutiny, arguing that the higher the empirical uncertainty underpinning a particular issue (in particular "when considering newly-enacted legislation"[346] which has not been empirically vindicated yet), the lower the degree of judicial scrutiny that should be applied.[347] More specifically, the authors advocate a "sliding scale" standard in considering social science evidence: "from more deferential at the time of adoption of a legislative measure to more probing after the law has been in place for some time."[348]

The outcome of such a "sliding scale" framework, however, is paradoxical: it encourages the courts to support infringements of constitutional liberties in situations where the marginal social return on such infringements is empirically uncertain, or even altogether unknown. Not only does such a presumption of constitutionality in favour of (untested) legislative facts contravene *Oakes*' rebuttable presumption of *unconstitutionality* of rights violations (which, ideally, the government ought to refute by demonstrating empirically laden justifications that satisfy the civil burden of proof), but, as will be presently explained, it also creates a perverse incentive for the government to underplay, underreport, or even deliberately obfuscate empirical foundations underlying its policy choices.

To take a (deliberately) extreme example to illustrate the point, imagine the government that seeks to run a policy experiment on its people that would include, say, some bioengineering.

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[346] Hughes & MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada", *supra* note 345 at 55.

[347] *Ibid.*

[348] *Ibid* at 56.

Because the modern tenets of deference suggest that such controversial policy would more readily be upheld under conditions of empirical uncertainty—when the policy-furthering legislation is still "young"[349] and when there is still "room for debate about what will work and what will not"[350]—it follows that the government would be officially incentivized to dress its problematic policy in conflicting and convoluted factual findings. As far as the government is concerned, the muddier the evidentiary waters get, the better. The question, of course, remains, whether such matrix of perverse incentives—whereby a weak argument for infringing rights may be strengthened by the absence of a good evidentiary record—can satisfy the section 1 standard according to which all rights violations ought to be demonstrably justified and the burden of proof ought to be discharged by the party seeking to uphold the violation, and not the other way around.[351]

Furthermore, this approach is internally self-contradictory. The traditional justification for deference rests on the "epistemic authority" rationale—the idea that courts are to defer to the legislature because, colloquially speaking, the legislature "knows better." Yet the circumstances of epistemic uncertainty ("no conclusive evidence either way") speak precisely to situations where no one knows the proper way. Presumably, on the logic of this approach, should the legislature find itself able to adduce convincing social science evidence in order to underscore its

[349] For the suggestion to use the age of legislation as salient factor in assessing the amount of deference extended to the government, see Hughes & MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada", *supra* note 345 at 54–57.

[350] *Canada (Attorney General) v. JTI-Macdonald Corp., supra* note 325 at para 41.

[351] *Cf.* an apt remark by McLachlin CJ in *Sauvé*, *supra* note 116 at para 10. wherein she observed that the practice of insulating some issues from rigorous judicial scrutiny under false pretences "reverses the constitutionally imposed burden of justification. It removes the infringement from our radar screen, instead of enabling us to zero in on it to decide whether it is demonstrably justified as required by the Charter."

competence in the field, the need for deference would disappear. If no branch of the government has a better grasp of evidence due to epistemic uncertainty in the field, then the idea of deferring to ideas grounded in expertise becomes otiose.

A host of other conceptual and doctrinal problems beset the current paradoxical approach to epistemic uncertainty. For instance, as Justice McLachlin (as she then was) observed in *RJR-MacDonald*:

> To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.[352]

Yet that is exactly what the Court normally does in the context of deference: it reasons that the complexity of the problems affects the boundaries of its institutional remits so, to be on the right side of the activism argument, it decides to remove itself from the discussion altogether. This cannot do. If the government cannot discharge its onus by substantiating each of its claims, then accepting such unsubstantiated claims and upholding a rights-infringing law based on them would amount to judicial abdication of its constitutional responsibility.[353]

Such abdication, as Kelsen would emphatically object, would make the government a "judge in his own case."[354] As he further explains, "if an institution is to be created at all that will control

[352] *RJR-MacDonald*, *supra* note 4 at para 136.

[353] *Ibid*.

[354] Kelsen, *supra* note 60 at 175.

the constitutionality of certain acts of state immediate to the constitution, in particular those of parliament and government, this power of control must not be conferred upon one of the organs whose acts are to be subjected to control."[355] Indeed, "If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?"[356]

Despite its paradoxical nature, it is not hard to imagine how this framework—according to which the less reliable the evidence tendered by the government, the more weight the court is willing to give to the government's argument—came to dominate judicial dockets. The *Oakes* test is already an epistemic minefield for any court seeking to venture in. If this is coupled with highly contested empirical premises in which judges do not feel very well-versed, it is easy to see how they may be tempted to avoid the whole "minefield" altogether. To step down. To let somebody else decide. It is crucial to remember that this has not always been the case. As explained above, the original thought was quite simple: in cases of doubt, a measure restricting a right could not be justified.[357]

Paradox No 2. The More the Court Resorts to Deference in Order to Appear Less Activist, the More Activist It De Facto Becomes

In the preceding discussion it was assumed that one of the main reasons animating the practice of judicial restraint in section 1 cases is the judges' desire to abstain—or at least appear to be abstaining—from encroaching on the traditional territory of the legislature in handling complex

[355] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) at 175.

[356] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 76.

[357] Petersen, *supra* note 12 at 123.

See also *AG (Que) v Quebec Protestant School Boards*, [1984] 2 SCR 66, 10 DLR (4th) 321.

policy-laden issues. As David Wiseman explains, such "legitimacy concerns"[358] largely channel "concerns that *Charter* review empowers an appointed judiciary to override the decisions of the relatively more democratically accountable branches of government."[359] Guy Davidov reinforces this sentiment with his own insight: "We simply do not want judges invalidating legislation or government actions—which represent the wishes of society—merely because of their personal views."[360]

Thus, the entire conceptual foundation for deference is rooted, at least in large part, in an effort to alleviate the anxiety of judicial activism.[361] As Christopher Dassios and Clifton Prophet explain, the conceptual retreat from the original *Oakes* framework under the banner of deference has been first and foremost animated by concerns about judicial activism.[362] Some even go as far as to call deference as a "flipside" of judicial activism.[363] As such, the courts purport to use deference in order to display what Aileen Kavanaugh calls interinstitutional comity and collaboration between different branches of government.[364] Even more simply, the courts use deference to pledge the virtues of judicial restraint, especially when dealing with complex polycentric factual contexts. Or so the theory goes.

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[358] Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 517.

[359] *Ibid* at 508.

[360] Davidov, *supra* note 10 at 19, cited to SSRN Report.

[361] For a comprehensive overview of the Court's development of the doctrine of deference in response to the critics accusing the Court of judicial activism, see Roach, *supra* note 55. For an analysis of the American development of the deference doctrine as a reaction to the activist years of "Lochner jurisprudence" see e.g. Solove, "The Darkest Domain", *supra* note 13.

[362] Dassios & Prophet, "Charter Section 1", *supra* note 8 at 291.

[363] Chan, *supra* note 38 at 855.

[364] Kavanagh, *supra* note 20 at 188.

The actual practice of deference, unfortunately, tells a different story. In designing and constantly recalibrating the *ad hoc* categories of cases where deference is warranted and those where it is not (as an increasing chorus of academic voices is making clear, there is currently "no way of determining *when*—in which case—the court is going to invoke deference),[365] the court in effect becomes *more*—not less—activist.[366] As Danielle Pinard posits, methodologically speaking, the "unpredictability of approach" is actually "the strongest case of judicial activism" there is.[367] As Pinard explains, the *ad hoc* approach is activist because it reinforces the power "to pave the way to the desired result, to the chosen destination."[368]

Guy Davidov echoes this sentiment by emphasizing that the current unpredictable practice of deference "undermines its own justification."[369] In his words: "Deference is supposed to provide an answer to problems of subjective reasoning, but in fact it has been applied in ways that only exacerbate the problem and lead to more subjectivity."[370] Indeed, not only, as explicated earlier, have categories or factors of deference not been consistently applied, but, even when they were, the logic behind the way deference was "practically applied" could not be "coherently defended."[371]

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[365] Davidov, *supra* note 10 at 20, cited to SSRN Report.[emphasis in the original].

[366] On deference as a species of judicial activism, see e.g. Jochelson, "Crossing the Rubicon", *supra* note 132.

[367] Pinard, "Institutional Boundaries and Judicial Review", *supra* note 7 at 215.

[368] *Ibid* at 215.

[369] Davidov, *supra* note 10 at 19, cited to SSRN Report.

[370] *Ibid.*

[371] *Ibid* at 23.

"Ironically," as Peter Schuck puts it, "rules and institutions that are designed to reduce the law's indeterminacy may actually *increase* it, due to the cumulative effect of their density, technicality, and differentiation."[372] Hence, in the absence of a principled approach to deference, all the attempts of using deference in order to tame epistemic uncertainty in constitutional adjudication are bound to result in the unmanageable increase in legal uncertainty and randomization in adjudication.

[372] Peter H Schuck, "'Legal Complexity: Some Causes, Consequences, and Cures' by Peter H. Schuck" (1992) 42 Duke Law J 1 at 4.

Chapter 2: Defining Deference: "The Darkest Domain"[373]

2.1 Current Conceptual Obscurity

At least in part, fuzzy practices of deference stem from fuzzy thinking about deference. On the one hand, the case law and scholarship are replete with criticisms and debates about the application of deference by Canadian courts. Yet on the other, largely missing from these discussions are questions that should be obvious: what, stripped of all the metaphorical veneers and broad conceptual sketches, *is* deference and what does it do.[374]

Indeed, whilst the theme of deference to Parliament is present throughout all *Charter* jurisprudence,[375] Canadian constitutional discourse has been confused by a lack of *any* sustained theoretical discussion on what it really means for the courts "to defer" to the normative or factual determinations proffered by the legislature. Is deference a substantive constitutional doctrine in its own right?[376] Or is it a proxy for something else (say, the court's reluctance to foray into, and sort through, a welter of contentious, uncertain, and increasingly complex evidence that informs public policy decision-making?) Or is deference simply a nebulous concept, as Trevor Allan has controversially argued, so that the search for the criteria of deference inevitably leads us to

[373] The title of this chapter is derived from Daniel Solove's landmark article: Solove, "The Darkest Domain", *supra* note 13.

[374] For an exhaustive overview of the lack of theoretical exploration of deference in constitutional law milieu, see e.g. *Ibid*. (describing American jurisprudence). For the same sentiment related to the Canadian practice, Hogg, *supra* note 12 at 22; David Beatty, "The Canadian Charter of Rights: Lessons and Laments" (1997) 60:4 Mod Law Rev 481 at 493; Petersen, *supra* note 12 at 126.

[375] Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150.

[376] For British scholarly accounts that tackle this question and the reply in the affirmative, see e.g. Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 Law Q Rev 222; Hunt, *supra* note 45; Young, *supra* note 318.

"chasing a chimera"?[377] Can deference be captured by a single concept or is it an "umbrella that has been used to cover a variety of judicial approaches"?[378] Questions like these abound, but answers are harder to find.[379]

As Guy Davidov comments on the current state of the deference doctrine, it "means different things in different cases" and its impact "changes dramatically from case to case without any explanation from the Court."[380] Indeed, as Davidov enlarges on the unprincipled nature of deference jurisprudence, "[e]ven if one can predict *when* deference will be used — which is highly doubtful — there is no way of telling *what it will mean,* what impact it will have on the decision."[381] And in the rare instances when any such efforts at clarification are made, the resulting framework is normally stated at such a high degree of generality that it serves more to "mystify" deference than to clarify it.

In order to lend some structure to the much-needed discussion, the rest of this section will identify and analyze four conceptual mistreatments of deference that currently dominate Canadian judicial dockets. The first one—perhaps the most common but also the most harmful—is that most references to deference are, to borrow from Benjamin Cardozo, "enveloped in the mist of metaphors",[382] which obscures any meaningful appreciation of the doctrine's functional contributions to judicial reasoning. The second one is the tendency to conflate deference with

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[377] Allan, "Human Rights and Judicial Review", *supra* note 317 at 672.

[378] Henry P Monaghan, "'Marbury' and the Administrative State" (1983) 83:1 Columbia Law Rev 1 at 4–5.

[379] As Aharon Barak posits, there is no accepted legal definition of the term "deference" (Barak, *supra* note 3 at 398.)

[380] Davidov, *supra* note 10 at 30, cited to SSRN Report.

[381] *Ibid* [emphasis in the original].

[382] *Berkey v Third Ave. Ry. Co.,* 155 NE 58, 61 (NY 1926).

what the Court sometimes calls a "contextual analysis."[383] The third conceptual mistreatment is to describe the "attitude of deference" to the legislature as "natural."[384] And, lastly—and related to the previous discussion of deference and judicial activism— there is a common misconception that the application of deference makes the process of determining the constitutional parameters of individual rights less political and less controversial. However, as will be explained below in relation to the latter, deference does not banish problematic epistemic discretion (or political considerations) from rights determinations—it just reallocates them to other political branches.

These deference-driven conceptual obscurities will be discussed in turn, following which Aristotle's methodological framework for a "genuine understanding of things" will be considered, with an ultimate goal to elicit the true doctrinal and conceptual scope of the principle of deference. Parenthetically, the four types of obscurities identified below will walk in the analytical footprints of, and will be immediately followed by, Aristotle's explanatory factors as applied to the definition of deference.

2.1.1 Equivocation

The first problem that afflicts almost every analysis of deference, judicial or otherwise, is what Paul Daly calls a terminological "language game"[385]—the tendency to engulf the doctrine in vague, sometimes metaphorical language, which short-circuits the functional and methodological

[383] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140.

[384] See, e.g., the decision in *R. v. Bryan*, *supra* note 254.

[385] "The Language of Administrative Law: Introduction | Paul Daly", online: <https://www.administrativelawmatters.com/blog/2015/08/20/the-language-of-administrative-law-introduction/>.

contributions of deference to the decision-making framework. This problem persists not only in proportionality jurisprudence, but also in the law of judicial review of administrative action. As a result, the situation often resembles the Emperor's New Clothes, with everyone talking about deference but no one wishing to admit that they have no clear understanding of how deference is supposed to affect the reasoning process about the merits of an issue.[386]

For instance, whenever the Court explains its usage of the term (which, admittedly, is not very often), it tends to define deference as a "special"—often "natural"[387]—"attitude" towards the original decision-maker[388] or, similarly, as a form of curial "respect."[389] One mercurial judicial explanation of deference went so far as to describe it as "a conclusion, not an analysis."[390] The description of deference as "judicial restraint" is also among the conceptual frontrunners.[391]

One subset of the foregoing strategy of obscuring deference is to give deference an apophatic description—define it through what it is *not.* Among other things, courts tell us that "deference does not equate to a negation of constitutional analysis"[392] and that it ''does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of

[386] For a similar argument, see e.g. Davidov, *supra* note 10 at 30, cited to SSRN Report.

[387] *R. v. Bryan*, *supra* note 254.

[388] Barak, *supra* note 3 at 397.

[389] *Dunsmuir v. New Brunswick*, *supra* note 312.

[390] *Saskatchewan Federation of Labour v. Saskatchewan*, *supra* note 356 at para 76. But compare to some academic commentary: "Deference is not merely the end result of judicial reasoning; it is also a means to that end." (Kristin Claire Hulme, "Contextualizing the Democratic Process: When Parliament Prefers, Do the Courts Really Defer?" (2012) 31:1 Natl J Const Law 59 at 61.

[391] *Saskatchewan Federation of Labour v. Saskatchewan*, *supra* note 356 at para 114.

[392] *Delisle v. Canada (Deputy Attorney General)*, *supra* note 198 at para 127.

reasonableness review while in fact imposing their own view."[393] Similarly, as Beverley McLachlin CJ (as she then was), writing extra-curially, has observed, ''deference . . is not a gift conferred by the court";[394] instead, it is an attitude that ''flows from the right of the legislature to say who will act on its behalf and on the expertise of [the original decision-maker]."[395] Such vague descriptive language does not provide much guidance to the lower courts and presents an obstacle towards achieving a principled and predictable framework for evaluating the merits of constitutional rights disputes.

Just to be clear, the problem is not so much that, in the deployment of metaphors or mercurial definitions, analytical clarity is being sacrificed on the altar of highly evocative statements (which is the problem with all figurative speech), but that such descriptive statements are being used in a prescriptive manner—as analytical guideposts for reasoning about limitations of fundamental rights. Such functional and methodological elasticity makes any statement about section 1 reasoning putatively non-falsifiable. Not surprisingly, commentators bemoan that an ensuing deferential approach is "inherently indeterminate, and consequently open to manipulation,"[396] and that it has "reduce[d] adjudication to a highly subjective exercise with little predictability."[397] Similar observations abound.[398]

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[393] *Dunsmuir v. New Brunswick*, *supra* note 312 at para 47.

[394] Beverley McLachlin, "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket"" (2016) 29:2 Can J Adm Law Pract 127 at 133.

[395] *Ibid* at 134.

[396] Timothy Macklem & John Terry, "Making the Justification Fit the Breach" (2000) 11 Supreme Court Law Rev 575 at 593.

[397] Christopher D Bredt & Adam M Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2012) 14 Supreme Court Law Rev 175 at 185.

[398] As Jamie Cameron maintains, that deference has "enabled the Court to engage in a case-by-case manipulation of *Oakes*" so that the court now "chooses between strict and deferential standards of

Some speculate that such conceptual elasticity is by design. As Guy Davidov explains: "[t]his way [courts] hold a perfect tool: powerful when they want it, meaningless when they don't. It creates an illusion of limiting subjectivity, but at the same time gives the courts unlimited discretion to achieve any desired result."[399] Indeed, it has been argued that by using undisciplined rhetorical devices such as deference, courts can easily obscure the fact that underneath all the rhetoric, judges actually prioritize their own policy preferences.

Furthermore, one can cast doubt on the aptness of the metaphors themselves. Consider the currently reigning notion of "deference as respect." As Aharon Barak discernibly observes, the notion of curial respect to the legislature is functionally coextensive with, and directly derives from, the principle of separation of powers.[400] Yet if the language of deference carries no additional explanatory power (are there circumstances under which courts can be *disrespectful* towards another branch of government?), why confuse the parties and the readers with unneeded considerations?[401] Why not refer to the principle of separation of powers directly? Conversely, if the notion of deference includes more than that, then, for all intents and purposes, what is it? In other words, if there is any substance (or, in Barak's parlance, any "add-on"), what is it? The broad language of "deference as respect" constitutes a simple restatement of already existing constitutional principles. It is too abstract to tell us anything about its content and liable to curial manipulation. A similar sentiment is expressed by Aileen Kavanagh who argues that respect is

justification on purely subjective grounds" (Jamie Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on R. v. Butler" (1992) 37 McGill Law J 1135 at 1147.)

[399] Davidov, *supra* note 10 at 20, citer to SSRN Report.

[400] Barak, *supra* note 3 at 397.

[401] Allan, "Deference, Defiance, and Doctrine", *supra* note 22.

always "a requirement of interinstitutional comity….",[402] meaning that defining deference as "respect" gives a misguided impression that the courts are courteous towards the legislature in some instances, but not in the others.[403]

2.1.2 Conflation of Deferential and Contextual Analysis

The second conceptual obscurity of deference is the conceit that the doctrine leaves unaltered the traditional justificatory standard under section 1 and, accordingly, that deference simply equals contextual analysis under section 1 of the *Charter*. From the jurisprudence alone, it is often impossible to discern whether, at each particular juncture, the court considers "deferential analysis" synonymous with "contextual analysis", a variation thereof, or even a wholly different conceptual species.[404] Unfortunately, the problem stretches far beyond semantics or an argument about labels.

For an emblematic example of this conflation, consider again Justice Bastarache's landmark majority opinion in *Thomson Newspapers*.[405] It begins with benign remarks to the extent that deference-according factors do not create varying standards of justification under section 1[406]

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[402] Kavanagh, *supra* note 20 at 188.

[403] *Ibid.*

[404] *Harper*, *supra* note 204 at para 76.

[405] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140.

[406] *Ibid* at para 90: "nothing in [the case law] suggests that there is one category of cases in which a low standard of justification under s. 1 is applied, and another category in which a higher standard is applied. In my view, [the case law] further[s] the contextual approach to s. 1."

Similarly, see Bastarache J's explication of the effects of contextual reasoning on section 1 analysis in the context of differing nature of rights: "The degree of constitutional protection may vary depending on the nature of the expression at issue. This is *not because a lower standard is applied*, but because the low

and simply further a broad contextual approach that has been adopted by the courts since the decision in *Edmonton Journal.*[407] These commonsensical observations are quickly followed, however, by an assertion that "contextual factors bear on the degree of deference which a court should accord to the particular means chosen to implement a legislative purpose",[408] suggesting that some aspect of proportionality analysis varies depending on the existence of deference-according "contextual factors." What is this aspect? According to the "contextual" gloss on deference, it is the type of evidence that can be furnished in order to discharge the traditional civil law standard of proof enunciated in *Oakes.*

2.1.3 Illusion of Constitutionality

Another problem with deference is that Canadian judges treat it as an indispensable feature of the constitutional arrangement—as some sort of a "naturally-occurring" phenomenon. Whenever it is invoked to explain the outcome of a putative section 1 decision, it is never explained where it came from or what its conceptual antecedents are.

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value of the expression may be more easily outweighed by the government objective" (*Ibid* at para 91.[emphasis added].

[407] *Edmonton Journal v. Alberta (Attorney General)*, *supra* note 227.

[408] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at para 111.

2.1.4 Half-Story Approach

And, lastly, the Court persists in describing deference in a simplistic, one-legged manner—as a device curbing the policy-making remit of the courts—conveniently omitting that in the constitutional realm, taking power from one branch of power normally results in giving it to another. This means that, whenever applied, deference does not expurgate problematic epistemic discretion from the realm of rights reasoning, but rather reallocates it to another epistemic agent—the government. This reallocation raises a host of other problematic implications for the constitutional principle of the separation of powers.

2. 2 What Does Deference Really Mean?

Based on the above, it becomes clear that the current articulation of the deference doctrine is afflicted with a slew of structural and analytical problems. A good starting point for thinking about the issue more lucidly may be Aristotle's methodological framework for a genuine understanding of things. We do not have knowledge of a thing, says Aristotle, until we have grasped all its "why's."[409] This Aristotelian epistemology—his "four explanations"[410] principle—serves as the perfect lens through which to unpack the true nature of metaphysical entities and helps to avoid situations whereby various commentators talk at cross-purposes when discussing deference. Simply put, these four explanations (called "material," "efficient,"

[409] Hocutt, *supra* note 54 at 385.

[410] While it is conventional in the literature to refer to this as "four causes," many commentators claim it to be more correct to use the term "four explanations." For a fuller account, see e.g. Hocutt, *supra* note 54.

"formal," and "final" explanations) elucidate different aspects of how a particular phenomenon comes into being.

2.2.1 The Material Explanation

For Aristotle, the material explanation refers to "that out of which" something is made; for instance, a statue may be made out of bronze.[411] The focus on the material explanation is particularly salient in the context of deference because this is where the bulk of judicial and academic confusion traditionally resides.

Thus, instead of restating the meaningless and vague conceptual parameters of deference (e.g., describing it as an "attitude" or "respect"), the proper material explanation of deference must focus on the actual real-life manifestation of deference, which is the domain of doctrinal frameworks and tests. As far as proportionality analysis is concerned, deference entails some alterations of the original standard and rules governing the contestation of public policies as contrary to the *Charter*. What do these alterations look like? As Cora Chan explains:[412]

> [T]he court may grant latitude to the government by shifting the burden of justification: requiring the litigant to show that a measure is unjustified rather than the government to show that it is justified. Even when the justificatory burden is on the government, however, the court may grant it leeway by lightening that burden. The heaviness of that burden is controlled by the standard of justification the government has to meet, which comprises two elements. The first is the standard of review—the question of law the government must

[411] Andrea Falcon, "Aristotle on Causality" in Edward N Zalta, ed, *Stanf Encycl Philos*, spring 2019 ed (Metaphysics Research Lab, Stanford University, 2019).

[412] Chan, *supra* note 38 at 858.

> prove to pass constitutional muster. The court can insist on a measure passing the most rigorous four-part proportionality test or can dilute or skip some stages of the test.
>
> [The court can also] lighten the government's justificatory burden by lowering the standard of proof on questions of fact, which is the second element constituting the standard of justification. For example, the court may require that the government merely show that the attainment of an aim by a measure is not a mere theoretical possibility, or that it is supported by some evidential basis, rather than prove a question of fact to a fair degree of certainty (e.g., on a balance of probabilities).
>
> Finally, in assessing whether the requisite standards of review and proof have been satisfied, the court may relax the degree of cogency of arguments required of the government in such satisfaction.

As follows from the above, the doctrinal rules and tests are not only the "material" out of which deference is made but, according to Aristotle, are also the subject of change—the thing that undergoes the change and results in a phenomenon we call "deference."[413] This, for curial deference to be consequential in any respect, it cannot be explained as "abstract attitude" on the part of the judiciary, but has to include some "addition" in the form of changes in the constitutional rules to be applied to the resolution of the case at hand.[414]

[413] *Ibid*.

[414] *Ibid.*

2.2.2 The Formal Explanation

This explanatory factor speaks to "the form" of the ultimate phenomenon to be created, "the account of what-it-is-to-be", for instance, the shape of a statue.[415]

For the doctrine of deference, here, too, confusion reigns. As alluded to above, the courts are never clear on whether deferential analysis affects the standard of proof applied to government—or only the *types* of proof that may satisfy the otherwise uniform and stringent civil law standard (what has been called a contextual differential analysis). As will be explained below, the proper understanding of deference is as a framework that lowers the justificatory requirement that government would have to satisfy under section 1 of the *Charter*. It is thus analytically inappropriate to treat it as synonymous with the contextual approach. Let us consider this argument further.

Broadly understood, the contextual approach to section 1 suggests that instead of looking at a putative *Charter* claim in the abstract, the court must situate it in its proper factual—that is, social, economic, and historical—contexts. *De facto* adopted for the first time in *Big M Drug Mart,*[416] the contextual approach received its first nominate articulation[417] in the concurring decision of Wilson J in *Edmonton Journal.*[418] As Wilson J explained, in order to find a "fair and just compromise between two competing values under s. 1",[419] the relevant importance of these

[415] Andrea Falcon, "Aristotle on Causality" in Edward N Zalta, ed, *Stanf Encycl Philos*, spring 2019 ed (Metaphysics Research Lab, Stanford University, 2019).

[416] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321.

[417] Shalin Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis" (1999) 22:1 Dal LJ 126 at 131.

[418] *Edmonton Journal v. Alberta (Attorney General)*, *supra* note 227.

[419] *Ibid.*

competing values must be ascertained not "at large",[420] but with close sensitivity "to the reality of the dilemma posed by the particular facts of a case."[421] An immediate example would be recognizing that freedom of expression, albeit a cardinal constitutional value in and of itself, may yield to other policy exigencies when taken in the context of commercial expression or, as was the case in *Edmonton Journal* itself, "in the context of disclosure of the details of a matrimonial dispute."[422]

The approach, first propounded by Justice Wilson, found its ultimate doctrinal iteration in the majority opinion in *Dagenais*,[423] (further confirmed in *Laba*,[424]) which held that under the proportionality test there must be a proportionality not only between the abstract objective of the impugned measures and its effects on the rights, but "between the deleterious and the salutary effects of the measures."[425] It must be noted that the idea of conducting proportionality analysis with close sensitivity to the case's context is not new and, in the international arena, was most famously championed in the works of Robert Alexy[426] and Aharon Barak.[427]

In *Doucet-Boudreau*, the Court admitted that its proper role "will vary according to the right at issue and the context of each case" and "cannot be reduced to a simple test or formula."[428] In

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[420] *Ibid.*

[421] *Ibid.*

[422] *Ibid.*

[423] *Dagenais v Canadian Broadcasting Corp.*, *supra* note 65.

[424] *R. v. Laba*, *supra* note 189.

[425] *Dagenais v Canadian Broadcasting Corp.*, *supra* note 65 at 890.

[426] Robert Alexy, *A Theory of Constitutional Rights* (Oxford, New York: Oxford University Press, 2010).

[427] Barak, *supra* note 3 at 349.

[428] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 36.

RJR-Macdonald, McLachlin J. (as she then was) observed that "the Oakes test must be applied flexibly, having regard to the factual and social context of each case":[429]

> That the s. 1 analysis takes into account the context in which the particular law is situated should hardly surprise us. The s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.[430]

It follows, thus, that under the contextual approach *stricto sensu*, the analytical framework of the proportionality test remains intact, while the contextual factors determine the respective "weight" of the salutary and deleterious effects of the legislation under review; these factors do not come into play until the very last step of proportionality review—the balancing exercise.

Deference analysis, on some interpretations, constitutes a subset of the contextual approach, with a subtle difference that, instead of suffusing proportionality analysis as a whole, it is usually concentrated at the individual stages, or sometimes even outside of, the *Oakes* framework. For instance, it has been suggested that, in applying the deference framework, courts should consider

[429] *RJR-MacDonald*, *supra* note 4 at para 132.

[430] *Ibid* at para 133

context *prior* to applying the *Oakes* criteria,[431] and then use that consideration to assess deference.

At first blush, this looks like an inconsequential gloss on the traditional contextual approach. Once we zoom in closer, however, it becomes clear that contextual analysis *sctricto sensu* and contextual analysis under the deference framework are different analytical species. Under the former, the doctrinal skeleton of the test remains intact, and context affects considerations that are "fed into' the reasoning process. Conversely, pursuant to deference analysis, "contextual factors" affect the formulation of the proportionality test's sub steps, so that the level of scrutiny itself is affected. According to most non-Canadian commentators, judicial self-restraint in the context of deference normally manifests itself in lowering the legal standards that the government would otherwise have to satisfy in seeking to uphold rights violation.[432] This means that deference as a legal technique shifts the intensity of review from the most intense to something else: rather than determining whether the primary decision-maker was 100% correct in the eyes of the court, the intensity of review decreases, in one way or another.

Thus, deference is conceptually distinct from what is known as "contextual analysis" in the course of *Oakes* reasoning, albeit, in the Court's hands, that distinction tends to get lost. Contextual analysis bears on the determination of weight the court assigns to the conflicting principles at hand—it does not affect the standard of review—the way the resulting principles are to be weighed against each other. For instance, it makes sense that some expressive activity

[431] See, e.g., analysis in *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140.

[432] Chan, *supra* note 38 at 854. Similar definitions of the doctrine of deference abound. David Wiseman, for instance, defines deference as "allow[ing] the government to meet a lower standard of justification in the s. 1 review stage" (Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 5.)

otherwise safeguarded by the *Charter* may, under the circumstances of the case, have little constitutional weight.[433] Conversely, deference lowers the standard of review itself—it is tantamount to placing a "thumb-on-the-scale." In short, deferential approaches change the level and intensity of the requisite scrutiny under section 1, while contextual approaches bear on the normative "weight" accorded to the private and public interests which are being balanced against each other. Even more simply, contextual approaches deal with what we put on the scale (as Aharon Barak reminds us time and again, the abstract weight of principled to be balanced is quite different from their factually-informed actual weight),[434] whilst deference determines wo whilst deferential approach changes the level and intensity of the requisite scrutiny under section 1. It changes the scales themselves. As has been demonstrated, these two approaches are not interchangeable and, if anything, can potentially come into stark conflict.

Even more simply, contextual approach deals with what we put on the scale (as Aharon Barak reminds us time and again, abstract weight of principles to be balanced is quite different from their factually-informed actual weight), whilst deference determines who is to "hold the scales."[435] These two approaches are not interchangeable.

Now, there is one particularly insidious subset of the "contextual" gloss on deference that suggests that the way "contextual deference factors" bear on the proportionality standard of review is by allowing non-traditional evidence to be admitted for the purposes of satisfying the civil law standard of proof. As commentators explain, this understanding suggests that "[t]he

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[433] See e.g. *RJR-MacDonald*, *supra* note 4 at para 63.

[434] Barak, *supra* note 3 at 350–352.

[435] See Timothy Endicott, "Proportionality and Incommensurability" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality Rule Law Rights Justif Reason* (Cambridge: Cambridge University Press, 2014) 311 at 340. ("Why should *they* [the courts] hold the scales?").

degree of deference that is accorded affects the extent to which the Crown can rely on arguments rooted in common sense, logic and reason to reinforce the social science evidence used to justify infringing constitutionally-guaranteed rights and freedoms."[436]

This reasoning, however, is unavailing. As will be explained in more detail below, the shifting parameter in the standard of proof is the level of confidence which the judiciary is justified in having regarding the factual submissions made by the party that bears the onus of proof—i.e. the government. However, if the contextual approach is nothing more than an attitude towards the type of evidence that can be accepted in order to achieve the requisite degree of confidence (and, as such "requires neither more nor less than" the approach established in *Oakes* itself),[437] then what is the point of the doctrine of deference in the first place? As canvassed above, the early articulations of the *Oakes* test were already amenable to a case-by-case exploration of the entire factual matrix of each particular case. Why "complicate entities beyond necessity"?[438] Conversely, if the way in which the requisite degree of confidence is achieved depends on a series of bifurcated factors instead of the assessment of the entire factual matrix of the case (e.g., the type of acceptable proof depends on the presence or absence of vulnerable groups, the polycentricity of the problem etc), then, as will be explained below, the framework is analytically flawed in such a fundamental way that cannot be salvaged.

To recapitulate, deference is not a restatement of a contextual analysis (i.e., a version of the traditional *Dagenais* take on the *Oakes* standard with some modifications for the type of

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[436] Kristin Claire Hulme, "The Unnatural Likeness of Deference: The Supreme Court of Canada the Democratic Process" (2011) PhD Thesis, Queen's University, Department of Political Science at 73

[437] *AB v Bragg Communications Inc*, 2012 SCC 46 at para 16.

[438] "Occam's razor | Origin, Examples, & Facts | Britannica", online: <https://www.britannica.com/topic/Occams-razor>.

admissible evidence), but a doctrine that does make a difference and "allow[s] the government to meet a lower standard of justification in the s. 1 review stage."[439] Hence, as stated in *RJR-MacDonald*, "the evidentiary requirements under s. 1 will vary substantially depending upon both the nature of the legislation and the nature of the right infringed"[440] so that the application of *Oakes*' "rigorous" civil standard of proof may be substituted with some other standards.[441] Just to settle any confusion, elsewhere the Court has asserted in quite unequivocal terms that the doctrine of deference is conceptually intertwined with the standard of proof.[442]

Guided by similar analysis, Guy Davidov suggests it is improper to equate deference with an abstract idea of contextual proportionality analysis. Contextual analysis permeates every step of section 1 review and is tightly interwoven with all normative and empirical considerations that inform proportionality reasoning. Conversely, the presence or absence of deference factors is being determined at the outset of the analysis, "before all the facts and considerations are examined." [443]

One can only theorize, again, following Davidov's logic, that the reason why courts maintain that deference does not affect the standard of proof (as opposed to the *type* of proof that can be used to satisfy the traditional civil standard) is because they want to have it both ways: to keep pretenses associated with their institutional roles as the protector of rights (the idea of lowering the standard of proof administers a serious reputational blow to such an idea) but at the same

[439] Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 27.

[440] *RJR-MacDonald, supra* note 4 at paras 64, 182.

[441] *Ibid* at para 64.

[442] *Ibid* at para 137.

[443] Davidov, *supra* note 10 at 17, cited to SSRN Report.

time to get themselves out of the predicament of having to require the proof that simply cannot be obtained. However, as an old Russian adage suggests, between two stools one falls to the ground.

2.2.3 The Efficient Explanation

This aspect of Aristotle's methodology refers to the "the primary source of the change or rest", e.g., the artisan, the art of bronze-casting the statue, the person who gives advice, the parent of the child.[444] The "efficient" explanation is equally consequential for our understanding of deference because it draws our attention to the actual agency—the Court—effecting the change in the doctrinal framework for reviewing rights claims.

As Guy Davidov correctly observes, "it is clear that neither the *Charter* nor the constitution include any reference to the concept of deference, not explicitly and not even implicitly."[445] Thus, as Davidov explains, "in the context of section 1—where courts are asked to decide whether limitations on *Charter* rights are reasonable and justified—deference is used *by the courts themselves*, as a doctrine."[446] Some German commentators go so far as to suggest that a principle of judicial self-restraint in proportionality reasoning "draws on internal motivation of judges only" and lacks rationality.[447]

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[444] Andrea Falcon, "Aristotle on Causality" in Edward N Zalta, ed, *Stanf Encycl Philos*, spring 2019 ed (Metaphysics Research Lab, Stanford University, 2019).

[445] Davidov, *supra* note 10 at 18, cited to SSRN Report.

[446] *Ibid.*

[447] Shu-Perng Hwang, *Verfassungsgerichtliche Abwägung: Gefährdung der gesetzgeberischen Spielräume? Zugleich eine Kritik der Alexyschen formellen Prinzipien*, 133

In other words, deference (at least in the way it is usually understood as a doctrinal tool that allows the judges to relax the standard of judicial scrutiny below the established baseline) is a creature of courts—not something that flows naturally from the legal or conceptual framework of the constitution. Empirical observations would seem to bear this point out. Not all constitutional rights systems that explicitly incorporate proportionality also have a well-developed ad-on in the form of a separate deference doctrine. If anything, some prominent proportionality regimes exhibit the exact opposite trend: making the proportionality test more and more stringent over time.[448]

2.2.4 The Final Explanation

Lastly, the final explanation, *per* Aristotle, determines the ultimate purpose of the thing— "the end, that for the sake of which a thing is done."[449] For instance, "health is the end of walking, losing weight, purging, drugs, and surgical tools."[450]

Recall that the *formal* explanation of deference—i.e. the attenuation of the traditional proportionality's standard of review and standard of proof—does not tell us much about the end goals of such manipulations. Indeed, why do judges decide to lower the threshold that a

ARCHIVDES öFFENTLICHEN RECHTS 606, 618 *et seq*. (2008), cited inKlatt & Schmidt, *supra* note 221 at 96..

[448] For instance, according to the quantitative analysis conducted by Guy Davidov and Amnon Reichman, the Israeli Supreme Court had been adopting an increasingly stringent approach to scrutinizing military decisions between 1990 and 2005 (Guy Davidov & Amnon Reichman, "Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel" (2010) 35:4 Law Soc Inq 919.)

[449] Andrea Falcon, "Aristotle on Causality" in Edward N Zalta, ed, *Stanf Encycl Philos*, spring 2019 ed (Metaphysics Research Lab, Stanford University, 2019).

[450] *Ibid.*

government's case needs to meet in order to withstand judicial scrutiny? What are they seeking to achieve?

The answer is twofold. At a more superficial level—the level of institutional expediency—the end result of deference is to make adjudication appear less political and, consequently, alleviate potential concerns of judicial activism (some commentators even bluntly submit that deference is "the flipside" of judicial activism).[451] Perhaps not surprisingly, courts are uneasy with controlling legislative prognoses[452] on which *Charter* disputes are normally based, and may, through deference, desperately seeking "the way out."

A deeper reason, however, has to do with the doctrinal environment that gives rise to activism concerns in the first place. As will be explained fully below, deference is (one of the many) strategies of dealing with empirical uncertainty in constitutional adjudication.[453] Conceptualized this way, it provides courts with doctrinal tools needed to reallocate some portion of the epistemically compromised decision-making (i.e. decisions that involve reasoning about highly uncertain factual or normative premises) to another epistemic agent—in this case, the government. The principle "out of sight, out of mind" appears apt to describe judicial eagerness to repackage the case involving a high level of epistemic uncertainty as a case counselling deference, meaning that judges would not have to deal with—and, most importantly, *not be seen as* dealing with—epistemically problematic public policies.

[451] Chan, *supra* note 38 at 855.

[452] Petersen, *supra* note 12 at 122.

[453] Petersen, "Avoiding the Common Wisdom Fallacy", *supra* note 51 at 310.

The idea that deference is a tool for reallocating the decision-making power from one institutional agent to another is not particularly new. In the context of constitutional adjudication, Ronald Dworkin submits that deference changes who has control over deciding the scope of constitutional rights.[454] According to Alison Young, deference determines the extent to which courts can control the substance of the legislative actions and decisions[455] Similarly, *per* Aharon Barak's explanation, "we can define deference as a situation where a judge adopts an opinion expressed by another branch of government (either the legislative or executive) regarding the components of proportionality when, without this expression, the judge would not have adopted that opinion."[456]

Just to alleviate potential misconceptions, the proper understanding of deference is not that it involves judicial respect towards government arguments made in good faith, thoroughly, and supported by persuasive reasoning and evidence.[457] If a judge accepts such arguments because they are persuaded by them, then no deference takes place. Indeed, as David Kenny observes, to "defer"—is to accept something despite being in substantial disagreement with something; to supplant one's own assessment of events with someone else's. When one is fully persuaded by arguments and reasons proffered in support of a claim, one does not defer—one *agrees.*[458] If a

[454] *Ibid.*

[455] Young, *supra* note 318 at 554.

[456] Barak, *supra* note 3 at 398.

[457] *Cf.* "In the context of constitutional adjudication, deference is a conclusion, not an analysis." (*Saskatchewan Federation of Labour v. Saskatchewan*, *supra* note 356 at para 76.)

[458] For a similar point, see e.g. Kenny, "Proportionality and the Inevitability of the Local", *supra* note 11 at 561: "If it is fully proven, one simply agrees; there is no deference."

position "persuades" a court, it is "no different from any argument in any legal brief." [459] Deference is not persuasion. To equate the two is an "oxymoron."[460]

Against this background, it may be instructive to portray deference as a legal tool that moves the decision-making authority from the judicial end of the spectrum to the legislative one. Because legislative control over legal interpretation of rights is more contentious (albeit not unheard of),[461] debate about control of the contours of rights typically arises only in contexts of contentious epistemic (factual and normal) uncertainty. In this regard, deference effectively reallocates epistemic discretion from the judicial end of the following continuum towards the legislative end.

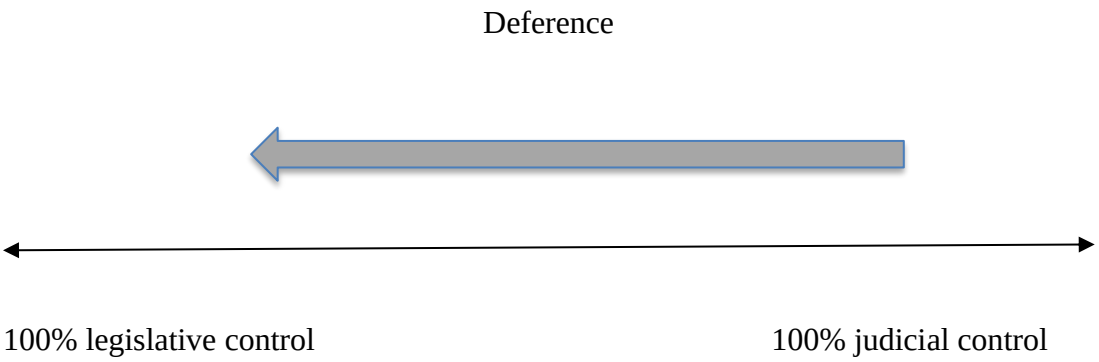

Figure 1. Apportionment of the Power of Discretionary Judgement between the Judicial and Legislative Branches of Government

Importantly, the continuum also parallels the "formal" explanatory factor of deference, according to which deference means the relaxation of the standard of review. On this account, 100% of

[459] William Yeatman, "Inquiry into Judicial Deference", online: *Compet Enterp Inst* <https://cei.org/blog/inquiry-into-judicial-deference/>.

[460] *Ibid.*

[461] See, e.g, labour disputes in the context of section 2(d) or section 15(1) litigation.

judicial control would correspond to the most stringent standard of review—review *de novo*[462]—whereby the court would look at the case not as a reviewing body, but as a decision-maker in the first instance, asking itself what decision *it* would make if charged with the task.[463] Conversely, when epistemically uncertain issues are within full control of the legislature (meaning zero judicial control under the conditions of extreme deference), it amounts, in David Beatty's words, to "no review at all."[464] The issue becomes non-justiciable.

Why does this reallocation of decision-making authority happen? Again, as alluded to at the beginning of this paper, courts are uncomfortable with being branded activist and are "mindful of the legislature's representative function."[465] As Daniel Solove aptly sums up, the deference principle is a "manifestation of the distinction between law and policy.[466]

Thus, when courts have unbridled control over epistemic decision-making related to public policies, the government's actions become paralyzed.[467] Conversely, when the government is in full control it leads to rendering the Charter non-justiciable. What is needed is something in between.

By way of summary, the result of the above reasoning about common misconceptions about deference, presented in the form of a table, is as follows:

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[462] Martha S Davis, "A Basic Guide to Standards of Judicial Review" (1988) 33 S D Law Rev 469.

[463] Young, *supra* note 318.

[464] Beatty, *supra* note 177 at 83.

[465] *Irwin Toy*, *supra* note 5 at 993–994.

[466] Solove, "The Darkest Domain", *supra* note 13 at 950.

[467] Mattias Kumm, "Who's Afraid of the Total Constitution?" in Agustín José Menéndez & Erik Oddvar Eriksen, eds, *Arguing Fundamental Rights in Law and Philosophy* (Dordrecht: Springer Netherlands, 2006) 113.

	Examples of Doctrinal Ambiguity & Confusion	Clarification
Material explanation: "What is it made of?"	Deference is a form of curial attitude of respect	Deference is not simply an "attitude", but a rule-based framework. The "attitude" explanation is a truism; there is no reason why courts should ever feel disrespectful to the legislator.
Efficient explanation: "Who brings it into effect?"	An ad-on in the form of a deference doctrine is "natural" property of proportionality.	Proportionality analysis does not automatically presuppose deference; rather, deference is an institutional creature of courts that are seeking to sidestep charges of judicial activism.
Formal explanation: "What shape does it take?"	Application of deferential factors simply results in a contextual analysis; deference does not attenuate the otherwise stringent justificatory requirements of section 1.	Deferential and contextual analysis are functionally and analytically distinct. While deferential analysis can be applied with sensitivity to context, it always results in *lowering the stringency of otherwise applicable legal tests and standards*, which contextual analysis does not.[468]
Final explanation: "What is the ultimate goal it seeks to achieve?"	The ultimate goal of deference is to limit the court's jurisdiction in the area of policy-making, largely in the face of epistemic uncertainty attending the case.[469]	This is true (though, potentially, slightly misguiding). The application of deference results not only in curbing some decision-making remit of the courts, but in reallocating this remit from the courts to the legislature. Simply put, it moves the

[468] But see the reasoning of McLachlin J in*RJR-MacDonald*, *supra* note 4 at para 137., wherein she held that the application of deference does not diminish the usual standard of proof required under section 1.

[469] "The exercise of judicial restraint is essential in ensuring that courts do not upset the balance by usurping the responsibilities of the legislative and executive branches." (*Saskatchewan Federation of Labour v. Saskatchewan*, *supra* note 356 at para 114.)

	Examples of Doctrinal Ambiguity & Confusion	Clarification
		function of guardianship of the constitution from courts to parliament (as Alexy explains, the scope of non-competence of the courts is equivalent to the scope of the corresponding competence of the legislature).[470]

Table 1. Common Misconceptions about Deference and Their Clarifications

Such multi-faceted analysis of the meaning of deference helps tie together different elements of the discourse, shedding much-needed theoretical light on the conceptual parameters of the doctrine, while also targeting and addressing common misconceptions and ambiguity in articulations of the deference doctrine by reviewing courts.

Following from the above analyses, deference can be described as practice where, in the context of judicial review, the reviewing court accepts, without the requisite scrutiny, the empirical and normative findings reached by the decision-maker under review. There are different levels at which deference can be conceptualized - indeed, we can peel these levels like an onion:

- deference is form of decision-making restraint;
- deference is a way to limit judicial intervention into policy area and a response to potential charges of judicial activism;
- deference is an alteration of the reasoning process;

[470] Robert Alexy, cited inKlatt & Schmidt, *supra* note 221 at 94..

- deference is the framework which determines who controls knowledge-related issues—courts or government actors in relation to judicial review—in a putative legal dispute.

Separately or in tandem, these individual descriptions are correct. Yet in order to capture the complete meaning and scope of the deference doctrine, the following definition of deference is proposed:

> ***Deference*** *is a doctrinal framework for, and an actual practice of, reallocation of epistemic discretion from one epistemic agent to another achieved through the alteration of the reasoning process about the merits of an issue.*

Applied to the doctrinal reality of proportionality analysis, the definition can be reformulated thus:

> **Deference** is a *doctrinal framework for, and an actual practice of, reallocation of epistemic discretion from the court to the legislature in the course of section 1 reasoning achieved through the attenuation of the standard of review and the standard of proof that would have applied in the absence of deference.*

2.3 Common Strategies of Deference: How to Defer

By what doctrinal means should deference take effect? While the Supreme Court seldomly announces the application of the deferential approach (preferring instead to attenuate various aspects of the *Oakes* test implicitly), it is even more rare for the court to give careful consideration to particular strategies of deference. Indeed, what does it mean, practically speaking, to defer? The question is especially salient because the judicial parlance employed in

the service of deference reasoning tends to confound. Sometimes, the Court says that it affords some latitude to the legislature by attenuating the third prong of the *Oakes* proportionality test.[471] Elsewhere the court emphatically pronounces that "[i]n the context of constitutional adjudication, deference is a conclusion, not an analysis."[472] When it comes to the very practical questions on how—exactly—the court is to relax its legal standards or decrease the intensity of review, confusion reigns.

According to a comprehensive and cogent taxonomy offered by Cora Chan, the Court's reasoning process when deploying proportionality reveals three "opportunities," or "strategies," of deference: (i) the relaxation of the standard of justification comprising (a) the standard of review and (b) standard of proof; (ii) the reversal of the onus of proof; and (iii) the assessment of the cogency of the government's arguments according to the diluted standard.[473]

While the Court's heavy "deferential" lifting is normally done by altering the standard of review, to one extent or another it resorts to all of the aforementioned strategies in its jurisprudence. For instance, the Court might attenuate one of the prongs of the *Oakes* test, as happens when it glosses on the least restrictive means component[474] (indeed, according to most commentators, the way the court deals with the minimal impairment requirements normally makes or breaks the case). A fine illustration is the Court's reasoning in *Prostitution Referenc*e, which, instead of

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[471] *Irwin Toy*, *supra* note 5.

[472] *Saskatchewan Federation of Labour v. Saskatchewan*, *supra* note 356 at para 76.

[473] Chan, *supra* note 38 at 859. Admittedly, Chan identifies one more strategy of deference—what the author describes as the court's acceptance of the government's definition of a *prima facie* rights infringement (*ibid* at 862). An example of such deferential approach to defining a right can be found in *Ontario (Attorney General) v. Fraser*, *supra* note 194 at para 275. wherein the dissenting judges maintained that "Section 2(d) is to be interpreted in such a way as to afford deference to the legislative branch in the field of labour relations."

[474] See e.g. *Irwin Toy*, *supra* note 5; Grimm, *supra* note 235.

asking whether the impugned measure impairs the right as little as possible,[475] inquired whether "effective yet less intrusive legislation [could] be imagined"?[476] Alternatively, it has become common for the court to lower the evidentiary threshold in section 1 cases, by holding, for instance, that "[a]bsent conclusive scientific or empirical evidence of a rational connection, one can be found by applying reason and logic."[477]

An idiosyncratic taxonomy of the Supreme Court's deference strategies is offered by Guy Davidov[478] who identifies five different levels of impact deference can have on the outcome of the case :

> The first group of cases, in which deference has the strongest impact, can be titled the "end of story cases." In these cases, the mere introduction of deference is enough for the Court to make its decision, which is, automatically, to uphold the impugned legislation or action. . . . Deference can be described, in such cases, as the first and last word. It is the one and only reason – or at least almost the one and only – sufficient to make the decision.
>
> A second level of impact exists when courts apply what may be called a "subjective-reasonableness" test. When this test is used, the standard is significantly relaxed, and the facts are examined from the state's point of view (rather than from the perspectives of all the competing interests involved). . . .
>
> A third level of impact – sometimes found in conjunction with the previous one – is shifting the burden of proof. In this line of cases, by introducing the concept of deference,

[475] *Oakes*, *supra* note 24 at para 70.

[476] *Reference re ss 193 and 1951(1)(C) of the criminal code (Man)*, [1990] 1 SCR 1123 at para 8, [1990] 4 WWR 481 [*Prostitution Reference*].

[477] *RJR-MacDonald*, *supra* note 4 at para 158; *R. v. Butler*, *supra* note 176 at 503; *R. v. Keegstra*, *supra* note 176 at 768, 766; *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140 at paras 104-107.

[478] Davidov, *supra* note 10.

> by allowing the state a "margin of appreciation", the courts actually shift the burden from the state to the individual harmed by its legislation or actions. . . .
>
> In a fourth category of cases deference can be described as "post-decision justification." Here the impact of the concept is much weaker. In the fourth group, . . .the cases are already decided when deference is introduced.
>
> There is a fifth group of cases, in which the rhetoric of deference is used but its impact is minimal.[479]

Regardless of the view one might hold on the aptness or validity of the Court's deference strategies in the abstract, further and serious conceptual problem in the Court's jurisprudence is the absence of any explanation of why it prefers one strategy over another. Indeed, even if one concedes that the extension of deference in a particular case is justified, it does not follow that a particular *strategy of deference* deployed is justified. As David Wiseman explains, there is a difficulty in discerning the reasons why one response to competence concerns (that are supposed to animate the invocation of the deference framework in the first place) may be preferred to another across different cases:

> For instance, in the Labour Trilogy, in his leading judgment for the majority, Justice McIntyre identified how a variety of challenges to competence could be expected to arise in adjudicating the s. 1 stage of any claim that a right to strike or collectively bargain, as part of the s. 2(d) guarantee of freedom of association, had been violated. But he chose to respond to those challenges by holding that s. 2(d) did not protect those rights--in other words, he ruled claims based on those rights to be injusticiable as outside the protective scope of the Charter. In contrast, competence challenges were also identified at the s. 1

[479] *Ibid* at 26-29, cited to SSRN Report [references omitted].

> stage of *R. v. Videoflicks Ltd.*, (sub nom. *R. v. Edwards Books & Art Ltd.)*, which dealt with the constitutionality of Sunday closing laws, and *Irwin Toy Ltd. c. Québec (Procureur général*), which dealt with freedom of corporate expression, but in both cases those challenges were responded to by conducting a deferential s. 1 review.[480]

Wiseman's observation is on point: nowhere does the Court engage in thoughtful consideration of why it opts for the particular deference strategies it does. What if the best strategy would be to afford deference in the course of determining remedies, or by altering the standard of review, and instead the Court proceeds to altering the standard of proof? Questions like these persist.

2.4 The Theory of Epistemic Discretion as a Doctrinal Motivation for Deference

2.4.1 General Overview

As alluded to in the previous sections, the need for deference stems from the fact that the process of defining and applying constitutional rights involves not only considerations of constitutional and statutory interpretations—the tasks in which the courts are relatively well versed—but also issues fraught with epistemic (knowledge-related) uncertainty. Epistemic uncertainty (uncertainties pertaining to the normative and evidentiary foundations of the case) is part of what is known as "the limits" of constitutional adjudication—the aspects of judicial discourse that are simply not amenable to conclusive in-court resolution. Epistemic uncertainty is inevitably present in interpretive, evidentiary, and evaluative attributes of constitutional rights regime.

[480] Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 8.[references omitted].

Though it pervades all legal reasoning, as Hans Kelsen observes, such uncertainty increases as the norms at issue move up in the hierarchy of legal norms.[481] Thus, uncertainty endemic to constitutional adjudication would normally be considerably greater than uncertainty present in adjudication of the lowest more particularized norms in the hierarchy of legal norms.[482]

Think about the fact that legislators legislate with a view to an uncertain future,[483] which means that the empirical and normative premises that underlie various policy choices are often (if not always) a mix of conjecture and speculation.[484] Thus, when the Court seeks to evaluate normative decisions about the legitimacy and importance of an end and empirical decisions about the necessity of a means of a particular policy, the judicial reasoning about these issues would *also* be partially conjectural and partially speculative. Thus, even a brief account of jurisprudence under the *Charter* reveals that, in an overwhelming majority of cases, courts tend to default to the regime of deference whenever they feel overwhelmed with empirical or normative uncertainty present in the *Oakes* proportionality analysis.

This proposition finds its support in the literature. Trevor Allan argues that the real reason for deference is uncertainty that stems from the assessment of public policies and the associated

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[481] Kelsen, *supra* note 60 at 184.

[482] *Ibid*

[483] As Alan Brady observes, "uncertainty is an inevitable feature of public policy and governance" (Alan D P Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012) at 67.)

[484] As McLachlin C.J. explained in*Canada (Attorney General) v. JTI-Macdonald Corp.*, *supra* note 325 at para 41: "[e]ffective answers to complex social problems . . . may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable."

problem of discretion.[485] Similarly, as Daniel Solove observes, deference as a doctrine emerged on account of "the Court's difficulties in grappling with the complex relationship between facts and law" in constitutional adjudication.[486] Alan Brady traces the necessity of empirical deference to "the difficulty of requiring full proof of every element of the proportionality standard from the state."[487] Aileen Kavanagh even goes as far as to define deference as "a rational response to uncertainty."[488]

The theory of epistemic discretion in constitutional adjudication traces its roots to the writings of Hans Kelsen who maintained that a legal norm is just a frame to be filled by various factual possibilities, so that the actual application of the norm would always be—to one extent or another—discretionary.[489] Again, as Kelsen observes, constitutional judges are not "legal automata."[490] As he also observes, "every conflict of right is also a conflict of interest or power, every legal dispute therefore a political dispute."[491] And, as he further maintains, the political character of adjudication is stronger as the sphere of discretion left to adjudication is larger,[492] which is naturally most pronounced in the realm of constitutional adjudication.

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[485]Allan, "Deference, Defiance, and Doctrine", *supra* note 22 at 42. As Allan explains, the demands for judicial deference are prompted by "concerns about the close interaction between law and discretion, legal principle and public policy."

[486] Solove, "The Darkest Domain", *supra* note 13 at 948.

[487] Brady, *supra* note 484 at 67.

[488] Kavanagh, *supra* note 20 at 186.

[489] While Kelsen did not use the actual term "discretion", that's the most plausible reading of his work. See e.g. Ana Escher, "How to Pull Types of Discretion out of Kelsen's Pure Theory of Law" (2019) 10:2 Prav Zapisi 382.

[490] Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Clark, New Jersey: The Lawbook Exchange Ltd, 2009) at 189.

[491] Kelsen, *supra* note 60 at 184.

[492] *Ibid.*

The modern articulation of the theory of epistemic discretion can be famously found in the works of Robert Alexy.[493] According to Alexy, "[t]he question of epistemic discretion arises whenever knowledge of what is definitely prohibited, commanded, or left free by constitutional norms is uncertain."[494] Hence, Alexy's theory seeks to answer the question of whose judgement ought to prevail in situations where the government, the claimant, and the court all have diverging views on the strength of factual and normative premises underlying the rights dispute. Who should have an ultimate discretion to rule on issues of epistemic uncertainties?

Hence, if rights adjudication is inevitably vulnerable to certain moral convictions, then it is not immediately clear why the judiciary should be the last authority on these convictions. By the same token, if the analysis of rights and their limits is inflicted with empirical uncertainty, then why should the judiciary have the right to the "last guess." Again, while it is within the remit of the courts to decide questions of law,[495] it is not immediately clear whether the same applies to the resolution of the contested factual and normative premises. Uncertainty in constitutional adjudication is pervasive; and yet, as Alan Brady observes, the proportionality test "does not, of itself, address those uncertainties."[496]

To summarize, constitutional decision-making is radically indeterminate; it inevitably attracts some degree of uncertainty and subjectivity of assessment. The question, as Bernhard Schlink

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[493] Note that Alexy's theory of epistemic discretion, albeit famous and much cited, has never been actually expanded upon by the author. Indeed, in his writings, Alexy usually explains his theory in no more than half a page.

[494] Alexy, *supra* note 26 at 184.

[495] Admittedly, some academics challenge this assumption. Yet in this piece, I don't intent to rehash the old debate about the legitimacy and finality of judicial review and simply accept the proposition that, in the words of Aharon Barak, "it is the courts that should decide questions of law" (Barak, *supra* note 3.

[496] Brady, *supra* note 484 at 21.

has so aptly put it, is "why justices should value their own subjectivity over the legislature's."[497] Indeed, while justices, at least according to the conventional canon, are steeped in deciding interpretive uncertainties, their legal expertise, as Shlink observes, "cannot legitimise their rendering political decisions - not any better than democracy legitimizes the legislature."[498]

A similar point is made by Guy Davidov, who posits that among the factors that should bear on determinations of whether to accord deference is the possibility of judicial error. Judges, according to Davidov, must "ask themselves, before making a decision, what … the consequences [will ensue] should they mistakenly invalidate a piece of legislation or government action."[499]

Yet another way to convey the same point is to emphasize that what is tested in *Charter* litigation is not amenable to 100% prove (is not truth-conducive), meaning that what the *Oakes* standard involves is not the testing of facts, but the testing of the judges "beliefs[500]" about the truth-value of various factual assumptions. The problem is that there is no good reason to assume that judicial "beliefs" about some body of assumptions are somehow superior to the legislative beliefs about the same things. Thus, what deference does in practice is shifts the scope of decision-making authority along the epistemic spectrum: instead of 100% judicial beliefs being determinative of the outcome of the case, it will now be less than 100%. Deference, as has been

[497] Bernhard Schlink, "Proportionality" in Michael Rosenfeld & András Sajó, eds, *Oxf Handb Comp Const Law* (Oxford University Press, 2012) at 735–736.

[498] *Ibid* at 736.

[499] Davidov, *supra* note 10 at 19, cite to SSRN Report.

[500] As Kyriakos Kotsoglou aptly observes, one of the main tenets of the law of evidence is that "the fact-finder cannot acquire unassailable accurate knowledge of what happened. Instead, all the fact-finder can acquire is a belief of what probably happened" (Kyriakos N Kotsoglou, "How to Become an Epistemic Engineer: What Shifts When We Change the Standard of Proof?" (2013) 12:3–4 Law Probab Risk 275 at 286.)

explained in the previous sections, reallocates the problematic epistemic discretion from the judiciary to the legislature.

As Alison Young further elaborates:

> [T]he strongest deference of deference is based upon epistemic reasons; where courts defer to the legislature or executive when face with contestable decisions as to the definition or application of Convention rights, there are good reasons to conclude that the legislature or executive, given their knowledge and expertise, are more likely to reach the right answer. In a similar manner, when faced with a choice between medical procedures, none of which can be conclusively proved to be the right medical treatment, there would be epistemic reasons for me to give weight to the opinion of my doctor when I decide upon her relative knowledge and expertise in choosing between competing medical procedures. Courts also give weight to the opinion of the executive or legislature, where such bodies have had a greater chance to hear evidence from a wide variety of parties affected by the right in question and where their experience has given them greater expertise in balancing these competing interests.[501]

Lastly, another commonly occurring argument in the literature posits that deference is needed because it would be impractical to hold the government to too high a standard in justifying its policies. As Alan Brady explains with reference to empirical uncertainty:

> For example, it may not be possible to show that a particular policy will definitely work to the extent possible. Alexy argues that if you were to require 100 per cent proof of protection of the public interest for all intrusions on rights, then the legislature would be absolutely prohibited from doing a significant number of things.[502]

[501] Young, *supra* note 318 at 570.

[502] Brady, *supra* note 484 at 67.

A similar argument is made by Matthias Klatt & Johannes Schmidt, who argue that imposing too high a standard of empirical validity on the government would lead to the "paralysis" of the governmental function.[503]

2.4.2 Types of Epistemic Uncertainty

2.4.2.1 Empirical Uncertainty

As stated above, judges normally default to the deference regime whenever they feel overwhelmed by epistemic uncertainty endemic to section 1 adjudication. This phenomenon is particularly glaring in cases where the court has to balance enumerated constitutional rights against the long-term robustness of large-scale polycentric public policies, most of which are created "under conditions of imperfect information."[504] One Irish commentator has gone so far as to consider the epistemic uncertainty inherent in such disputes "[t]he central difficulty with navigating the tension between rights and governmental autonomy."[505] The biggest difficulty experienced here is the unavailability of conclusive social science evidence[506] that would guide judicial decisions. The idea here is that courts are to abstain from interfering into public policy-

[503]Klatt & Schmidt, *supra* note 221 at 69, 72..

[504] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 524.

[505] Brady, *supra* note 484 at 20 [emphasis added].

[506] Dawood, "Democracy and Deference", *supra* note 6 at 180.

making because they do not have all the relevant information to appreciate the "real-world context" of drafting policy prognosis and make well-informed decisions.[507]

As Petersen explains, there are three strategies for courts to deal with empirical uncertainty, the invocation of the doctrine of deference being only one of them:

> First, they can reserve the evaluation of empirical questions to their own judgment, relying either on their intuition or on available social science evidence. This strategy has, in particular, been followed by the German Constitutional Court. However, this approach has certain disadvantages. As judges are, most often, not trained in empirical research, they may not be aware of its potential pitfalls. . . . The remaining two approaches are deferential ones. On the one hand, courts can grant a margin of appreciation for evaluating social facts to the legislator. This seems to be the preferred strategy of the Canadian Supreme Court. However, this approach is also problematic because it is difficult to determine the limits of the legislative margin of appreciation. . . . On the other hand, courts can also defer the assessment of empirical questions to expert witnesses. However, even in these cases, judges have to be aware not to draw wrong inferences from the expert opinions.[508]

Indeed, as commentators observe, the issues the Court faces under section 1 are "outside the traditional boundaries of judicial expertise and depend on subjective assessments of often conflicting social science evidence."[509] Examples of such empirical uncertainty abounds. For instance, is a partial advertisement ban of tobacco products as effective as a total ban?[510] Can

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[507] Paul Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 Univ Tor Law J 117.

[508] *Ibid* at 307.

[509] Christopher P Manfredi & James B Kelly, "Misrepresenting the Supreme Court's Record? A Comment on Choudhry and Hunter," (2004) 49:3 McGill Law J 741 at 757.

[510] *RJR-MacDonald, supra* note 4.

wealthy political actors significantly influence the outcome of the election, or would their influence be negligible or speculative?[511] Better yet, consider the influence of the two-tier health care system on the efficiency of the government's tier.

In the landmark Canadian case of *Chaoulli v Quebec (AG)*,[512] the Supreme Court struck down a provincial ban on private health insurance. The claimants in this case argued that the delays resulting from waiting lists under the public system, in conjunction with the inability to obtain private health insurance, violated their rights to life, liberty, security, and personal inviolability. Admittedly they had a point. The court in *Chaoulli* recognized that some patients "die as a result of long waits for treatment in the public system when they could have gained prompt access to care in the private sector."[513] Indeed, were it not for the ban, they could buy private insurance and stay alive.[514]

The declared objective of the impugned legislation at issue in *Chaoulli* was the achievement of a laudable social goal: "to promote health care of the highest possible quality for all Quebeckers, regardless of their ability to pay."[515] Consequently, as part of its proportionality analysis, the Court had to assess whether the prohibition on private insurance had a rational connection with the declared objective and whether, all things considered, there were less restrictive ways to promote high-quality healthcare in the province. However, as numerous commentators pointed out, the Court was presented with evidence that was inconclusive at best and seriously

[511] *Harper, supra* note 204.

[512] *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*].

[513] *Ibid* at para 37.

[514] *Ibid.*

[515] *Ibid* para 49.

conflicting at worst.[516] Out of the two most comprehensive studies on the impact of a parallel private health care on public health care, one, the Kirby Committee, concluded that—maybe—privatization of healthcare would be relatively harmless, whilst the other, the Romanow Commission, suggested that—maybe—preserving the one-tier public system is a better solution.[517] The Court had no other choice than to shoot in the dark.

Putting aside some dubious moral grounds on which the case was predicated,[518] the fact-finding process in *Chaoulli* perfectly demonstrates how empirical disagreement that accompanies long-term public policy programs can often make or break the outcome of the whole case. This means that even on the most charitable interpretation, what judges are engaging in when trying to 'predict' the outcomes of various governmental policies for many decades ahead is not a rational analysis but something approximating "a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society."[519] This is a far cry from a rational and reasoned analysis that the proponents of proportionality are trying to portray as proportionality's main allure.

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[516] Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9 at 533.

[517] Howard Chodos & Jeffrey J MacLeod, "Examining the Public/Private Divide in Healthcare: Demystifying the Debate" (2005), online (pdf): *Canadian Political Science Association* <cpsa-acsp.ca/papers-2005/MacLeod.pdf>

[518] As Patrick J Monahan observes, "any healthcare system which deliberately and systematically imposes pain or even death on innocent individuals in the name of improving healthcare provided to others cannot be justified either morally or legally, since it fails to treat all individuals as equally deserving of concern and respect," see Patrick J Monahan, "Chaoulli v Quebec and the Future of Canadian Healthcare" (17 January 2007), online: *The Court*

<www.thecourt.ca/chaoulli-v-quebec-the-future-of-canadian-health-care/>

[519] *Mckinney v University of Guelph*, [1990] 3 SCR 229 at 304, 76 DLR (4th) 545.

As Niels Petersen observes, empirical uncertainty afflicts almost all stages of the proportionality test:

> First, whether a specific measure promotes the purpose it is supposed to promote is, in principle, an empirical question. Second, the minimal impairment test compares the effects of different measures with each other. There is, of course, normative judgment involved when it comes to the question of whether a measure is more or less restrictive with regard to an individual right. However, this normative judgment presupposes an idea about the empirical effects of the compared measures.[520]

It follows, then, that the courts are put into a tight stop of trying, at the same time, to discharge their constitutional duty to rigorously protect rights and avoid being accused of judicial activism on account of bridging (inevitable) factual gaps in a case with their own personal empirical takes.

2.4.2.2 Normative Uncertainty

It is well established that facts alone, albeit of paramount importance, do not determine the outcome of constitutional disputes, nor do they themselves "dictate policy." Regardless of the rhetorical facade, it is impossible to resolve policy-laden debates by "following the science" or "following the facts" in the interest of common good, because no set of empirical premises can tell us what the common good, or public interest, is. As David Hume demonstrated centuries ago, normative domain can never be made a subsidiary to empirical domain.[521]

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[520] Petersen, "Avoiding the Common Wisdom Fallacy", *supra* note 51 at 303.

[521] Rachel Cohon, "Hume's Moral Philosophy" in Edward N Zalta, ed, *Stanf Encycl Philos,* fall 2018 ed (Metaphysics Research Lab, Stanford University, 2018).

Justice Bastarache puts the point nicely:

> Some value judgments cannot be justified by proof: why polygamy is proscribed (morality); why marketing boards are required (economic policy); why social benefits are not evenly offered to all types of claimants (social priorities). Some justifications must only be plausible and consistent with democratic principles. The court requires a rational basis for choices that will withstand the scrutiny of normative analysis.[522]

The problem, however, is that policy decisions being challenged in proportionality courts are replete with various normative assumptions—especially about the relative "weight" of contested constitutional interests at stake—yet there is no fool-proof recipe to appraise the validity and accuracy of these assumptions. Any body entrusted with making final calls in this area would necessarily be exercising sizable epistemic discretion. By virtue of being unelected and unaccountable bodies, courts, as commentators routinely state, are particularly ill-suited to make this final call.

The additional problem for proportionality is that not only does it require judges to give shape to normatively contentious propositions—but also to balance them. According to Kelsen, any balancing of interests (of which proportionality is a notable species) is inherently indeterminate and works not so much to provide a solution to a serious value-laden problem, but rather to "diagnose" it. Indeed, as he suggests:[523]

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[522] Michel Bastarache, "Decision-Making in the Supreme Court of Canada" (2007) 56 Univ N B Law J 328 at 330.

[523] Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Oxford University Press) at 82.

> [T]he principle of the so-called balancing of interests is merely a formulation of the problem [...], and not a solution. It does not supply the objective standard according to which competing interests can be compared with one another as a means of settling conflicts of interests. . . . [*N]either the norm nor the system of norms provides a decision as to which of the interests involved is of greater value.*

2.4.2.3 Types of Uncertainty and Deference-Counselling Factors

This thesis suggests that, albeit unacknowledged, concerns about empirical and normative uncertainty directly inform the way the Court structures its deference jurisprudence. Thus, as a general rule, the deference factors (with more or less consistency identified over the years) normally fall into one of two camps: strategies to grapple with *empirical uncertainty* (when the court is dealing with "conflicting scientific evidence");[524] or strategies to grapple with *normative uncertainty* (when the court struggles to assign the weight to "competing claims of different groups in the community,"[525] especially if one or more of these groups is a vulnerable one).

For classification purposes, the following diagram is proposed:

[524] *Irwin Toy*, *supra* note 5 at para 74.

[525] *Ibid.*

	Underlying Problem	Factors Counselling Deference, (Formerly Known as "Categories of Deference")[526]	Justifications for Conventional Justifications
Normative Dimension	➟*Normative uncertainty* (uncertainty as to how much weight is to be accorded to the various interests at stake)	➟Mediation between the competing claims of the different groups;[527] ➟Protection of vulnerable groups; ➟Nature of the right infringed	➟Democratic authority (formalist justification)
Empirical Dimension	➟*Empirical uncertainty* (uncertainty as to how to draw causal inferences in the absence of conclusive evidence)	➟ Inferior judicial expertise (as in non-criminal cases);[528] ➟ The magnitude of potential fiscal impact of the legislature;[529] ➟Conflicting scientific evidence	➟Epistemic authority / institutional competence (functionalist justification)

Table 2. Types of Epistemic Uncertainty and Deference-Counselling Factors

[526] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140.

[527] *Irwin Toy*, *supra* note 5 at para 74.

[528] It warrants notice that, following the decision in *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140. the status of this category is uncertain.

[529] This factor draws on both democratic and epistemic reasons for its invocation.

2.4.3 False Epistemic Dichotomy

2.4.3.1 There is No Such Thing as Epistemically Easy Cases

As stated above, judges normally resort to the invocation of deference because they are worried about being accused of "judicial micro-management of public policy on the basis of poor evidence."[530] They argue that, under some particular sets of circumstances, the legislature may have a stronger democratic and epistemic authority than the courts to decide (at least partially) the constitutional contours of *Charter* rights. The presupposition behind this argument is that in some—epistemically problematic—cases (say, cases where there is no conclusive scientific evidence exists or where it is not clear how much normative weight to assign to the interests of the third parties in a dispute) giving judges too much discretion "runs the risk of transferring too great a power to the judiciary."[531]

The problem, however, is that if we were to assume that there are cases that are so epistemically problematic that they counsel the reallocation of epistemic discretion from the judiciary to the legislature, then there must likewise be cases that are relatively epistemically unproblematic. In these latter cases, the *Oakes* stipulations would apply as usual; whilst in the former cases courts would need to apply the standard of deference. Think of this as a variation of Dworkin's "hard" vs "easy" case distinctions, or Hart's problem of "the core and the penumbra."

[530] Manfredi & Kelly, "Misrepresenting the Supreme Court's Record?", *supra* note 510 at 744, 755.

[531] Young, *supra* note 318 at 576.

It follows, then, that the current Canadian theory of deference presupposes that there are epistemologically "hard" and epistemologically "easy" *Charter* disputes. In these former cases, judges are unsure about the implications of their decision, and hence used the contextual pegs of, say, the presence of the vulnerable group, or polycentricity of the dispute, as a pretext for reallocating much of the problematic epistemic discretion to the legislator. Conversely, in epistemologically easy cases the factual and normative assumptions made in the case would be uncontested, which means that in deciding the case judges would not be stepping on the legislature's toes. To recapitulate, on this account, the traditional deference factors (or deference categories) serve as conceptual proxies reflecting the court's conception of cases as epistemically hard and epistemically easy.

The problem, however—and this explains why not a single deference factor proposed by the Court has ever worked—is that there is no such thing as an epistemically easy section 1 case. Which means the perfect deference scenario is flawed because the framework is premised on the faulty assumption that "easy" cases can be identified. Every single case that makes it to an appellate court is an epistemically hard case. Thus, instead of unworkable bifurcated categories, judges need to think about the way to deal with this epistemic uncertainty in a principled and coherent manner. Come to think of it, even the *Oakes* case itself does not provide an example of a "core" example of an epistemologically easy case.[532] The question arises, what kind of case would?

[532] David Kenny, "Proportionality, the Burden of Proof, and Some Signs of Reconsideration" (2014) 52 Ir Jurist 141 at 144. See also other "reverse onus" cases almost identical to *Oakes* wherein the Court, nonetheless reached the opposite conclusion (*Downey, supra* note 189.

A good analogy can be drawn between judicial attempts to divide cases into epistemically easy and hard and Fuller's attempt to differentiate cases into polycentric and non-polycentric disputes with a view to offer a cautious note about the former's amenability to judicial resolution. As Jeff King explains, Fuller believed that polycentric problems demarcated the limits of adjudication and judicial resolution of polycentric disputes would "(1) give rise to unintended consequences, (2) encourage judges to try unorthodox solutions such as consultations of non-represented parties, guessing at facts etc., and (3) prompt the judge to recast the problem in a judicially manageable form." The problem, however, as King further explains, is that polycentricity is "a pervasive feature of the law."[533] If anything, the pervasiveness of polycentricity only increases over time.[534]

To summarize, it appears that the Court has been operating on the assumption that some epistemically problematic cases—cases where interests conflict and precision is elusive—should be afforded judicial latitude, but other—"easy," straightforward—cases, should not. The problem is, the quest for searching for "straightforward" section 1 cases is not much different from Winnie-the-Pooh's search for the East Pole. Not only is epistemic uncertainty a *sine qua none* of virtually any dispute that makes it to court, but in high-profile constitutional cases it reaches a high degree of magnitude.

[533] King, *supra* note 155.

[534] *Ibid.*

2.4.3.2 Epistemic Uncertainty Cannot be Banished from Judicial Reasoning

As is evident from the above, the problem of the court's ability to deal with epistemic uncertainty in section 1 adjudication is greater than ever. Unfortunately, most legal thinking provides only incompletes answers. Among the most common proposals for dealing with problems of epistemic uncertainty in constitutional adjudication is to build up the epistemic competency of judges so as to enable them to adequately process and evaluate evolving social science knowledge.[535] Largely missing from such accounts, however, is the fact that lack of judicial capacity to evaluate science is only part of the problem. Every judge might get a PhD, become an expert in science and social science, and the problem would still persist. That is because the problem is not only that judges cannot be relied upon to judge science. It is also that science and social science are, and will always be, partially unreliable and always incomplete. Thus, the way out is to learn to deal with this uncertainty—not to pretend that better training is a silver bullet. Hans Kelsen noticed this long time ago when he opined that uncertainty can never be banished from judicial reasoning, so that there would never be any qualitative difference between the legislative task and the judicial task—only quantitative.[536] Similarly, as Alan Brady explains, uncertainty in human rights reasoning is "inevitable":

[535] For academic proposals of this sort, see e.g. Hughes & MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada", *supra* note 345; Benjamin Perryman, "Adducing Social Science Evidence in Constitutional Cases" (2018) 44:1 Queen's LJ 121.

[536] Escher, *supra* note 490 at 385–386.

> There is no way to excise it fully from rights-based judicial review. The application of abstract human rights norms in specific cases will involve complex public decisions. This will give rise to difficulties of both empirical and normative measurements.[537]

2.4.4 Aleatory vs Epistemic Uncertainty

2.4.4.1 Overview

The previous sections sought to explain how epistemic uncertainty bears on the justificatory dilemmas judges face in section 1 adjudication. This section plans to go deeper and ask the antecedent question: What exactly do we mean when we say that empirical or normative claims underpinning section 1 reasoning are epistemically contested? What kind of uncertainty are we talking about? As Ivan Kramosil points out, there is a common misconception that all uncertainty surrounding us is of the same nature and that it can be processed through the same tools and models.[538] On closer scrutiny, however, it turns out that uncertainty is itself a highly uncertain concept.

Questions about the nature of uncertainty implicated in section 1 reasoning are not trivial; they have serious implications for our understanding of the shifting parameter in the standard of proof mandated by the *Oakes* test. Recall that standard of proof is one of the chief devices for reallocating epistemic discretion between institutional decision-makers in a legal dispute. As this

[537] Brady, *supra* note 484 at 21.

[538] Ivan Kramosil, cited by Kotsoglou, "How to become an epistemic engineer", *supra* note 501 at 283.

thesis suggests, much of the problems with the doctrine of deference can be traced to the fact that the court's reasoning about the mechanics of the standard of proof is conceptually confused.

A good starting point for thinking about uncertainty is to observe that the philosophy of the law of evidence talks about two types of uncertainty attending judicial reasoning about the merits of a case: aleatory uncertainty and epistemic uncertainty. Aleatory uncertainty pertains to the probabilistic variability of various physical phenomena. It speaks to the natural randomness of different outcomes. For instance, when we say that there is a 70% chance of rain tonight, what we are actually saying is that in a long series of days with similar atmospheric conditions to those today, rain would occur on 70% of those days.[539] Conversely, to speak about epistemic uncertainty is to speak about the limitations in our data or in our knowledge. So understood, an epistemic probability "is just a person's numerical judgement of the strength of her belief that a certain event has occurred."[540] Because epistemic uncertainty speaks to limited knowledge, this type of uncertainty can be reduced (though not necessarily fully eliminated).

Ivan Kramosil offers a lucid example to show the difference between aleatory and epistemic uncertainty. Aleatory uncertainty, says Kramosil, is the kind attendant to the result of a coin tossing. This uncertainty, however, is qualitatively different from the "uncertainty which side of a coin we are observing (head or tail) supposing that this coin has been dug out in a very damaged state during an archaeological investigation."[541] It follows, thus, that aleatory

[539]Alan Agresti, *Statistical Methods for the Social Sciences*, 5th ed (Pearson, 2018) at 68.

[540] Kotsoglou, "How to become an epistemic engineer", *supra* note 501 at 283.

[541] Ivan Kramosil, *Probabilistic Analysis of Belief Functions*, IFSR International Series in Systems Science and Systems Engineering (Springer US, 2001) at 4.

uncertainty "results from the fact that a system can behave in random ways",[542] whilst epistemic uncertainty "results from the lack or not perfectly credible information concerning the actual internal state of a deterministic system in question."[543]

2.4.4.2 Epistemology of Legal Fact-Finding (Correcting the Misconceptions about the Civil Standard of Proof)

The standard model employed in law, as Kyriakos Kotsoglou explains, treats the standard of proof as an evidentiary technique that determines the probative force of all evidence based on degrees of probability.[544] This means that the traditional view holds that the parameter that shifts when moving to different standards of proof is the grade of *aleatory* probability.[545] For instance, as has been observed, "[c]onventional wisdom has it that 'a balance of probabilities means more likely than not or more probable than not'."[35] H. L. Ho calls this an "an external viewpoint":[546] the approach according to which civil and criminal standards of proof differ only in the probabilistic threshold they impose.[547]

Ho posits, however, that to base the standard of proof doctrine on aleatory probability is profoundly misguided.[548] In Ho's words, "cases are not disposed of on probability

[542]Kotsoglou, "How to become an epistemic engineer", *supra* note 501 at 283.

[543] *Ibid.*

[544] *Ibid* at 283-284.

[545] *Ibid* at 275.

[546] H L Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press) at 174.

[547] *Ibid* at 182.

[548] *Ibid* at 180.

assessments."[549] Consider the traditional civil standard of proof, he suggests. "If the usual interpretation of this is right", says Ho, "it would seem to follow that any probability that exceeds 0.5 will satisfy the civil standard: 'The balance must be tipped by the defendant, no more.'"[550] That is not, however, how civil adjudication works.

In this connection, L Jonathan Cohen provides a widely cited example of what is known as a paradox of legal proof:[551]

> [I]t is common ground that 499 people paid for admission to a rodeo, and that 1,000 are counted on the seats, of whom A is one. Suppose no tickets were issued and there can be no testimony as to whether A paid for admission or climbed over the fence. So by any plausible criterion of mathematical probability there is a .501 probability, on the admitted facts, that he did not pay. The mathematicist theory would apparently imply that in such circumstances the rodeo organizers are entitled to judgement against A for the admission-money, since the balance of probability … would lie in their favour. But it seems manifestly unjust that A should lose his case when there is an agreed mathematical probability of as high as .499 that he in fact paid for admission … [T]here is something wrong somewhere. But where?

As Ho observes of this scenario, "the intuition shared by most people is that the defendant cannot be held liable."[552] Some argue that the judge would not even allow such cases to go to the jury.[553]

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[549] *Ibid* at 86.

[550] *Ibid* at 180.

[551] L Jonathan Cohen, *The Probable and The Provable*, Clarendon Library of Logic and Philosophy (Oxford: Oxford University Press, 1977) at 75, 270–271.

[552] Ho, *supra* note 547 at 137.

[553] *Ibid.*

It follows, thus, that the shifting parameter in the standard of proof is not a degree of aleatory probability—but a degree of epistemic probability, which is defined as a strength of judicial belief about the truth-value of a particular factual hypothesis.

This proposition, however, is not as simple as it appears. It would be mistaken, as Ho observes, to treat the standard of proof as simply grounded in the degree of belief or confidence of the fact-finder, regardless of how this confidence has been achieved.[554] As an illustrative example, a perfect subjective confidence in the truth of a putative factual assumption can be acquired from reading tea leaves;[555] however, this would not make such confidence judicially cognizable. It means that "something else" is required in order to shift the gears in the standard of proof.

Ho proposes that, "[t]he court should be concerned with the rationality of belief and not merely with its strength."[556] The belief, as other commentators also aver, "must be rationally well founded'.[557] It means, therefore, that "the justification for a finding of fact is not to be found purely in the end-state of deliberation: it must also depend, must it not, on the rationality of the reasoning which led to that end-state?[558]

To recapitulate, the shifting parameter in the standard of proof is not the probability of the factual hypothesis being true, but a deliberative and justified attitude of the institutional decision-

[554] *Ibid* at 179

[555] *Ibid* at 96

[556] *Ibid* at 179.

[557] Larry Laudan, "Is Reasonable Doubt Reasonable?" (2003) 9 Legal Theory 295 at 305.

[558] Ho, *supra* note 547 at 179.

maker. As Ho puts it, "the standard of proof is about the distribution of caution in trial deliberation."[559] In his own words:

> [T]he standard of proof should be interpreted as an instruction to the fact-finder on the attitude that she must adopt when deliberating on the verdict. It is, in one aspect, about the caution she must exercise in making her findings. To draw a rough analogy: if you ask me to drive fast, it is intelligible for me to ask, 'How fast?' and it is equally intelligible for you to respond with a quantitative answer, if only as a rough indication of the speed you desire. But if you ask me to drive cautiously, it makes no sense for me to ask, 'How cautiously?' and expect you to give me a quantitative reply, even as an estimate. What caution requires of a formula one racer is very different from what it requires of the driver of a busload of young children. The demands of due caution depend on the context.[560]

The idea of predicating the nature of the standard of proof on the degree of a justified belief of the legal fact-finders has important doctrinal implications for section 1 reasoning. First, the failure of Canadian courts to identify the true shifting parameter in the standard of proof explains their never-ending struggle with non-traditional types of evidence adduced in the course of proportionality analysis (such as common sense or reasoned apprehension of harm). Consider the logical progression of this judicial predicament. Whenever, in the course of section 1 adjudication, it becomes clear that certain epistemic assumptions made by the government cannot be corroborated by any evidence (meaning that no evidence exists to prove whether the

[559] *Ibid* at 174.

[560] *Ibid* at 183-184.

hypothesis is likely to be true or not),[561] two options are normally available to the court willing to entertain the government's hypothesis. Neither, however, is satisfactory.

The first option is to explicitly lower the standard of proof mandated by the proportionality test so that, to borrow from the commentators, the rights could be abridged based on "next to nothing."[562] It goes without saying that this solution is hard to defend, which likely explains why courts try to avoid it.

The second option is similarly unpalatable. Courts can (and often indeed do)[563] argue that, even in the absence of any evidence, it is possible to evaluate factual hypotheses put forward by the government based on the traditional civil standard of proof. All that is needed, they say, is for judges to be convinced that the government's argument is reducible to a commonsensical proposition.

Despite some obvious rhetorical appeal, this latter option (which, admittedly, is relatively novel)[564] is fraught. As explained earlier in this section, an unqualified judicial willingness to accept arguments "from common sense" as meeting the civil standard of proof risks putting subjective judicial belief at the centre of section 1 justification—and without any demand such

[561] This dilemma would normally arise whenever the court treats aleatory probability as a shifting parameter in the civil standard of proof.

[562] Johnston, *supra* note 176 at 94.

[563] *Thomson Newspapers Co. v. Canada (Attorney General)*, *supra* note 140.

[564] At the dawn of the *Charter* era, it was held that "mere fear or concern about harm to society is not sufficient to justify a limitation on the freedom of the individual; there must be a demonstration of actual harm or a real likelihood of harm." (*National Citizens' Coalition Inc v Canada (Attorney General)*, 1984 Court of Queen's Bench, 11 DLR (4th) 481.)

belief be rational, or even plausible. For instance, as Chief Justice McLachlin (as she then was) warned in *Sauvé*, "one must be wary of stereotypes cloaked as common sense."[565]

In judging whether subjective belief is sufficient to ground the civil standard of proof, we need to be particularly cognizant of the typical demographic from which judges are normally drawn. Would the "common sense" of this demographic be analogous to the "common sense" of the ordinary Canadian? Recall that at one point in time, the top Canadian judges held that it was "self-evident" that homosexuality erodes the foundations of a traditional marriage. It is even more telling when judicial opinions on what is "self-evident" point in diametrically opposite directions.[566] All in all, it looks like the same absence of evidence can be dubbed either an "clear commonsensical proposition" or "assertion[s] of belief",[567] depending on what the Court's preferred outcome is.

There is a third approach to the problem of evidential scarcity, however, which is rarely explored by the Court, and that could provide solution to section 1's epistemic dilemmas. It is to adopt Ho's framework and treat the civil standard of proof as demanding a justified and rationally well-founded belief in the truth-value of the government's statements. On this account, any epistemic uncertainty would automatically become judicially cognizable. If it is impossible to convince a rational person of the plausibility of the commonsensical proposition, then the case should rest on the fact that the government has not met its burden. If, however, the rational epistemic actor (i.e. a judge) would have at least a partial confidence in the truth-value of the

[565] *Sauvé*, *supra* note 116.

[566] E.g., as happened is *Sauvé* (*ibid*), wherein judicial opinions split on whether disenfranchisement of inmates was conducive to the promotion of the rule of law goals - or detrimental to them. For an excellent scrutiny of the relationship between judges and dominant ideology, see Bakan, *supra* note 75 at 103-117.

[567] *Chaoulli*, *supra* note 513.

contention (“more confident than not”), then the claim stands. On this understanding, even common-sense arguments can be demonstrably justified under section 1 without having to compromise the rigour of the traditional standard of proof.

The above approach has already been implicitly recognized by Canadian courts, albeit never in a methodical or a well-theorized manner. Consider what the Supreme Court said on the standard of proof in the context of section 1 review:

> [T]o meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified.” The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.[568]

To summarize, the proper understanding of the shifting parameter in the civil standard of proof is the degree of a justified and rationally well-founded judicial belief in the truth-value of the government’s factual hypothesis. No rigid formula is required. Indeed, as Ho explains, the idea of the standard of proof is already context-dependent, in the same way the exercise of caution would be context dependent. Thus, it would be a mistake for judges to surmise that just because the probative force of section 1 evidence cannot be conclusively established, the only alternative is to rely on arguments from common sense. Ho’s theory arguably offers a third way.

[568] *RJR-MacDonald*, *supra* note 4 at para 128.

Chapter 3: Theoretical Justifications of Deference

The question of "why to defer", according to Murray Hunt, is "probably the most difficult question in contemporary public law";[569] yet thoughtful debate about the issue has never properly crystallized.[570] As one British judge has aptly observed, the need for "deference" or judicial "self-restraint" in constitutional reasoning is often taken for granted,[571] and even in the rare instances when courts do proffer constitutional rationales for judicial self-restraints (such as expertise and legitimacy considerations), these rationales, as David Wiseman pinpoints, "often coincide,"[572] "are rarely explained",[573] and even can potentially conflict with each other.[574]

The ambition of this Chapter is to provide a conceptual and normative scrutiny of the existing justifications for deference and, ultimately, expose their theoretical bankruptcy. It is argued that for a coherent vision of a theory of curial deference to materialize, it needs to be built from first principles—from foundational propositions concerning the basic theoretical postulates of constitutional law. As Hunt posits, deference theory needs grounding in something explicitly normative, "in which courts are encouraged not only to articulate their reasons for deferring or not deferring, but to theorize them in terms of what justifies or limits judicial intervention."[575] It

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[569] Hunt, *supra* note 45 at 346.

[570] For a discussion on how the issue of deference rationales is drastically underexplored, see Cora Chan, "Deference, Expertise and Information-Gathering Powers" (2013) 33:4 Leg Stud 598 at 599.

[571] Derry Irvine, "The Impact of the Human Rights Act: Parliament, the Courts and the Executive" (2003) Public Law 308 at 316.

[572] Wiseman, "Competence Concerns in Charter Adjudication", *supra* note 150 at 509.

[573] *Ibid.*

[574] Wiseman, "Managing the Burden of Doubt", *supra* note 16 at 13–14.

[575] Hunt, *supra* note 45 at 351.

is for this reasons that I propose to bring considerations of the rule of law—an uncontroversially foundational principle of liberal legality, and, in particular, Canada's constitutional order[576]—to bear on the development of a doctrinally sustainable and predictable body of deference jurisprudence.

3.1 Traditional Justifications for Deference

3.1.1 First and Second-Order Grounds for Decisions

In dissecting substantive grounds (or justifications)[577] for deference, it is common to rely *mutatis mutandis* on the distinction between first-order and second-order reasons for actions[578] famously introduced by Joseph Raz.[579] On this classification, first-order grounds for decision pertain to the legal merits of the putative case[580] and feature prominently when the court decides the case solely on the balance of normative and empirical considerations at hand,[581] whereas second-order

[576] *Reference re Secession of Quebec*, [1998] 2 SCR 217.

[577] Admittedly, it is possible to discern a subtle semantic distinction between reasons, rationales, grounds and, finally, justifications for deference; however, a review of germane literature reveals that judges and commentators normally use these terms interchangeably. Here, I use all these terms to denote underlying explanatory principles behind the invocation of deference as a doctrine.

[578] See e.g. Kavanagh, *supra* note 376; Chan, *supra* note 571;

, e.g., Aileen Kavanagh, "Defending deference in public law and constitutional theory" (2010) 126(Apr) Law Q Rev 222; Cora Chan, *Deference, Expertise and Information-Gathering Powers*, SSRN Scholarly Paper ID 2066022 (Rochester, NY: Social Science Research Network, 2011); Stephen R Perry, "Second-Order Reasons, Uncertainty and Legal Theory" (1989) 62 South Calif Law Rev 913.

[579] Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999).

[580]Chan, *supra* note 38 at 858.

[581] Note that it is impossible to defer to anyone based on first-order reasons alone because this would simply constitute agreeing with them. As Aileen Kavanagh points out, "[w]hen we agree with someone on a particular issue, we do not 'defer' to them. Rather, we simply assess the pros and cons of the issues ourselves, and come to an independent conclusion which matches the other person's conclusion" (Aileen

grounds describe peremptory institutional concerns that can (fully or partially)[582] override the first-order reasons and operate as a distinct mode of practical reasoning, thereby giving rise to deference.[583]

Second-order grounds come in various forms and shapes, such as the institutional competence of the decision-maker relative to the court or its relative democratic legitimacy.[584] Functionally, they usually act as "reweighting"[585] (as opposed to "exclusionary")[586] reasons unrelated to the merits of the case. In the words of Cora Chan, "[i]f a court defers on second-order grounds, it is treating the case of the government as more compelling that what the court, on its own balance of first-order reasons, assesses it to be."[587] On this account, the doctrine of deference is said to give rise to a "presumption"[588] in favour of the practical solution advanced by the legislature; as Stephen Perry explains, it operates "at the level of an agent's subjective determination of what to do as part of a strategy to deal with practical uncertainty."[589]

The distinction between the first- and second-order reasons for actions is worth emphasising due to the common misunderstanding of deference alluded to earlier in this thesis. Some commentators suggest that deference may be "earned" by the primary decision-makers if the

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Kavanagh, *Constitutional Review under the UK Human Rights Act*, 1 edition ed (Cambridge, UK ; New York: Cambridge University Press, 2009) at 169.)

[582] Perry, *supra* note 578 at 932.

[583] *Ibid.*

[584] Chan, *supra* note 571 at 600.

[585]Chan, *supra* note 38 at 858.

[586] Chan, *supra* note 571 at 601.

[587] Chan, *supra* note 38 at 858. See also Kavanagh, *supra* note 20 at 188.

[588] Perry, *supra* note 578 at 945.

[589] *Ibid* at 942, FN 79.

latter can openly demonstrate the justifications for the decisions they have reached, and show that the reasons for their decisions are "worthy of curial respect."[590]

However, if the court, in deliberating the case, finds the first-order reasons proffered by the legislature persuasive or compelling on their merits, it is inappropriate to describe such deliberative process as deferential. As discussed above, to accede to a putative argument because of substantive agreement with its content is to *agree*—not to defer.[591] Thus, in the words of Aileen Kavanagh, deference takes place "only if the decision is *at variance* with the court's own assessment of the substantive issue, or where it is *uncertain* about the correct assessment of what the balance of reasons requires."[592] If the court is convinced, on account of reason, logic, and evidence, that the government's decision is proportionate, then deference has not taken place.

Simply put, judges defer when they act against their better judgement, on account of some other higher-order considerations. It is these second-order considerations—or "justifications" for deference—that will be the primary concern of the sections to follow.

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[590] Hunt, *supra* note 45 at 340. For the idea that deference can be extended based on the first-order grounds, see also Allan, "Human Rights and Judicial Review", *supra* note 317 at 672, 676; T R S Allan, "Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory" (2011) 127 LQR 96 at 97, 103, 105; Chan, *supra* note 571 at 601.

[591] Kenny, "Proportionality and the Inevitability of the Local", *supra* note 11.

[592] Kavanagh, *supra* note 376 at 233. For a similar point, see also Kavanagh, *supra* note 20 at 186:

> [I]f A defers to B's judgement, he assigns more weight to it than he would otherwise judge it to possess on his own determination of what the balance of reasons requires. . . Clearly, if A's assessment of the issue leads to the same conclusion as B, A does not defer to the latter's judgement by agreeing with it. A is simply acting on his own understanding of what the balance of reasons requires.

3.1.2 Normative vs Prudential Justifications

Courts may elect to defer to parliament or government for a myriad of reasons; yet not all of these reasons would be normatively cognizable (i.e. not all of them would constitute normative reasons *prescribing* a certain action, as opposed to reasons *explaining* the prudence of the action taken). It is important, therefore, to differentiate between legal-normative justifications for deference and prudential justifications, i.e. considerations predicated on the putative agent's advancement of their self-interest. While prudence can technically be viewed as a source of legal normativity, it is problematic if advanced on its own, as opposed to being part of a broader normatively discernible property.[593]

First, considerations from prudence, efficiency, or convenience, despite being a conventional part of the strategic approach to judicial review, do not explain why it would be incumbent upon the courts to defer under proper circumstances. As Alex Worsnip observes, it is one thing to say

[593] As Alex Worsnip explains, however, distinctively prudential reasons, such as, for instance, your own well-being, matter not on their own, but "in virtue of having some more general property (such as mattering morally, or being cared about) that other people's well-being can have too" (Alex Worsnip, "Eliminating Prudential Reasons" (2018) at 8, online: https://philarchive.org/archive/WOREPR).

Aileen Kavanaugh provides the following illustration of prudential considerations being deeply intertwined with moral considerations in favour of curial deference:

> For example, the argument that judges ought not to interfere with a legislative or executive decision because of fear of a future legislative attack on their independence is partly based on institutional self-interest and self-preservation. But underlying this is a (moral) concern to preserve the reputation of the courts and the laws they uphold, thus enhancing their ability to decide cases justly.

Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding Const Essays Const Theory* (Cambridge: Cambridge University Press, 2008) 184 at 206.

that you are permitted to give prudential considerations some weight "*if you want to*."[594] It is quite another, however, "to say that you make a mistake if you do not."[595]

Secondly, prudential considerations in favour of deference should always be viewed as *prima facie* suspect because they can potentially conflict with normative considerations militating *against* deference. For instance, in a politically charged climate, it might be imprudent for a court to render a decision like that in *Brown v Board of Education*[596] (based, say, on the prudential reason "that society is not ready for the change, or at least not ready for the change introduced by [the judges]");[597] yet from this we cannot derive a legally and normatively cognizable principle that courts *should* defer to the elected bodies under similar circumstances. It is therefore ill-advised to accede to arguments such as Bickel's according to which prudence may constitute a more completing justification for judicial restraint than principle.[598] If anything, prudence should be seen not as a source of reasons that weigh against other reasons, but rather as part of a descriptive analysis of judicial decision-making (i.e. as an explanatory, as opposed to a .

For instance, a court may be deferential in order to avoid charges of judicial activism, so as not to "undermine confidence in their judgements."[599] Or, as Aileen Kavanaugh puts it, courts may wish "to placate a hostile legislature, which might otherwise limit the powers of the court."[600] Judicial effectiveness is also sometimes advanced as a prudential concern. On this logic, the

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[594] Worsnip, *ibid.*

[595] *Ibid.*

[596] *Brown v Board of Education of Topeka* (2954) 347 US 483.

[597] Kavanagh, *supra* note 20 at 206.

[598] Alexander M Bickel, "Foreword: The Passive Virtues" (1961) 75 Harv L Rev 40 at 49, 68, and 79.

[599] Lord Steyn, "Deference: a Tangled Story" (2005) PL 346 at 349.

[600] Kavanagh, *supra* note 20 at 185.

weight of the court's caseload should be factored in deciding whether the court wishes to preserve its limited resources and conserve energy. Richard Posner entertains (but eventually rejects) the idea that there is a danger that the judiciary would be "starved for resources" and stretched too thin if it were to rigorously inquire into every case that comes its way.[601]

The takeaway from this part is that deference should not be problematized as a proxy for something else (say, the court's desire to avoid the charges of judicial activism or its reluctance to foray into, and sort through, a welter of contentious and increasingly complex evidence that informs public policy), but instead it should be viewed as a substantive constitutional doctrine in its own right. To outsource (partially, or entirely) the decision-making power to another body based on prudential considerations, as some commentators bemoan, is "an abdication by the courts of its enforcement responsibilities."[602]

3.1.3 "Institutional Superiority" Considerations Counselling Judicial Restraint

Because, as explained above, the extension of deference is normally based on second-order reasons for actions,[603] it follows that the justifiability of any theory of deference should depend on whether such second-order reasons are themselves defensible.[604]

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[601] Richard Posner, *The Federal Courts: Crisis and Reform* (Cambridge: Harvard University Press, 1999) at 317.

[602] Timothy H Jones, "The Devaluation of Human Rights under the European Convention" (1995) Public Law 430 at 432.

[603] Chan, *supra* note 38.

[604] Chan, *supra* note 571 at 599.

The orthodox account of deference holds that its principles are fashioned from considerations of institutional expertise and democratic legitimacy of courts vis-a-vis legislatures, or, really, lack thereof.[605] In this spirit, proportionality without sufficient deference is claimed to result in substantial alteration of policies as envisioned by legislatures. And because those policies reflect collective preferences, judicial revisiting of these decisions trespasses on principles of democratic accountability. Moreover, it is claimed, judicial revision risks setting in motion cascading effects of further policy changes, thereby giving rise to fears that the courts will trespass the decision-making territory where they do not belong. The argument is typically underlined with concern that judges may be too institutionally myopic to see broader ramifications of governmental policies, or to properly analyse social science evidence implicated in policy-making.

On such understandings, demands for deference are, in effect, logical extensions of desire to uphold the separation of powers within a constitutional polity (in the way the "separation of powers" is conventionally understood).[606] As Cora Chan explains, the point of separation of powers is twofold. First, it aims to enhance efficiency of constitutional decision-making by "allocating functions to institutions that are most capable of performing them well"[607] (the argument from "institutional superiority").[608] Secondly, it seeks to uphold constitutional values of a particular society by "allocating functions in a way that best achieves these values and is hence most constitutionally legitimate."[609] What kind of values are we talking about? As far as

[605] *Ibid.*

[606] Chan, *supra* note 2 at 11.

[607] *Ibid*.

[608] *Ibid.*

[609] *Ibid.*

deference is concerned, respect for majority rule would be at the top of the constitutional arrangement.[610]

Taken together, as Matthias Klatt posits, the considerations bearing on the institutional problem of judicial review represent a conflict of competences.[611] This conflict lies between the legislature's competence to decide on matters of public policy and the judiciary's competence to oversee such decisions. As explained in *Doucet-Boudreau*, the proper respect of the demarcation between these competencies requires the judiciary to extend deference not only to policy objectives, but also to the specific means chosen by the government to achieve those objectives.[612]

Back in 1930, the issue of the adequacy of the judiciary's institutional features to (re)consider politically charged decisions of government was probed in the course of a high-profile theoretical debate between Hans Kelsen and Carl Schmitt. Schmitt argued, among other things, that because every constitutional dispute at its core was a political dispute, courts should not be entrusted with the task of constitutional adjudication, lest they risk becoming *de facto* political actors. Conversely, Kelsen argued that such claims are premised on a simplistic understanding of the judicial role. Adjudication, he claimed, is always inherently political and inevitably involves a law-making component; the difference between the respective tasks of legislature and judiciary is one of degree, not kind. In fact, the political nature of the constitutional adjudication is not that

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[610] Hunt, *supra* note 45 at 354.

[611] Matthias Klatt, "Positive Rights: Who Decides? Judicial Review in Balance" in Jan-R Sieckmann, ed, *Proportionality Balanc Rights Robert Alexys Theory Const Rights* Law and Philosophy Library (Cham: Springer International Publishing, 2021) 163 at 172. For the same point about the core competencies of the judiciary and the legislature, see *R. v Imona-Russell*, 2013 SCC 43, [2013] 3 SCR 3 (SCC) at para. 28, *per* Karakatsanis J.

[612] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *supra* note 429 at para 57.

different than that of civil, or criminal, adjudication. Again, for Kelsen, the difference is quantitative, not qualitative. To banish constitutional adjudication from the proper remit of the courts on account of its political nature is to strip the constitution of meaningful power, and to do so on the basis on a false pretense.[613]

It appears that much of the current scholarly discussion around deference follows the contours of Schmitt's arguments. As Cora Chan observes, the expansion of judicial oversight of the legislative task under the banner of "proportionality reasoning" "has led to concerns that, in adjudicating rights, courts may intrude into policy issues that they lack expertise or democratic legitimacy to decide."[614] Thus, in this way of thinking, the doctrine of deference serves as an institutional approach to judicial restraint in relation to issues courts are (ostensibly) not well-positioned to decide. In short, courts put on a deferential hat when they are sufficiently humble to recognise that someone else may be better positioned to decide the issue, or so the reasoning implies.

Practically speaking, in Canadian context, that implies courts should retreat from strict application of *Oakes*' under the auspices of a deference doctrine whenever they are institutionally ill-equipped to decide politically charged questions.[615] Political decisions, according to this logic, should be left to political branches.[616]

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[613] For the content of this fascinating debate, see *The Guardians of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated and edited by Lars Vinx (Cambridge, UK: Cambridge University Press, 2015).

[614]Chan, *supra* note 38 at 852..

[615] Dassios & Prophet, "Charter Section 1", *supra* note 8 at 290.

[616] See David M Beatty, "Law and Politics" (1996) 44 Am J Comp L 131 at 134.

The takeaway from the above is that this (partial) reallocation of the decision-making authority from the judiciary to the legislature is animated by at least two peremptory concerns related to the counter-majoritarian difficulties adumbrated above: the first one is constitutional ("public authority defendants enjoy greater democratic legitimacy than the courts"), the second one is epistemological ("the government is more likely to 'get it right'"). Hence, courts defer to (what they perceive as) legally and epistemically superior institutions.[617] This division of labour, as Alan Brady observes, is necessitated by empirical and normative uncertainties inherent in proportionality adjudication.[618] If it is impossible to map out the normative fabric of the constitution with the exact precision, then someone should be responsible for the decisions made at the penumbra of the constitution. It follows that the reviewing courts must figure out how to navigate "that epistemic uncertainty in a way which gives adequate protection to rights, but does not second-guess where other decision-makers's assessment may be more sound than would be the courts'."[619]

3.1.3.1 Democratic Legitimacy

It is commonly said that courts should defer to elected bodies because the latter enjoy greater constitutional legitimacy. Here, it is assumed that, under proper circumstances, elected bodies are, compared to courts, more legitimate policy-balancers with direct accountability to their

[617] See Hughes & MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada", *supra* note 345 at 27.

[618] Brady, *supra* note 484 at 21.

[619] *Ibid.*

constituencies.[620] The argument can be seen in Justice LaForest's dissenting opinion in *RJR-MacDonald*,[621] where he explicitly draws upon institutional distinctions between the legislature and the courts. In particular, he reasons that extending deference in cases where the legislature seeks to regulate competing constitutional interests (especially with regard to so-called "social legislation")[622] is justified because such an approach purportedly respects the proper role of the legislature.[623]

In similar spirit, as one English judge has observed:[624]

> The fact that a statutory provision represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgements of the democratic assembly on how a social problem is best tackled.

In its most common form, the democratic legitimacy argument proceeds from the premise that there is a need to allay the public's disquiet about judicial overreach in the domain of public policy-making[625]—the so-called danger "that government by the judiciary may be substituted for democracy."[626] A similar admonishment is famously offered by Jurgen Habermas, who argued

[620] Kavanagh, *supra* note 20 at 186.

[621] *RJR-MacDonald*, *supra* note 4.

[622] See, e.g., a dissenting opinion in *RJR-MacDonald (ibid)* at paras 68-70.

[623] *Irwin Toy*, *supra* note 5 at para 79.

[624] *R v Lichniak*, [2002] UKHL 47 at par 14, *per* Lord Bingham.

[625] See e.g. Roach, *supra* note 55 at 108–109.

[626] Allan, "Human Rights and Judicial Review", *supra* note 317 at 672.

that overly intrusive constitutional adjudication essentially gains the status of "competing legislation",[627] which makes it undemocratic.

At least superficially, these kinds of arguments look like strong second-order reasons for deference. They are, after all, as Mark Elliott argues, "underpinned by normative considerations"[628]—a purported "constitutional principle."[629] Indeed, contrary to some prudential arguments from institutional efficiency or convenience (which can sometimes be viewed as "necessary evil"),[630] legitimacy-based deference is deemed "normatively right."[631] It presupposes that under certain conditions, wherein the court lacks a democratic imprimatur, it needs to delegate its decision-making to the elected branches.

This argument branches out into several other strands. Some suggest, for example, that because in adversarial, as opposed to inquisitorial, judicial systems, not all parties affected by the outcomes of judicial processes are parties to legal proceedings before a court[632] (think of, for instance, "vulnerable groups"), the legislators are the better balancers of everyone's interests. Others point to the absence of both political and legal checks on courts' unbridled power to

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[627] Jurgen Haberman, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996).

[628] Mark Elliott, "Proportionality and Deference: The Importance of a Structured Approach" in Christopher Forsyth & et al, eds, *Eff Judic Rev Cornerstone Good Gov* (Oxford University Press: Social Science Research Network, 2010) 265 at 11, cited to SSRN Report SSRN Report online at: https://ssrn.com/abstract=2326987.

[629] The necessity for judicial deference was discussed in *R v Lambert*, [2001] UKHL 37, [2001] 3 WLR 206, wherein Lord Woolf CJ observed that "… the legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention."

[630] Elliott, *supra* note 628 at at 11, cited to SSRN Report.

[631] *Ibid.*

[632] Barak, *supra* note 3 at 391.

decide societal issues. “If judicial review evolves such that political power in its judicial guise is limited only by a constitution whose meaning the courts alone define,” as Christopher Manfredi observes, “then judicial power is no longer itself constrained by constitutional limits.”[633] Aileen Kavanagh suggests judicial deference to democratic branches as “a requirement of *interinstitutional comity*—the requirement of mutual respect between the branches of government.”[634]

An interesting argument about judicial restraint on democratic grounds is proposed by Peter Russel, who posits that judicial control of the policy-making function impedes not just the democratic legitimacy of its decisions, but also the quality of democratic deliberation:[635]

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

To similar effect, Mark Tushnet complains that litigation distorts the formulation of governmental policies. This happens, as he explains, when “too many constitutional norms [find

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[633] Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism,* 2d ed. (Don Mills, ON: Oxford University Press, 2001) at 22.

[634] Kavanagh, *supra* note 20 at 188.

[635] Peter H Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms” (1983) 61:1 Can Bar Rev at 52.

their way] into the lawmaking process, supplanting legislative consideration of other arguably more important matters."[636]

3.1.3.2 Institutional Expertise

Another commonly invoked second-order reason for deference is that the legislature has more institutional expertise to decide the constitutionality of its own policies than the court.[637] In the words of Jeffrey Jowell, who favours this justification over the democratic one, it is based on a "practical evaluation of the capacity of the decision-making bodies to make certain decisions."[638] The idea here is that judges lack expertise, knowledge, and resources to pass judgement on epistemically complex and uncertain policy issues. As Justice La Forest put it in his dissenting opinion in *RJR-MacDonald*: "[c]ourts are not specialists in the realm of policy-making, not should they be."[639]

The precise normative import of the expertise-based rationale for deference is debated among commentators. Mark Elliott argues that the rationale it not normative at all, but purely practical, which invites the question of whether something so important as the protection of constitutional

[636] Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995) 94:2 Mich Law Rev 245 at 247.

[637] Geoff Sigalet, *Proportionality's Reductio Ad Monitum*, SSRN Scholarly Paper ID 3464617 (Rochester, NY: Social Science Research Network, 2018). See also Davidov, *supra* note 10 at 147–148.

[638] Jeffrey Jowell, "On Vires and Vacuums: The Constitutional Context of Judicial Review" in C Forsyth, ed, *Judicial Review and the Constitution* (2000) 327 at 330.

[639] *RJR-MacDonald*, *supra* note 4 at para 68.

rights can hinge on purely practical concerns.[640] Cora Chan finds a normative conceptualizing deference as part of a "requirement of rationality."[641] As she submits, "rationality requires courts to defer on the[] second-order grounds of institutional capacity in situations of judicial uncertainty."[642] In support, as stated by the Supreme Court in *McKinney*, the policies under scrutiny are:[643]

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

Hence, as far as epistemic rationality is concerned, deference to the institutions that possess superior expertise is "part of '*getting it right*'."[644] Note that some commentators believe that the "getting it right" argument should not be understood verbatim. As Kirsty McLean posits, institutional divisions of power depend not on an "inherent ability" of the court or the parliament to make the right decisions, but on the "perceived appropriateness" of the courts to make such

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[640] Elliott, *supra* note 628 at 11, cited to SSRN Report. Furthermore, even if the legislature is better situated to foresee the long-term effects of its policies, this does not in principle make it a better decision-maker for the purposes of resolving the conflicts of constitutional rights. For instance, if one party to a medical malpractice dispute is a doctor (which is necessarily the case), this does not automatically change the standard of proof in their favour or invites the judges to attach more weight to their opinions, simply by virtue of the fact that judges do not have specialised medical training.

[641] Chan, *supra* note 571 at 598. For the same sentiment, see also Hunt, *supra* note 45 at 353–354; Young, *supra* note 318 at 555, 570; Kavanagh, *supra* note 20 at 244–245.

[642] Chan, *supra* note 15.

[643] *Mckinney v. University of Guelph*, *supra* note 520 at 305.

[644] Julian Rivers, "Proportionality and Variable Intensity of Review" (2006) 65:1 Camb Law J 174 at 200 [emphasis added].

decisions.[645] Which, of course, begs the question of what issues are more appropriate for legislatures than courts.

In answer, some deference proponents contend that "courts should in principle bow to the decisions of the legislature and those exercising power on its behalf on matters of public interest (sometimes referred to as matters of public 'policy')."[646]

Arguments of this sort usually follow in the footsteps of Dworkin's famous conceptual separation between the issues of *principles* (which is claimed to be the main province of the judiciary) and *policies* (something that should be left to the government to deal with).[647]

Other authors subdivide the issue of "public policy" into separate components. A prominent example would be a claim that courts should defer to government not on all policy issues, but only on those that are sufficiently polycentric. The argument from polycentricity is rooted in Lon Fuller's landmark argument that courts are not appropriate forums for deciding truly polycentric policy issues.[648] Fuller explains his idea by analogizing polycentric policy issues with a spider web:[649]

> A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker

[645] McLean, *supra* note 168 at 72.

[646] Hunt, *supra* note 45 at 343.

[647] Ronald Dworkin, "The Forum of Principle" (1981) 56 N Y Univ Law Rev 469 at 516.

[648] Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv Law Rev 353.

[649] *Ibid* at 395.

> strands to snap. This is a "polycentric" situation because it is "many centered"—each crossing of strands is a distinct center for distributing tensions.

As a final note, it is worth reiterating that the idea to ascribe additional weight to the government's proportionality argument on expertise grounds rests *not* on the government's ability to demonstrate its expertise by disclosing the relevant information (and, respectively, on the court being persuaded by that information), but on the institutional (not necessarily rebuttable) *presumption* regarding the government's information-gathering and information-processing powers.

3.2 Problems with Traditional Justifications

This this section aims to demonstrate that, despite their purported "self-evidence",[650] the "institutional superiority" rationales for deference are afflicted with various conceptual ills. In a sweeping and critical statement, Aharon Barak dismisses the democratic legitimacy and institutional competence arguments as follows:

> None of [the traditional justifications of deference] is proper. Judging enjoys full democratic legitimacy, as it is derived directly from the constitution. Similarly, the institutional structure allows the judiciary to receive information regarding the different

[650] Cora Chan, "Deference, Expertise and Information-Gathering Powers" (2013) 33:4 Leg Stud 598 at 599.

considerations in the same way this information is presented to other branches of government.[651]

This section draws on Barak's argument to demonstrate that traditional competence-based rationales for deference do not constitute a principled or normatively defensible basis for judicial restraint. I will argue that such rationales are *ad hoc* tactical justifications the judiciary sometimes employs to retrospectively rationalize its decisions and avoid potential charges of judicial activism. As such, they are internally inconsistent; the empirical and normative assumptions on which they rely have not been established; and, most importantly, they cannot be conceptually reconciled with principled notions of judicial review. Thus, either deference as a constitutional doctrine needs to be conclusively abolished (which, this thesis submits, is a flawed path), or its conceptual and theoretical underpinnings need to be thoroughly revisited (as this thesis attempts to do).

As an aside, one can only speculate why the orthodox deference rationales are so problematic and why there has been so little conceptual inquiry into their problematic nature. It is possible that a reason may be uncritical importation into Canadian constitutional law of the in-built distrust of judicial interest balancing characteristic of English and American law.

In the case of English courts, such distrust was based on the unassailable conceptual commitment to the sovereignty of parliament and correlative distrust of judicial oversight of the parliament's

[651] Barak, *supra* note 3 at 398.

acts. As Murray Hunt explains, the idea of the sovereignty of Parliament lives on,[652] as vital as ever in contemporary accounts of our constitutional arrangements, notwithstanding the demonstrable fact that Parliament's power is now subject to a number of constitutional constraints which should long ago have made this claim *embarrassingly at odds* with both legal and political reality."[653]

Hunt further explains that English commentators often take special pride in "the anti-theoretical nature" of English jurisprudence,[654] seeing themselves as "an old democracy whose institutions have been shaped by the way things work in practice."[655] Which is ironic, because the doctrine of deference does not work well in practice.

In the case of the US, the rather unquestionable acceptance of deference, as Duncan Kennedy explains, came from the (at least rhetorical) skepticism towards balancing tests.[656] Such foundational anti-proportionality commitments made it easier to find a conceptual home for the doctrine of deference without the need for robust theoretical justification.

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[652] For instance, one in English judge in 1983 was astounded when the power of English Parliament to repatriate the Canadian Constitution was challenged in cort (*Manuel v A-G*, [1983] Ch 7), arguing that "a contention that an Act of Parliament is *ultra vires* is bold in the extreme. It is contrary to one of the fundamentals of the British Constitution: see, for example, Halsbury's Laws of England" (Hunt, *supra* note 45 at 337).
The English courts' distrust of constitutional review may be also buttressed by the nature of the *Human Rights Act, (Human Rights Act 1998*, s 2 Statutes (UK), the enactment of which some commentators come to believe to be "an enactment of Parliament's sovereign will" (Hunt, *supra* note 45 at 337) as opposed to the will of the people as constituent force.

[653] Hunt, *supra* note 45 at 339.

[654] *Ibid* at 338.

[655] Lord Hoffman, "The Separation of Powers" (2002) JR 137 at 138, para 5.

[656] Duncan Kennedy, "Proportionality and 'Deference' in Contemporary Constitutional Thought" in Tamara Perišin & Siniša Rodin, eds, *Transform Reconst Eur Crit Leg Stud Perspect Role Courts Eur Union* (Rochester, NY: Social Science Research Network, 2020) 29.

Thus, for various reasons, neither the English nor American constitutional systems experienced a particularly strong pushback against the doctrine of deference, so the need to provide rigorous justification never arose. Even though the constitutional realities of Canada do not display similar skepticism towards proportionality-based review or judicial interest balancing, unfortunately, its courts imported the doctrine of deference without interrogating its conceptual commitments.

3.2.1 Problems with the Legitimacy Rationale

While the democratic legitimacy and institutional expertise rationales for deference usually go hand-in-hand, the legitimacy argument is considered to be the more "controversial"[657]—and hence, weaker[658]—of the two. As Jeffrey Jowell submits, if we assume that deference is warranted on the ground of superior democratic legitimacy of the defendant, then courts would have to relax the requirements of the proportionality test *automatically*, i.e. on every occasion where constitutional rights are being limited by a public interest (policy).[659] This would necessitate deference in every single section 1 case.

Not only would that render the *Oakes* proportionality test redundant (as it would have to be downgraded to a less robust reasonableness standard across the board), but it would also potentially put the whole administration of constitutional justice into disrepute. As Aileen

[657] Kavanagh, supra note 20 at 203.

[658] For a strong criticism of the democratic legitimacy rationale for deference, see e.g. T R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65:3 Camb Law J 671.

[659] Jeffrey Jowell, "Judicial Deference and Human Rights: A Question of Competence" in Paul Craig & Richard Rawling, eds, *Law Adm Eur Essays Honour Carol Harlow* (Oxford University Press, 2003) at 73.

Kavanaigh describes it, judges "would abdicate their duty if they were to pay substantial deference to the elected branches in a *routine* manner, simply because they do not possess democratic legitimacy."[660]

Admittedly, one could try to salvage the argument for legitimacy-based deference by arguing that it should be viewed not as an "all or nothing"[661] phenomenon, but rather as a matter of degree. That way it would be possible, or so the argument goes, to calibrate the appropriate intensity of judicial scrutiny depending on the context of the case.[662] For instance, one can argue that the legislature wields superior democratic legitimacy when passing judgement on issues of public policy but does not possess the requisite legitimacy when deliberating on matters of constitutional interpretation. Such middle-of-the-road, spatial solution to the problem of deference suggests that the court is not required to bow to the legislature in all cases—but only in *some*, carefully delineated, cases.

The problem with this approach —and this will be amplified in greater detail in subsequent sections—is that there is simply no such thing as a section 1 issue devoid of public policy dimensions. Every proportionality issue is a policy issue. As Mark Elliott puts it, the individual prongs of the proportionality test suggest that it is for the court to arrive at a primary judgement on policy-related matters, "rather than to form a merely secondary judgement about the reasonableness of the decision-maker's view."[663] This circles back to Jowell's original argument

[660] Kavanagh, *supra* note 20 at 202.[emphasis in the original]. For the same argument, see also Jowell, *supra* note 665 at 80.

[661] Kavanagh, *supra* note 20 at 202.

[662] *Ibid.*

[663] Elliott, *supra* note 628 at 269.

that the legitimacy-based notion of deference has no choice but to presuppose automatic deference in *all* section 1 cases, which is widely problematic.

In addition to being structurally problematic, deference on democratic grounds suffers from multiple normative shortcomings. If we assume that the lack of democratic legitimacy to probe a constitutional question creates a "precluded area"[664] of decision-making, it follows, as Murray Hunt posits, that the court would be "abdicating its task of deciding whether justification has been made out" in each case a democratic deficit has been established.[665] Recall that section 1 of the *Charter* authorizes only such derogations from the Constitution that are demonstrably justified by the offending government. Hence, an argument according to which we can determine that a putative issue is within the government's discretion based on the second-order reasons for action alone is, as Hunt emphasizes, "the very opposite of justificatory":[666]

> It amounts to telling courts that a matter is none of their business, which is difficult to reconcile with modern conceptions of legality and the political branches' own professed commitment to the rule of law and to respect for fundamental rights and values.[667]

By the same token, the fact that the impugned public policy garners support of the majority of the population poorly translates into a normative principle according to which the preservation of parliamentary supremacy should take precedence over other constitutional considerations. To the contrary, as many commentators submit, the advent of constitutional democracy has elevated

[664] Hunt, *supra* note 45 at 351.

[665] *Ibid.*

[666] *Ibid.*

[667] *Ibid.*

respect for *minority interests*—institutionalized in the text of the *Charter*—as a paramount constitutional value that acts as a check on the majority will. With the passage of a constitutional bill of rights, "the primacy of representative status and political accountability has been erased."[668] Since the *Charter* came into effect, any content of policy adopted in Canada is only *intra vires* insofar as it stays within the four corners of the Constitution. The *Charter* has institutionalized judicial supervision over the content of all policy adopted in Canada, and the proportionality test is a doctrinal vehicle that sets this supervision in motion.

Hence, the predication of legitimacy of decision-making processes on alignment with majority preferences is grounded in "crudely formalistic notions of the separation of powers and the supposed continued sovereignty of Parliament."[669] Majority will should be respected by courts only to the extent that it is constitutional[670]—that is, to the extent it comports with fundamental minority rights and interests. The courts, as Jeffrey Jowell suggests, should not presume superior constitutional competence of legislatures to decide constitutional matters "simply because of their representative character and the fact that they are politically accountable to the electorate."[671] For instance, the fact the government arguing for the internment of Japanese American in the *Korematsu* case[672] was democratically elected, should not ascribe its position any extra weight.

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[668]Jowell, *supra* note 665 at 75.

[669] Hunt, *supra* note 45 at 347.

[670] Chan, *supra* note 2 at 7.

[671] Jeffrey Jowell "Judicial Deference and Human Rights: A Question of Competence" in Paul Craig & Richard Rawlings, eds, *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford University Press, 2003) at 75.

[672] *Korematsu v United States*, 323 US 214 (1944).

T.R.S. Allan makes a similar argument. He argues that the legitimacy-based rationale for deference hinges on the contrived antagonism between democracy and constitutional rights. The only way such antagonism can exist, Allan suggests, is if we equate democracy with brute majority rule.[673] Conversely, in a liberal democracy (such as Canada's), "majority rule is tempered by constraints that secure basic rights of liberty and equality against infringement, or at least impose onerous requirements of justification on offending legislation."[674] Cora Chan hypothesizes that in some polities—like, for instance, the UK—the preservation of a deep-rooted tradition of parliamentary supremacy can be a virtue to strive for, as the British "nuanced constitutional context" purportedly "necessitates deference."[675] However, such sentiment cannot be directly imported into the democracies with strong constitutional commitments.

As we have seen, deference on democratic grounds can be inconsistent with other constitutional principles, such as the notion of liberal constitutionalism which is "rooted in the sovereignty of the individual and the court's task in protecting that sphere."[676] Interestingly, as David Wiseman observes, legitimacy-based deference may also potentially conflict with expertise-based deference, as the two may pull in different directions depending on factual and institutional elements of particular cases.[677] It is not clear which deference rationale would be subordinate to another and for which reasons.

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[673] Allan, *supra* note 56 at 133..

[674] *Ibid* at 134.

[675] Chan, *supra* note 2 at 9.

[676] Hunt, *supra* note 45 at 339.

[677] Wiseman, "Managing the Burden of Doubt", *supra* note 16.

In the final analysis, a Duncan Kennedy maintains, to the extent that arguments for deference rest on notions of "democratic deficit," the degree of deference afforded by courts should depend on the extent of democratic deficit.[678] This means, as Matthias Klatt summarizes, that "democratic legitimacy admits of degrees."[679] For instance, if we were to assume that the intensity of judicial intervention can be decreased if the defendant has more democratic legitimacy (as is the case with the elected branches), it would stand to reason that decisions of the institutions that enjoy less democratic legitimacy (e.g., administrative actors) would attract less deference. As one English judge put it, "greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure",[680] presumably on account of the latter's inferior democratic legitimacy.[681]

The problem, however, is that the Supreme Court's actual jurisprudence displays the opposite trend. Canadian courts usually afford a greater degree of deference to administrative actors than to the elected branches. While, according to the prevailing doctrine, parliament usually must "earn" deferential treatment in each section 1 case (as it is not extended automatically, on democratic grounds alone), the executive branch usually enjoys a presumptive across-the-board deferential review under the heading of the *Doré/Loyola* test.[682] It is not clear why the presumptive degree of deference is higher in the context of unelected branches, as opposed to elected ones. However, this observation does inflict a significant blow to the theory that there is a

[678] Kennedy, *supra* note 662 at 49.

[679] Klatt, *supra* note 611 at 179.

[680] *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2003] QB 728, *per* Laws LJ at para 71.

[681] Kavanagh, *supra* note 20 at 203.

[682] For more detail, see Iryna Ponomarenko, "Tipping the Scales in the Reasonableness-Proportionality Debate in Canadian Administrative Law" (2016) 21 Appeal 125.

causal connection between the democratic credentials of the defendant in a section 1 case and the court's willingness to render the proportionality test less demanding.

3.2.2 Problems with the Expertise-Based Rationale

The idea that courts should ascribe additional weight to the arguments of other branches of government on the basis of the latter's expertise garners broader support among commentators than legitimacy-based justifications.[683] Some even go as far as to assert that deference should be determined *purely* on institutional expertise grounds.[684]

Such widespread embrace notwithstanding, the argument for expertise-based deference warrants a cautious approach. Recall that this argument ascribes additional weight to claims of primary decision-makers *not* because of the legitimacy of the *process* used (as is the case with the legitimacy-based deference),[685] but because of "the respective ability of the institutions to reach the correct conclusion."[686] As Alison Young recounts:[687]

[683] For a commentary that deems the expertise-based rationale for deference superior to the legitimacy-based rationale, see e.g. Young, *supra* note 318 at 555, 570; Kavanagh, *supra* note 20 at 91–193.

[684] Jowell, *supra* note 665 at 72–73.

[685] Young, *supra* note 318 at 566.

[686] *Ibid.*

[687] *Ibid.*

> Courts defer to the greater knowledge or expertise of the legislature or the executive, recognising that they may be better placed to reach the right conclusion as to the definition and application of a [...] right.

This means that the proponents of expertise-based deference face an uphill battle of proving not only that deference to relative institutional expertise is normatively desirable, but also that the parliament and the government, on account of their special expertise and information-gathering powers, are actually more likely to "get it right."[688] Neither of these premises is a given.

Mark Elliott, who otherwise holds a favourable opinion of expertise-based deference, is particularly skeptical of the normative underpinning of this deference rationale. He calls it a "necessary evil",[689] as it is adopted for negative reasons based on purported limitations of the courts and is "motivated by entirely *practical* considerations."[690] By the same token, he maintains that there is "no normative reason[691] for diluting the requirements of the proportionality test based on the "court's relative institutional incompetence."[692]

Indeed, normatively speaking, it is not clear why relative institutional expertise should generate second-order grounds for deference in situations when "such expertise or powers fail to generate persuasive reasons for the court on the merits of the case."[693] As explained at the beginning of

[688] Rivers, *supra* note 645 at 200.

[689] Elliott, *supra* note 628 at 11, cited to SSRN Report.

[690] *Ibid* [emphasis in the original].

[691] *Ibid.*

[692] *Ibid.*

[693] Chan, *supra* note 15 at 2.

this Chapter, institutional competence of the primary decision-maker may be featured in the court's reasoning not only as a second-order reason for action, but also as a first-order reason. In this latter case, the government always has the option of putting its expertise to use by trying to persuade the court on the merits of the case. As Cora Chan elaborates:[694]

> If the government is able to demonstrate its superior information-gathering ability by *disclosing* the relevant information to the court, and the court is persuaded by such information on the legal merits, then the government's information-gathering powers would be factored into the court's first-order reasoning.

The problem, however, is that instead of relying on the actual information gathered and processed by the primary decision-maker, the court that is willing to ascribe additional weight to this decision-maker's opinion relies on a legal fiction. It treats an abstract idea of institutional expertise as a proxy for the institution's actual ability to gather and process evidence, even in situations where such evidence has not been disclosed. Simply put, the court cannot *see for itself* why the government is leaning towards a certain conclusion (presumably because too many interlinked variables are involved),[695] but is asked to *trust* the government to know better. Chan argues that, in most cases, such a normative leap is unjustified. To the extent that the government is capable of generating convincing reasons for its actions based on its superior expertise, such reasons should be "'subsumed within' the court's first-order analysis."[696]

[694] *Ibid* at 4 [emphasis in the original].

[695] Kavanagh, *supra* note 20 at 193.

[696] Chan, *supra* note 15. at 4.

A similar argument is put forward by Trevor Allan, who claims it is illegitimate for courts to bow to purported superior expertise of the government as a substitute for bringing their own judgement to bear on the matter.[697] Indeed, if the court attempts to identify in advance the government's discretionary areas of judgement, it *de facto* creates a doctrine of non-justiciability, which is "at odds with the basic idea of justification."[698] The notion of justification is widely considered the main normative underpinning for the test of proportionality.[699] As Allan maintains, "[a]n argument that an issue is within the decision-maker's discretion is the very opposite of justification."[700] Hence, there is no escaping the fact that substantive issues in each particular case must be probed on their merits. The court, as Allan insists, should always enforce its own balance of first-order reasons.[701]

That deference on expertise grounds jeopardizes the "culture of justification" and corrupts the reasoned nature of proportionality becomes especially pronounced once we consider the issue of the onus of proof. Traditionally, at the section 1 justification stage the government bears the onus to demonstrate the reliability of the factual and normative assumptions that underpin its constitution-infringing policy. Unfortunately, the notion of deference inverts this logic. It creates what Thomas Poole calls a "presumption of good faith"[702] according to which the government's argument can gain additional legal weight without having to be proved in a traditional sense. In

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[697] Allan, "Deference, Defiance, and Doctrine", *supra* note 22 at 47.

[698] *Ibid* at 51.

[699] James Peter Barry, "The Proportionality Standard and Constitutional Culture: A Comparative Analysis of Rights Adjudication in Canada and the French Republic" (LLM Thesis, Dalhousie University, 2015) [unpublished] at 142, online: https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1009&context=llm_theses

[700] Hunt, *supra* note 45 at 351.

[701] Allan, "Deference, Defiance, and Doctrine", *supra* note 22 at 52.

[702] Thomas Poole, "Courts and Conditions of Uncertainty in "Times of Crisis" (2008) PL 234 at 249.

Poole's words, it refutes the "sceptical habit of mind that should always underpin . . . judicial review."[703]

Moreover, it should strike a reflective observer as odd that the presumption of the government's good faith is usually predicated not so much on the superior institutional features of the government itself, but rather on the institutional inferiority of the judiciary. According to the traditional deference narrative, the fact that the courts are institutionally incompetent to reach a particular policy decision is usually viewed as a reason for extending deference to other branches of government. However, this approach is contrary to the onus of proof, which should lie on the government. The institutional shortcoming of the court (presuming there are any) should not relieve the government from the duty to discharge its burden under section 1. As Cora Chan explains:[704]

> The court need not show that it has superior institutional competence before ruling against the government. Where the latter fails to convince the court on both first- and second-order levels, the court ought to rule against it on the basis that it has failed to discharge its onus.

To argue otherwise—to champion the relaxation of the proportionality test based on nothing more than the purported institutional deficiencies of the courts—is to give the government an unfair advantage.[705] The blatant presumption of relative institutional competence goes contrary to the ethos of section 1 justification. The principle of justification that is at the normative heart

[703] *Ibid* at 250.

[704] Chan, *supra* note 571 at 610.

[705] Thomas Poole, "Courts and Conditions of Uncertainty in "Times of Crisis" (2008) PL 234 at 250.

of the limitation clause states that the government has to justify—by means of demonstration and adducing reason and evidence—its rights-infringing measures. Therefore, the principle of justification (which directs the court to decide cases on the balance of substantive reasons) and the principle of relative institutional competence (which is an institutional reason that absolves the primary decision-makers of the requirement to adduce the first-order reasons for adopting the impugned policies) are incommensurable. The normative pedigree of the expertise-based deference is not derived from the constitution.[706] It is hard to escape the conclusion that deference on expertise grounds results in "underenforcement" of rights, which means that rights are not realised to their full conceptual limits.[707]

The problems for expertise-based deference do not end there. If, as Mark Elliott puts it, we accept that the basis on which deference is exhibited is "relative expertise", "it becomes apparent that public authority defendants cannot legitimately occupy a uniquely privileged position in this regard."[708] Other parties to the dispute (for instance, high-profile interveners or even the claimants themselves), can also have superior expertise compared to the court. On this logic, it would be incumbent upon the court to assign special weight to their position too. Here, however, we run into the problem outlined by David Wiseman, according to which various grounds for deference may start pulling into different directions.[709] What happens if, for instance, in the course of section 1 review there are multiple institutional loci of expertise? To the extent that

[706] As Jestaedt and Hwang maintain, the constitution does not vest the legislature with any special discretion in epistemically problematic proportionality cases (discussed in Klatt & Schmidt, *supra* note 221 at 95.)

[707] Dimitrios Tsarapatsanis, "The Margin of Appreciation Doctrine: A Low-Level Institutional View" (2015) 35:4 Leg Stud 675.4/22/2022 4:53:00 PM

[708] Elliott, *supra* note 628 at 9, cited to SSRN Report [emphasis in the original].

[709] Wiseman, "Managing the Burden of Doubt", *supra* note 113.

expertise-based deference is motivated by the search for truth, there is nothing that would prioritise the information-gathering and information-processing powers of the government over other parties to the dispute. Tilting the scales in the government's favour based on the abstract presumption of government's relative competence is not normatively justified.

Another blow to the expertise-based doctrine of deference comes from the proponents of the so-called "competence building" theory.[710] Even if we assume, these scholars submit, that courts do indeed lack an institutional wherewithal to tackle difficult policy questions, it does not follow that this institutional deficit warrants judicial restraint. Indeed, as Mark Elliott observes, it is not entirely clear "that deference on grounds of relative expertise is an appropriate judicial response"[711] to the institutional shortcomings of the judiciary. The alternative can be competence-building. For instance, courts can undertake special steps to build expertise and better evaluate factual statements made by the legislatures, including by inviting expert opinions or interveners. Similarly, as Murray Hunt puts it, "[i]nstitutional competence constraints can often be resolved, in that procedures can be changed (as they sometimes are) in order to accommodate what is required procedurally in order for the court to fulfil its constitutional function."[712]

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[710] *Ibid.*

[711] See also JWF Allison, "Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication" (1994) CLJ 367 at 382-383; Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart: Oxford, 2003) 337 at 350.

[712] In his essay, Hunt specifically references the House of Lord's decision in R v Shayler, [2002] UKHL 11, [2002] 2 WLR 754, whereby the court reasoned that, even in the absence of a special statutory provision to such effect, it could appoint a special advocate to represent the individual, so that the sensitive material that could not be legally disclosed to the individual's legal counsel could still bear on the outcome of the case.

Finally, it is worth reiterating that the argument for deference rests on the reliability of assumptions regarding the institutional advantages of the government relative to the courts and, correlatively, the institutional shortcomings of the courts that prevents them from gaining a valuable insight into the "real-world context"[713] of policy-making. The question, however, is whether those assumptions are borne out by evidence. Would the institutional design for rights reasoning be epistemically improved if we ascribe additional weight to the arguments of the primary decision-makers?

Recall that the notion of deference asks judges to give additional weight to government's conclusions even when such conclusions are founded on undisclosed or unsubstantiated information,[714] ostensibly on account of the government's institutional superiority. The claim here, as Cora Chan explains, is that "even if the government cannot demonstrate that it is correct on the merits of *this* particular case, the fact that it was usually correct in the past in deciding this *type* of issues is a reason that warrants deference this time."[715] But is it true that governments are always getting all policy issues "right" and courts, as Jeff King admonishes, are destined to "get things wrong"?[716] Are they indeed better equipped to make far-reaching factual prognosis?[717]

Many commentators respond in the negative. For one thing, the track record of governmental policy-making is less than pristine; the assertion that the government always "gets it right" is

[713] PC Weiler, "The *Charter* at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 UTLJ 117.

[714] Cora Chan, "Deference, Expertise and Information-Gathering Power" at 4.

[715] *Ibid* [emphasis in the original].

[716] Jeff A King, "Institutional Approaches to Judicial Restraint" (2008) 28:3 Oxf J Leg Stud 409 at 411.

[717] Sujit Choudhry, "So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section" (2006) 37.

wholly bereft of any evidentiary support. And for another, it is not clear whether courts should indeed be presumed to have inferior competence compared to other government actors. Aileen Kavanaugh insists that they should not.[718] As Kirsty McLean elaborates, "[i]n principle, there are very few, if any, decisions a court cannot make if given enough time and information."[719] Indeed, if the court is provided with all of the first-order reasons that were available to the primary decision-makers, it is not clear why the court cannot reach a reasonably competent decision.[720] This argument that judges are not required to have some "special" expertise to scrutinize difficult policy issues is further amplified by Guy Davidov:[721]

> There is no reason to suspect that [judges] cannot understand the social background and objectives of a law or arguments about the effectiveness of alternative means. A case about a piece of economic legislation would not be more difficult, in this respect, than a civil case concerning medical malpractice or a major commercial contractual relationship. Courts do not have to define goals, choose means or come up with ideas. They do not have to create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding.

All the more so because the nature of expertise germane to section 1 reasoning is twofold. On the one hand, the decision-maker undertaking section 1 review is faced with the need to make factual prognosis regarding the impugned policy measures. Yet on the other hand, the factual prognosis

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[718] Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudiciation" in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory*, (New York: Cambridge University Press, 2008) 188 at 226.

[719] McLean, *supra* note 71. at 72.

[720] Jeff A King, "Institutional Approaches to Judicial Restraint" (2008) 28:3 Oxf J Leg Stud 409–441.

[721] *The Paradox of Judicial Deference*, SSRN Scholarly Paper, by Guy Davidov, papers.ssrn.com, SSRN Scholarly Paper ID 920607 (Rochester, NY: Social Science Research Network, 2006).at 13-14.

must be made in the context of deeper normative questions about the costs of the putative policies to constitutional rights. It is not clear, therefore, whether any expert opinion on policy can be neatly divorced from normative judgements concerning individual rights.

For instance, in determining how a putative legislative objective can be best achieved in terms of the costs to constitutional rights in the course of the minimal impairment step of *Oakes*, at issue is not only a "factual prognosis"[722] which the government is purportedly better-situated to make, but also a normative judgement concerning the costs to rights. Thus, the ascription of additional weight to the government's factual statement cannot be analytically separated from the normative judgement concerning the issue of rights. To put it differently, the fact that the government might be ostensibly better skilled at making policies in general, does not mean that it is more skilled at choosing alternative policy measures that would be less burdensome for the implicated *Charter* rights.

In this connection, recall also that review for legality ought to be distinguished from review for correctness.[723] A proportionality court should not ask itself what the best possible policy would be. It should only retrace the steps of the legislator and review its decisions. The normative/policy questions asked at these steps are judicially cognizable. Hence even if we assume that the government knows best how to resolve some contentious social issues outside of the constitutional context (which itself is not a given), it is worth remembering that it is not what proportionality is about.

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[722] Rivers, *supra* note 124. at 199.

[723] Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamfield & Peter Leyland, eds, *Public Law in a Multi-Layered Constitution* (Oxford: Hard Publishing, 2003) 337 at 352.

It is also important to acknowledge that, from a certain perspective, deference for epistemic reasons is a paradoxical phenomenon. On the one hand, it instructs the courts to acknowledge their institutional limitations and exercise judicial restraint. Yet on the other, it suggests that institutional limitations of courts are especially pronounced in situations of normative and factual uncertainty. It is not clear whether the conditions of uncertainty can give rise to a meaningful claim that one institution is likely to be more correct than another. If the outcome of a controversial policy is uncertain—perhaps even so uncertain as to amount to flipping a coin—then are we saying anything meaningful when suggesting that the government is more likely than the court to "get it right"? The prospects of "getting it right" suggest some degree of certainty and predictability; the notion of epistemic uncertainty implies the opposite.

For instance, it is true that it may be hard for judges to choose between two equally plausible policies implicated in a rights dispute. However, as a keen observer may notice, the problem does not dissipate if we pose the same dilemma to other branches of government. Indeed, as Kirsty McLean observes, "While [governmental] institutions have potentially greater access to data, they are not able to make perfect decisions based on perfect knowledge either."[724] The conditions of uncertainty suggest that, unless we have the luxury of hindsight, *everyone's* decision would be epistemically deficient. This applies not only to the courts, but also to governments.

The idea that the conditions of epistemic uncertainty should give rise to judicial deference on expertise grounds presents us with yet another paradox. As Trevor Allan rightly

[724] McLean, *supra* note 71 at 77.

observes, absolutely all constitutional cases contain a significant degree of uncertainty.[725] This means that all proportionality cases would have to be deferential cases, which is a contradiction in terms.

3.2.3 The Ineluctable Circularity of Deference Rationales

The preceding sections sought to elucidate specific logical and conceptual shortcomings of leading justifications for deference and also to question their epistemological reliability. This section will flip the script: for the sake of argument, I will assume that the claims about superior democratic legitimacy and institutional competence of the legislature *vis-à-vis* the judiciary are descriptively accurate insofar as the legislature is indeed more capable, constitutionally and institutionally, to pass judgement about policy issues implicated in rights disputes. Yet, I will argue, once we interrogate the normative import of these competence-based arguments (the idea that judges *ought to* defer to more competent institutions), the arguments start collapsing on themselves. Hence, as will be explained shortly, even on the most charitable reading, the conventional justifications for deference cannot provide a reliable conceptual foundation for robust judicial deference to the legislature. Now, there remains a possibility that these deference rationales are capable of sustaining the claims for minimal or moderate deference, but this argument only holds if we assume that the justifications themselves are *per se* correct, which is not a given. The section below will unpack these points.

[725] Allan, "Deference, Defiance, and Doctrine", *supra* note 133. at 53.

3.2.3.1 Normative Assumptions Underpinning Deference Rationales

As Cora Chan observes, the discussion about deference, and, hence, about which institutions are in better position to enforce rights, depend on "deeper, normative arguments about constitutional values"[726] and the role of courts in a democracy.[727] A similar emphasis on the inescapably normative underpinnings of any theory of constitutional review is rehearsed by Dworkin, who maintains that, as far as rights protection is concern, "[t]he best institutional structure is the one best calculated to produce the best answers to the essentially *moral question* of what the democratic conditions actually are, and to secure compliance with those conditions."[728]

In section 1 jurisprudence, conventional justificatory rationales for deference are competence-based and proceed on the assumption that optimal decisions from the perspective of *Charter* rights protection are achieved *if and when constitutionally and epistemically inferior institutions defer to constitutionally and epistemically superior institutions.*

In other words, whenever a court reasons that the institutional competence and democratic legitimacy of the legislature merits robust deference in the course of section 1 reasoning, it accepts both the descriptive premises of this formula (i.e. that the legislature's competence is indeed epistemically and constitutionally superior to that of the courts) and also its normative supposition (that rights are best protected if the decision regarding their limits rest with epistemically and constitutionally superior institutions).

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[726] Cora Chan, "Chan, *supra* note 37. at 4.

[727] *Ibid.*

[728] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1999) at 34.

As an important aside, we can, in principle, think of other (potentially competing) normative suppositions that can be factored into our thinking about the best institutional arrangements for protecting rights. Joseph Raz, for instance, posits that the enforcement of fundamental rights should rest not necessarily with the institutions that, epistemically, are more *capable* of reaching the "correct" decisions, but with whichever institutions are, "in the circumstances of the time and place, *most likely* to enforce [rights] well, with the fewest adverse side effects."[729] Central to this account of the institutional framework for constitutional rights is the idea that the correct content of rights is more likely to be revealed if the institutions entrusted with their enforcement have not only the *capacity*, but also the *motivation* to protect rights.[730]

Similarly, Hans Kelsen believed that constitutional adjudication must remain the preserve of the courts not so much because, normatively speaking, we do not want the legislature to be the judge in its own case. As Kelsen maintained:[731]

> [I]f any institution is to be created at all that will control the constitutionality of certain acts of state immediately to the constitution, in particular those of parliament and government, this power of control must not be conferred upon one of the organs whole acts are to be subject to control.

[729] Joseph Raz, "Disagreement in Politics" (1998) at 45

[730] For instance, as Raz explains, it is possible to argue that the enforcements of constitutional rights would be made more secure if courts, as a relatively apolitical branch, would be entrusted with the task of ascertaining their content. Conversely, as he explains, "we may have sufficient reason to believe that the legislature will not even try to establish what rights people have, or what restraint it should exercise, given the fact of disagreement over principles." Specifically, according to Raz, in many countries "there are ample reasons to suspect that members of the legislature are moved by sectarian interests to such a degree that they are not likely even to attempt to establish what rights (some) people have." (Joseph Raz, "Disagreement in Politics" (1998) at 46.)

[731] *The Guardians of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated and edited by Lars Vinx (Cambridge, UK: Cambridge University Press, 2015) at 175.

In fact, as he further explains, when we allow the legislature to police the limits to its own power ("in whole or in part")[732], we effectively confer the important supervisory role on the institution that "has the best legal chance as well as the *strongest political motive* to violate the constitution."[733] The identical sentiment is echoed by Dworkin who posits that courts are more likely to produce the best answer to moral questions related to rights because they have no vested interest in upholding the constitutionality of the rights-infringing law. Conversely, when we allow people or their elected representatives to decide on the scope or meaning of rights, they become judges in their own case.[734] The supervisory role that one branch of government can exercise over another, in conjunction with the need to prevent the concentration of power, are actually among the main justificatory rationales behind the principle of the separation of powers.

It is perfectly possible, thus, to imagine a normative universe in which the procedural principle that "no person ought to be judge in their own case" would command normative precedence over the substantive principles counselling deference even if this would have costs in terms of epistemic or democratic reliability of the resulting decision. In fact, that's how Canadian law operates in areas outside of rights adjudication.

Consider, for instance, the defendant in a criminal case who, on account of being a former Supreme Court judge or a law professor, may be more likely to reach a proper interpretation of the *Criminal Code*, or to produce a better assessment of evidence than a presiding judge in the

[732] *Ibid.*

[733] *Ibid* [emphasis added]/

[734] Ronald Dworkin, *A Matter of Principle* (1985) at 24.

putative case. Such a position of superior epistemic competence would, presumably, lead to a higher quality of decision-making. In reality, however, no judge would defer to the defendant's opinion on second-order grounds alone (i.e. grounds related to the defendant's presumptive epistemic competence). Instead, the judge would make their own assessment of the merits of the case even if, from the epistemic perspective, such a decision not to defer would have costs in terms of the quality of judicial output. It is hard to see why the same logic should not apply to constitutional adjudication.

3.2.3.2 Institutional Design for Rights Protection: A Tale of Two Competences

For now, however, I wish to sidestep these potential lines of rebuttal and engage with the competence-based argument for deference on its own terms. On this account, *Charter* rights are optimally protected when constitutionally and epistemically inferior institutions defer to constitutionally and epistemically superior institutions.

Practically speaking, it means that whenever a court assesses itself as lacking in institutional competence and democratic legitimacy to decide certain section 1 issues, it must defer to a more competent institution - e.g., the legislature or Parliament.

Such competence-based arguments are, however, irreparably circular. On the one hand, courts are asked to surrender their power of judicial review to elected branches on account of competence concerns; yet on the other hand, the very reason courts have the power of judicial review in the first place is because the constitution deems them competent to undertake such a task.

Indeed, the presumptive starting point of constitutional review in a liberal democracy is that the *legislature* owes the *duty of deference to the judiciary*. The power of rights review vests in the courts because, being constitutionally empowered to oversee the decisions of elected officials and being eminently skilled at reasoning about constitutional rights, the judicial branch is constitutionally and epistemically superior to the legislative one.

When deference is viewed in this light, its fragility is brought into sharper relief. On the one hand, it holds that the legislature is constitutionally and epistemically superior to the judiciary because, as a democratically elected institution that (at least according to the prevailing argument), it possesses a special epistemic competence in the field of policy-making. Yet on the other hand, the judiciary is also an epistemically and constitutionally superior institution for the reasons explained. Hence, depending on the way constitutional and institutional superiority are defined, in any given section 1 case we can selectively justify either the need for judicial restraint, or the need for robust and intrusive judicial scrutiny.

In this regard, Murray Hunt posits that the biggest problem with justificatory arguments for deference is that they operate within paradigms of competing and mutually exclusive institutional supremacies.[735] Specifically, he observes that the current notion of deference blends together appeals to both "judicial supremacy" and "parliamentary supremacy", which are paradoxically being used together, often even by the same judges or commentators, "depending on the issue they are addressing or whether they are seeking to justify judicial interference or

[735] Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart: Oxford, 2003) 337 at 339.

abstention in a particular case."[736] On this account, the demarcation line between the competing supremacies would be determined on an *ad hoc* basis in each particular case, depending whether judges wish to justify judicial intervention or judicial non-intervention. Such conception of deference is built on constantly shifting theoretical sand. Hunt attributes this self-contradictory account of deference to the "Dicean inheritance", which he describes as:[737]

> [A] constitutional discourse which selectively invokes democratic positivism and liberal constitutionalism in order to justify or explain a particular decision, but which lacks an overarching coherent vision of democratic constitutionalism in which the apparent contradiction of these foundational commitments is explicitly confronted and an attempt made to reconcile them without resort to the language of sovereignty.

Thus, the arguments from liberal constitutionalism according to which courts are institutionally and constitutionally superior to the legislature is used whenever judges want the review to be intrusive, but the same judges may pronounce themselves as lacking in constitutional and institutional competence whenever they opt for judicial non-interference. Such logic is irrevocably circular.

This circularity is also pinpointed by Niels Petersen who argues that, when articulated at a sufficiently high level of generality, the legitimacy-based justifications for deference and judicial review cancel each other out.[738] On the one hand, it is assumed that judges have the power of judicial review because they are more constitutionally legitimate than the legislator to oversee

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[736] *Ibid* at 343-344.

[737] *Ibid* at 344.

[738] Niels Petersen, "Avoiding the Common-Wisdom fallacy: The role of Social Sciences in Constitutional Adjudication" (2013) 11:2 Int J Const Law 294–318 at 310.

constitutional compliance; yet on the other hand, it is also assumed that the legislator is more legitimate than the judiciary so that the latter must defer to the legislator. In other words, the same arguments from constitutional competence are being selectively invoked to both justify the power of judicial review and to take it away. Such logic, as Petersen laments, simply makes no sense.[739]

Epistemic Competence of the Judiciary. I will now return to the discussion about the perceived epistemic superiority of the judiciary over the legislature which is commonly invoked as one of the main justifications of judicial review. According to the oft-cited version of this argument, most forcefully propounded by Dworkin, judges possess greater epistemic competence vis-à-vis the legislature in reasoning about rights because they are more likely to arrive at the correct interpretations of relevant constitutional provisions.

Dworkin argues that this epistemic reliability of judicial interpretation can be explained by the fact courts are forums of principle rather than policy and, as such, their decision-making is not influenced by policy considerations. Courts, as Dworkin recounts, "make decisions about principle rather than policy—decisions about what rights people have under our constitutional system rather than decisions about how general welfare is best promoted."[740] Such decisions are reached "by elaborating and applying the substantive theory of representation taken from the root principle that government must treat people like equals."[741]

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[739] *Ibid.*

[740] Ronald Dworkin, "A Forum of Principle" (1981) 56 New York University Law Review at 516.

[741] *Ibid.*

The argument about the superior epistemic competence of the judiciary gains additional analytical purchase when viewed through the lens of evidentiary particularism.[742] The claim here, supported by numerous commentators, is that the main epistemic advantage of judicial reasoning resides in its exposure to a unique factual palette: instead of dealing with the highly stylised issues of rights in the abstract, judges decide particular and concrete cases.[743] As David Bilchitz explains:[744]

> General decision-making across a range of cases can obscure the problems that may arise in particular instances to which that general decision may apply. General decision-makers may simply overlook or fail to give sufficient weight to the problems that may be faced in particular cases.

The need for rules and principles to develop through the particular and analogical reasoning of courts in actual cases is further emphasized by Roscoe Pound who argues that legal principles best mature through a "long course of trial and error."[745]

Constitutional Competence of the Judiciary. In addition to possessing epistemic advantages in deciding cases of constitutional rights, courts are also uniquely positioned to police the boundaries of legitimate legislative authority. According to the modern model of democratic

[742] Malcolm Langford, "Why Judicial Review?" (2015) 1 Oslo Law Review at 48.

[743] *Ibid.*

[744] David Bilchitz, Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights (Oxford University Press, 2007) at 127.

[745] Roscoe Pound, *The Formative Era of American Law* (Little, Brown & Co, 1938), at 51, cited in Donald Horowitz, The Courts and Social Policy (The Brookings Institution, 1977).

constitutionalism, decisions about rights are made in an institutionally fragmented environment: people's elected representatives make a preliminary assessment as to the limits of a constitutional right; however, this assessment can be subsequently corrected by the judiciary. Within this model, courts act as the "guardians"[746] of the Constitution is the sense that, as Kelsen explains, they "control the behaviour of certain organs immediate to the constitution, such as parliament or government, with respect to its conformity to the constitution."[747]

On this account, per Aharon Barak, the democratic legitimacy of the courts to oversee the legislative activity "is derived directly from the constitution."[748] In fact, as Kelsen further recounts, it makes no sense to describe judicial review as unconstitutional because "the judicial review of legislation as a prerogative of the courts is instituted by those very constitutions which especially stress this principle."[749] Properly conceptualised, the legitimacy of the judiciary to control legislative decisions compliments the legitimacy of the legislature to make these decisions in the first place. In this respect, elected bodies effectively act as positive legislators, and the judiciary—as negative ones.[750]

[746] *The Guardians of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated and edited by Lars Vinx (Cambridge, UK: Cambridge University Press, 2015) at 174-175.

[747] *Ibid* at 175.

[748] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) at 398.

[749] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange Ltd: New Jersey, 1945) at 281.

[750] *Ibid.*

3.2.3.3 Reconciling the Competing Paradigms

The foregoing discussion has set out to demonstrate that, taken to their logical conclusions, the rationales for deference become irrevocably circular. While the legislature as an elected body may have greater legitimacy in channelling collective preferences, the judiciary has a legitimate function of ensuring those preferences remain within the four corners of the constitution. Similarly, while the legislature possesses certain epistemic advantages in passing judgement on policy issues, the judiciary is uniquely positioned to produce superior epistemic outputs with regard to constitutional interpretation.

Admittedly, there are a few ways out of this constitutional impasse. For instance, if we can locate the *areas* of constitutional and epistemic competence where each of the respective branches of government is superior to the other—in other words, if we can differentiate between the aspects of proportionality analysis within which the legislature and the judiciary are the masters of their own craft—then perhaps we can ferret out the exclusive zones of proportionality within which each branch deserves deference.

The problem, however, is that no such zoning is possible. As explained in the previous sections, the most plausible candidate for a demarcating factor—a policy component in a putative decision—does not withstand scrutiny. While the Dworkinian distinction between principle and policy may be attractive in theory (suggesting that courts ought to focus their institutional effort on deciding issues of principle while deferring on the issues of policy),[751] such distinction is

[751] Conor Gearty picks up Dworkin's argument to draw conclusions for deference. Gearty argues that judges can problematize the principle vs policy distinction as a swimming pool "with the shallow end marked 'legal principle' and the deep end marked 'public policy'." On this understanding, judges should abstain from venturing into the policy end of the pool where they can be "entirely out of their depth" (Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2004) at 121-122)

impossible to maintain in practice. Judicial review is a forum of mixed principle and policy and, as Kelsen demonstrated almost a hundred years ago, we cannot reliably differentiate between strictly legal and political questions in the course of constitutional adjudication.[752] By definition, constitutional adjudication involves policy-making, the question is only to what degree.[753] The point was masterfully expressed by Aileen Kavanaugh who posits that a claim according to which judges should stay away from policy arguments is a "recommendation of judges to refrain from doing something they do all the time."[754]

Now, if moral and political reasoning are necessary components of rights adjudication[755] then a *fortiori* that is true of proportionality, which, on account of its balancing component, always carries a "moral infection."[756] Indeed, proportionality analysis is a tightly woven web of normative, empirical, and legal inquiries in which issues of policy cannot be easily divorced from issues of principle. If anything, contrary to a common misconception, the proportionality framework *invites* judges to weigh various policy options. Furthermore, again contrary to a popular sentiment, we cannot have cases in which the policy component is more pronounced and less pronounced (so that judges could focus on the matters of principle and forgo the matters of

[752] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) at 272.

[753] *Ibid.*

[754] Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory*, (New York: Cambridge University Press, 2008) 188 at 195.

[755] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford Scholarship, 2012) at 692.

[756] *Ibid* at 692-695.

policies) because, by virtue of its analytical structure, proportionality puts policy issues front and centre of its analysis. Properly understood, *every* proportionality case is a policy-laden case.

As Duncan Kennedy puts it, "the proportionality method is in itself an invitation to the usurpation of the legislative role because it requires the judge to assess the weights of conflicting considerations without any plausibly objective measuring tool.[757] Thus, given that proportionality explicitly invites judges to consider—and weigh—contentious policy issues, there is no way of taking these issues out of the purview of the court without eviscerating the very core of constitutional review.

Just to be clear, the argument here is not so much that it is impossible to draw a principled distinction between legal and policy issues in constitutional review—of course they can be *differentiated* from each other at least at some level of abstraction (though there are dissenters on this point).[758] Rather the point is—and this warrants nuanced understanding of the proportionality principle itself—legal and policy issues cannot be *separated* in the course of the section 1 analysis. Every proportionality issue is a policy issue, wherein the judges are asked to inquire, from various angles, into the connection between the policy measures adopted by the government and the societal goods such policies are sought to promote. As Aileen Kavanagh posits:[759]

[757] Duncan Kennedy, "Proportionality and 'Deference' in Contemporary Constitutional Thought", in The Transformation or Reconstruction of Europe: The Critical Legal Studies perspective on the Role of the Courts in the European Union (Hart, 2018) 29 at 37.

[758] For an inquisitive critique of the principle vs policy distinction in adjudication see, e.g., Kavanagh, *supra* note 24, FN 42

[759] *Ibid* at 196.

> This reflects a more general point, namely, that to the extent that a statute explicitly promotes collective goals, judges cannot interpret those laws faithfully without some considerations and evaluations of how best to promote them.

A second strategy for accommodating two aforementioned deference paradigms (one to the parliament, the second to the judiciary) within a single conception of judicial review might be to assign relative normative weight to constitutional competences of the judiciary and the legislature. On this account, even if we conclude that, on balance, the constitutional and institutional competence of the judicial branch outweighs that of the legislative branch, this still leaves room for the possibility that the judiciary owes the legislature at least *some* measure of deference. The problem here, however, is that the proportionality test already incorporates a moderate notion of curial deference into its framework. Indeed, as will be explained in greater detail in the next Chapter, on account of the relatively deferential standard of proof (balance of probabilities) and due to the balancing framework that integrates majoritarian preferences into the constitutional parameters of *Charter* rights, proportionality already allocates a significant portion of the decision-making power from the judiciary to the legislature. Thus, it appears that we can make a qualified case in support of minimal or moderate deference in section 1 adjudication; however, not only does the strength of this case depend on the descriptive accuracy of the justifications for deference (which is not given), it is also not clear whether such doctrine of deference would have any meaningful import for the current state of section 1 jurisprudence. Yet even if the latter are true, the adequacy of this approach should still be questioned. It is not clear whether using the language of deference in section 1 cases in conjunction with the language of proportionality leads more to clarify than to obfuscate them.

Now, if we wish to justify a robust account of deference, we face an even steeper uphill battle. We need to prove that, at least in some instances, legislative constitutional and institutional competence is *a priori* superior to the judicial competence. Such an argument cannot succeed. It would require asserting that majority *a priori* trump those of the minority, which subverts the entire ordering of the constitution since the introduction of the *Charter.* Similarly, we cannot argue that the ability to provide factual assessment of a constitutional issue is more important than the ability to interpret the Constitution. Add to that the normative import of the "no judge in their own case" argument, and the prospects of a viable case for robust deference are smaller still. No matter how you twist it, there is no room for robust deference as a separate constitutional doctrine in section 1 adjudication.

It follows that if we reduce the commonly cited justifications for deference (institutional competence and democratic legitimacy) to their underlying normative formula, we find ourselves in a constitutional stalemate. On the one hand, the arguments from constitutional and epistemological competency justify *judicial deference to the legislature* on account of the legislature's superior democratic pedigree and expertise in handling complex policy issues. Yet on the other hand, the same arguments from constitutional and epistemological competence can also be used to justify *legislative deference to the judiciary*. Indeed, not only is the judiciary uniquely positioned to interpret and reason about constitutional rights, but it also directly derives its legitimacy from the constitution that empowers it to police the boundaries of legislative authority. This section entertains but ultimately dismisses the possibility of reconciling these competing competences under the doctrinal umbrella of deference.

3.3 Deference as the Desideratum of the Rule of Law (Legal Limits to Judicial Discretion)

The above sections sought to demonstrate that, despite the fact that courts often employ the institutional expertise and democratic legitimacy rationales as *ex post facto* rationalizations for exercising curial restraint (especially in relation to policy issues), these competence-based justifications do not provide a principled theoretical basis for deference as a doctrine. This conclusion is especially salient for the principle of proportionality which, by virtue of its very design, vests extensive policy-revising powers in courts and, as such, deems these powers commensurate with the judiciary's constitutional and institutional competence. After all, every proportionality question is a policy question.

Against this analytical backdrop, the section which follows will propose a novel justification of deference in section 1 adjudication—one that ties judicial restraint in proportionality reasoning to the requirements of the principle of the rule of law. While this revision of the theory of deference appears radical, it is simply the logical extension of the widely accepted conception of normative and empirical discretion in proportionality reasoning first problematized by Alexy.[760] The rule of law, on the theory proposed herein, operates so as to fetter judicial discretion in section 1 cases and, in so doing, to allay the widespread fears of judicial activism. The practical result of such an approach, as will be enlarged upon in the next Chapter, is the call for judges to exercise an across-the-board moderate judicial restraint in handling controversial empirical and normative issues inherent in section 1 cases; conversely, it is argued that strong judicial restraint in

[760] Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002). See also Matthias Klatt & Johannes Schmidt, "Epistemic Discretion in Constitutional Law" (2012) 10:1 Intl J Constitutional L 69.

proportionality reasoning, or flexible (contextual) model of deference, are never justified, neither analytically nor normatively.

Before fleshing out the rule-of-law-based theory of deference, I will hone in on Kelsen's theory of constitutional review which I adopt as a springboard for exploring the connection between the principle of proportionality, the principle of deference, and the principle of the rule of law.

3.3.1 Setting the Parameters of Judicial Review: The Theory of Hans Kelsen

As Niels Petersen posits, discussion about the appropriateness of proportionality in rights reasoning—and, by extension, arguments concerning deference—hinge on unstated assumptions about the role of judicial review in a constitutional democracy and the value of legal certainty.[761] It is important, therefore, to acknowledge and interrogate these assumptions.

Conventional arguments in favour of deference effectively hinge on the implicit idea that section 1 cases arise in distinct categories of "policy" and "principle." On this account, the argument goes, failure to exercise judicial restraint in relation to epistemically uncertain policy-laden issues leads to repudiation of the proper boundaries between judicial and political decision-making.[762] Crucially, this account of deference only holds if we accept, following Dworkin, that, in the course of judicial review policy considerations can be neatly distinguished from considerations of principle. Yet that is precisely what cannot be achieved, especially with respect to the proportionality principle which places policy issues firmly in the hands of constitutional judges. As Duncan Kennedy observes, "Dworkin to the contrary notwithstanding, proportionality

[761] Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press, 2017) at 39.

[762] *Ibid* at 59.

in contemporary practice has always included policies as well as principles, rights and powers."[763]

It is clear, then, that, if the doctrine of deference is to be theoretically vindicated at all, it needs to be anchored it in a less idealistic account of judicial review, one that would recognize, and grapple with, the inevitably political nature of judging.

At the same time, it is prudent to stay away from yet another extreme—from drawing on the simplistically realistic accounts of judicial review which, in the spirit of Jeremy Waldron's work, readily embrace the political nature of disagreements about rights[764] and then abjure judicial review on this very ground.[765] Accounts such as Waldron's do not contain any feasible mechanisms for constraining and checking the power of elected officials that may harbor anti-minority sentiments,[766] not to mention the fact that they hold no explanatory power over the practice of constitutional review by the Supreme Court of Canada.

I therefore propose a middle ground. The theory of judicial review propounded by Hans Kelsen offers an institutionally responsible, realistic, and, at the same time, principled understanding of constitutional adjudication that sensibly explains—and conceptually underpins—the actual practice of Canadian constitutional review. Furthermore, because in his writings, Kelsen drew

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[763] Duncan Kennedy, "Proportionality and 'Deference' in Contemporary Constitutional Thought", in Tamara Perišin & Siniša Rodin, *The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart, 2018) 29 at 31.

[764] Waldron describes these disagreements as "the circumstances of politics" (Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) at 101-103).

[765] For Waldron's criticism and ultimate rejection of judicial review as inherently undemocratic, see Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 1:5 Yale L J 1346 at 1354-55.

[766] Dimitrios Kyritsis, "Representation and Waldron's Objection to Judicial Review" (2006) 26:4 Oxf J Leg Stud 733–751.

extensively on German public law, from which the proportionality principle takes its roots, he offered a very nuanced discussion of the role of interest balancing in constitutional adjudication. In the interests of space and flow of ideas, I will focus on the most salient features of Kelsen's theory.

3.3.1.1 Constitutional Courts Make Policies, and There is No Way Around It

A striking feature of Kelsen's theory is his embrace of the political nature of constitutional adjudication head-on, and the way he builds his arguments about the desirability of judicial review around it. Judges, he maintains, are not "legal automata" capable of producing objective decisions devoid of policy component.[767] "Those who advocate the institution of a constitutional court," he says, "have never failed to note or to acknowledge the eminently political meaning of the decisions of a constitutional court."[768] It follows, for Kelsen, that the distrust of constitutional adjudication usually "rest[s] on the erroneous assumption that there is an essential difference between the function of adjudication and 'political' function."[769]

Nothing, however, could be further from the truth. "If one conceived of 'the political' as the authoritative resolution of conflicts of interests",[770] Kelsen explains, then every judicial decision,

[767] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law,* translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) 272 at 189.

[768] *Ibid* at 185.

[769] *Ibid* at 183.

[770] *Ibid* at 184.

"within certain limits,"[771] is necessarily political.[772] Now, this applies not only to norms of individual application (such as when courts decide disputes between individual parties), but also to norms of general application, including decisions concerning conflict of rights.[773]

It is noteworthy that in his discussion, Kelsen ascribes the core political character of the judicial function to its balancing function. When the law authorizes the judge "to weigh conflicting interests against each other"[774] (think proportionality!), "it confers upon the judge a power to create law",[775] meaning that the judicial function becomes endowed with the same political character as the legislative function, though (and this is a crucial point) to a smaller degree.[776] As Kelsen surmises, "every conflict of right is also a conflict of interest or power, every legal dispute therefore a political dispute."[777]

It makes no sense, therefore, to abjure (or abridge) the power of judicial review on the grounds that some of the issues that arise in the course of constitutional adjudication are subject to doubt, uncertainty, or disagreement—in the way that all political issues are. If anything, as Kelsen

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[771] *Ibid* at 184.

[772] *Ibid.*

[773] As Kelsen explains, "From a theoretical point of view the difference between a constitutional court empowered to invalidate statutes and a normal civil, criminal, or administrative court is that the latter, though it is applying as well as creating law, just like the formerm only creates individual norms, whereas a constitutional courts by applying the constitution to a fact of norm-creation, arrives at an annulment of unconstitutional statutes. A constitutional court does not enact statutes, but it destroys them by setting the actus contrarius that corresponds to the creation of law. It functions ... as a 'negative legislator'" Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law,* translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) 272 at 193-194.

[774] *Ibid* at 184.

[775] *Ibid.*

[776] *Ibid*.

[777] *Ibid*

points out, adjudication usually begins where things get doubtful and contested.[778] This is as true of constitutional adjudication as of civil adjudication (because "there is no hard-and-fast distinction between the function of a constitutional court and that of an ordinary court"):[779] courts that are engaged in balancing competing interests inevitably create new norms that are being 'subsumed' under the norms that regulate them.[780] Thus, we cannot use the policy-laden nature of proportionality balancing as an excuse for judicial surrender to the legislature.

In a similar spirit, as Aileen Kavanaugh rightly observes with respect to the judicial function at large, "[j]udicial evaluation of policies and legislative goals (including their consequences for society) is part of the 'traditional judicial toolkit'."[781] Kavanaugh urges us to recall that:[782]

> [W]hen judges are deciding medical negligence cases, it is entirely legitimate for them to consider (as they often do) the impact their decisions will have on medical practice. Similarly, if judges have to decide whether a member of the police force owes a duty of care to members of the public, they must consider the impact this would have on the conduct of police business and their ability to suppress crime, as well as consequences for legal development and the role of the courts.

Notably, according to Kelsen, the (limited) political function of a court is not a bug but a feature of judicial review. His logic proceeds like this. Courts cannot fulfill their constitutional

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[778] *Ibid* at 186.

[779] *Ibid* at 194.

[780] *Ibid* at 188.

[781] Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory*, (New York: Cambridge University Press, 2008) 188 at 195.

[782] *Ibid* at 195-196.

requirement of reviewing legislative and administrative decisions without undertaking a substantive scrutiny of the decisions themselves; consequently, because the substantive content of the legislative and administrative decisions always includes considerations of policy, courts cannot engage in a close scrutiny of these policies without potentially altering them, at least in the court's capacity as a "negative legislator."[783] In Kelsen's own words, "[t]he control of the legislative and executive functions by the courts means that legislative, executive, and judicial functions are combined in the competence of the courts."[784]

This emphasis on the policy-making role of courts is important because most arguments counselling judicial restraint—or even judicial abdication—in constitutional reasoning spring from the disavowal of the political function of courts as contrary to the principles of the separation of powers. Carl Schmitt, in his fight against judicial review, questions, on the legal-theoretical level, whether constitutional adjudication, by virtue of its political character, is even genuine adjudication.[785] For Schmitt, the answer is unequivocal: political questions, as non-justiciable questions, cannot fall within the ambit of judicial competence.[786]

The same distrust of the policy-making function of courts is at the root of the general skepticism that gives rise to strong pro-deference accounts of judicial review. Controversial policy issues, for the supporters of deference, ought to be non-justiciable. Proportionality, as unconstrained

[783] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange Ltd: New Jersey, 1945) at 281.

[784] *Ibid* at 282.

[785] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) 272 at 182.

[786] *Ibid* at 186.

moral-political reasoning, is *prima facie* suspect.[787] And yet for Kelsen, such skepticism of the policy-making role of the courts misses the mark. If the reviewing courts are banned from inquiring into substantive, policy-laden aspects of the impugned legislation, then there is no much role left for judicial oversight at all. This point is well articulated by Duncan Kennedy, who observes that the proposals for judges to defer in all situations that implicate political, economic, and social issues, "would seem to reduce the scope of judicial review so radically as to be inconsistent with the 'normal' understanding of the separation of powers"[788] under which the courts ought to strike down the law that violates the Constitution.

Jumping ahead, the fact that it is impossible to remove the policy-making element from the remit of the courts does not licence the inference that courts have, or should have, unlimited power to alter the political landscape of the state. Far from it. First, the political character of adjudication, *per* Kelsen, whilst identical in principle to the political character of legislation, differs greatly from the latter from a *quantitative* perspective.[789] Secondly, as will be expanded upon in subsequent sections, there is a plethora of doctrinal devices that can be employed in the service of limiting judicial discretion in section 1 reasoning. Hence, while we cannot remove *all* policy issues from the purview of the courts, we can remove *some*. It is in this connection that Aileen Kavanaugh observes that, in determining the scope of and justifications for judicial restraint, the real distinction must be drawn not between policies and principles as such (because such

[787] *A Critique of Proportionality*, SSRN Scholarly Paper, by Francisco Urbina, papers.ssrn.com, SSRN Scholarly Paper ID 2173690 (Rochester, NY: Social Science Research Network, 2012) at 199.

[788] *Proportionality and "Deference" in Contemporary Constitutional Thought*, SSRN Scholarly Paper, by Duncan Kennedy, papers.ssrn.com, SSRN Scholarly Paper ID 2931220 (Rochester, NY: Social Science Research Network, 2016).at 44.

[789] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) 272 at 184.

distinction cannot be practically maintained), but between "the type of policy decisions appropriate to the institutional features, competence, and legitimacy of the courts and the type of policy decisions that is beyond that competence."[790] This issue will be given a more complete treatment in the next sections.

3.3.1.2 There is No Such Thing as a Separation of Powers

Another salient feature of Kelsen's theory is his wholesale rejection of the principle of the separation of powers, at least in its most common iteration. To explicate his point, Kelsen aptly points out that in the course of constitutional adjudication, a normative paradox takes place. On the one hand, judicial control of the legislative function "is not compatible" with the traditional principle of the separation of powers[791] because such control, to the extent that it inquires into the substantive qualities of the law (i.e. policies), inevitably vests the judiciary with some legislative powers.[792] Yet on the other hand, as Kelsen admits, "the judicial review of legislation as a prerogative of the courts is instituted by those very constitutions which especially stress [the principle of the separation of powers]."[793] How to reconcile these competing principles?

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[790] Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory*, (New York: Cambridge University Press, 2008) 188 at 197.

[791] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange Ltd: New Jersey, 1945) at 280-281.

[792] *Ibid* at 280.

[793] *Ibid* at 281.

Kelsen's answer is intriguing. He believes that the *prima facie* paradox is nothing but superficial because "the separation of powers" is a misnomer. From the policy perspective, the three branches of government all engage in a law-making function, though to a different degree. Thus, a conventional trichotomy of the legislative-executive-judicial powers is rather semantic as opposed to functional.[794]

As Kelsen explains, according to the principle of the separation of powers, "the creation of general norms . . . belongs to the legislative body."[795] However, from a functional point of view, there is no essential difference between the general norms created by organs of the executive or judicial power and norms and "laws" or statues (general norms) created by the legislative body.[796] The nomenclature is different, but the feature descriptions are substantially the same.

Therefore, to insist on the clear separation of functions between the branches, for Kelsen, is to support an illusion. In his own words:[797]

> The concept of "separation of powers" . . . presupposes that the three so-called powers can be determined as three distinct coordinated functions of the State, and that it is possible to define boundary lines separating each of these three functions from the others. But this presupposition is not borne out by facts. [In reality], it is not possible to define boundary lines separating these functions from each other, since . . . *most acts of State [are] at the same time law-creating and law-applying acts.*

[794] *Ibid* at 257.

[795] *Ibid.*

[796] *Ibid.*

[797] *Ibid* at 269 [emphasis added].

For Kelsen, the attempt to conceive of the trichotomy of the branches of powers as some sorts of "watertight compartments" stems from a failure to situate them in the political purposes and setting that precipitated their creation. The idea of having different branches of government, as Kelsen recounts, has never been tied to the supposition that each of these branches is institutionally better-equipped than the other to effectuate its particular role. Instead, central to the separation of powers paradigm has originally been a negative, as opposed to a positive conception of the goal it seeks to achieve. As Kelsen submits:[798]

> The historical significance of the principle called 'separation of powers' lies precisely in the fact that it works *against a concentration* rather than *for a separation* of powers.

On this account (and this ties to the next point about the shortcomings of the competence-based theories of judicial review), judicial review of legislation as a prerogative of the courts signals not so much our trust in the superior institutional competence of the courts ("no one will claim that [judicial review] is an absolutely effective guarantee under all conceivable circumstances"),[799] but rather our "distrust of the legislative and executive organs."[800] This

[798] *Ibid* at 282.

[799] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) at 181.

[800] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange Ltd: New Jersey, 1945) at 281.

means that judicial power must be viewed not as complementary to some clear-cut functions of the other branches, but as a "kind of counterweight" to them.[801]

Consequently, as alluded before, the idea that the functions of different branches of government are substantially distinct is nothing but a fiction. Even when the Constitution expressly enshrines the principle of the separation of powers, as Kelsen avers, "the legislative function—one and the same function, and not two different functions—is distributed among several organs, but only one of them is given the name of "legislative" organ."[802] It is more prudent, therefore, to speak of *"distribution",* as opposed to separation of powers, or so Kelsen maintains.[803]

Such realistic depictions of the roles of various branches—under which policy-making functions cut through the formal taxonomies of power—allows Kelsen to eschew what Murray Hunt calls "romantic notions" of judicial or parliamentary supremacy.[804] The spatial zones of parliamentary and judicial competence[805] are nothing but fiction because such competences inevitably intersect. Thus, as Hunt suggests, and as follows from Kelsen's theory, it would be a mistake to ground deference in a formalistic notion of the separation of powers.[806] There is no need to debate

[801] *Ibid* at 281.

[802] *Ibid* at 272.

[803] *Ibid.*

[804] See, e.g., Hunt's criticism of the idealistic dualistic notion of competing supremacies (Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamfield & Peter Leyland, eds, *Public Law in a Multi-Layered Constitution* (Oxford: Hard Publishing, 2003) 337 at 343).

[805] *Ibid* at 343.

[806] *Ibid* at 347.

whether the court or the parliament must have the primary control over the direction of proportionality; instead, we need to admit that it is a question for both.[807]

3.3.1.3 The "Institutional Superiority" Rationale for Judicial Review is Problematic

Because, on Kelsen's account, the real institutional arrangements in modern states are based on the distribution, rather than the separation of power, it means that policy-making function vests in every single branch of government, albeit to a different degree. Yet therein lies a conceptual difficulty for "institutional superiority" theories of judicial review. If all branches of government make policies (and there is no way to strip them of this function without eviscerating their constitutional role), then it would be conceptually incongruent to suggest that these branches lack institutional expertise or constitutional competence to perform their role. The proponents of the conventional theory of deference cannot claim that robust judicial review of government policies is illegitimate, since the phenomenon of judicial review *a priori* includes the policy-making function.

Hence, in making a case for strong judicial review, Kelsen believed that the main question is not which institution is in the better position of more accurately answering the rights questions, but from which body emanates the greatest danger of a violation of the constitution. On this understanding, the rationale for judicial review is not positive, but negative: we create the function of constitutional review not because of our trust in courts to produce more accurate

[807] *Ibid* at 352.

answers than the legislature,[808] but because of our "distrust of the legislative and executive organs."[809] As alluded to above, we do want the legislature and the government to be judges in their own case.[810]

In amplifying his points, Kelsen suggests that any use of competence-based arguments in order to remit the supervision of the constitution back to the body that is in the best position to infringe it is nothing else but a thinly veiled attempt "of avoiding an effective guarantee of the constitution" in the first place.[811] This point, in Kelsen's view, equally applies not only to the Schmittian claim that the function of the guarantee of the Constitution should be remitted back to the monarch (in the monarch's purported capacity as *pouvoir neutre*),[812] but also to the ideology of proclaiming the parliament the guardian of the constitution "in the service of the democratic principle."[813] Hence, as follows from Kelsen's account, courts should not cede, fully or partially, their power of constitutional review to the parliament on the sole ground that parliaments are more democratically competent than courts to undertake this role.

Other commentators echo this sentiment, suggesting that competence-based rationales for judicial restraint cannot be accepted as presumptively trumping other constitutional principles

[808] *Ibid* at 181.

[809] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange Ltd: New Jersey, 1945) at 281.

[810] *The Guardians of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated and edited by Lars Vinx (Cambridge, UK: Cambridge University Press, 2015) at 175.

[811] *Ibid* at 176.

[812] *Ibid* at 179

[813] *Ibid* at 177, FN 2.

(such as Kelsen's and Dworkin's concerns about procedural fairness). In the words of Karl Klare:[814]

> For time-honored theoretical and historical reasons, the countermajoritarian concern is always a respect-worthy consideration. Limitations of institutional competence should always be considered. But that is precisely what the countermajoritarian and institutional competence concerns are—considerations in a complex balancing of multiple sometimes conflicting factors. . . . Within an overall proportionality template, it may sometimes be appropriate to subordinate those concerns to other considerations. Surely we cannot rule out this possibility *a priori*.

It follows, thus, that Kelsen wholeheartedly embraces the policy-making function of courts and, although he admits that courts sometimes can get it wrong,[815] he believes this to be the price we need to pay for the effective control of political decision-making by elected branches.

[814] Karl Klare, "Critical Perspective on Social and Economic Rights, Democracy and Separation of Powers", in HA Garcia, K Klare and LA Williams (eds), Social and Economic Rights in Theory and Practice: Critical Inquiries (New York: Routledge, 2014) at 19. `

[815] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law,* translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) 272 at 181.

3.3.1.4 Judicial Discretion Needs to be Limited

While Kelsen acknowledges the wide scope of the discretionary power of judges—and the concomitant policy-making function of courts—he does not surmise that judicial discretion is an unalloyed virtue.

Kelsen admits that judges, on account of their institutional role, do not blindly execute the law; instead, the function of judicial review is inevitably imbued with an exercise of political power.[816] That does not lead him, however, to the view that courts are like all other political actors, but for the fact their politics are cloaked by pretences of legal formality (a charge commonly levelled at courts by critical legal scholars).[817] Instead, Kelsen suggests that judicial discretion is a matter of degree: "the larger the sphere of free discretion" in the hands of the judges, the stronger the political character of adjudication.[818] And while there is no way to eliminate this discretion altogether,[819] it can be minimised:[820]

> If one wishes to restrict the power of the courts and thus to reign in the political character of their function . . . one has to make sure that the sphere of free discretion that the statutes leave to those who apply them is narrowed down as far as possible.

[816] *Ibid* at 183.

[817] Judith Shklar, "Political Theory and the Rule of Law", in Allan Hutchinson & Patrick J. Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto, 1987) 1 at 10.

[818] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law,* translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) at 184.

[819] *Ibid.*

[820] *Ibid* at 193.

3.3.2 The Principle of the Rule of Law: "Government of Laws, Not of Men"

3.3.2.1 Theoretical Background

There are many archetypes of the rule of law as a doctrinal principle, but they are all nested under the overarching ethos of limited and responsible government. According to the principle of the rule of law, human behaviour cannot be governed by the momentary "whim or self-interest"[821] of those who hold power; instead, it must be guided by general rules "fixed and announced beforehand."[822] Hence, in its basic—procedural—manifestation, the rule of law constitutes a set of formal attributes that imposes the non-substantive constraints on lawmaking.[823] In its capacity to limit the arbitrary exercise of coercive power, the rule of law is a necessary condition of any valid legal system.

As Francis Lamer observes, in Canada, the rule of law has acquired status as a "constitutional principle"[824] and became *ipso facto* a tool to be used in the arsenal of constitutional challenges.[825] Indeed, as Mary Liston highlights, "[a]s a constitutional principle, the rule of law is both part of the written and (so-called) unwritten constitution."[826] As an implicit constitutional

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[821] Joseph Raz, "The Rule of Law and Its Virtue", in The Authority of Law: Essays on Law and Morality (Clarendon Press, 1979) 211 at 220.

[822] Friedrich Hayek, *The Road to Serfdom* (London, 1944) at 54.

[823] Richard Bellamy, "The Rule of Law and the Rule of Persons" (2001). Critical Review of International Social and Political Philosophy (CRISPP), Vol. 4, No. 4, pp. 221-251, 2001. Available at SSRN:http://ssrn.com/abstract=1530464

[824] First articulated as an unwritten constitutional principle in *Roncarelli v .Duplessis*, [1959] SCR 121. Per Rand J: "[I]n the presence of expanding administrative regulation of economic activities, such a step [making official decisions based on the likes and dislikes of public officers] would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure."

[825] Francis Lamer, "The Rule of Law and the Perils of Judicial Discretion" (2012) 56 SCLR 135 at 136.

[826] Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State "(2011) in Colleen Flood & Lorne Sossin, eds., *Administrative Law In Context: A New Casebook* (Emond-

principle, the rule of law appears in the preamble to the *Constitution Act, 1867*, where it is stated that Canada is to have a "Constitution similar in principle to that of the United Kingdom."[827] The rule of law also appears as an explicit principle in the Preamble to the *Constitution Act, 1982:* "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."[828]

In order to unpack the notion of rule of law, according to Joseph Raz, it is helpful to begin with the observation that nowadays the concept has a semantic range so broad as to deprive the term of "any useful function" whatsoever.[829] Indeed, Raz suggests, the rule of law has become a by-word for "about every political ideal," separate from its actual meaning: "if the rule of law is the rule of good law then to explain its nature is to expound a complete social philosophy."[830] The same sentiment informs Strayer JA's apt observation in *Singh v Canada (Attorney General)*, that "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be."[831]

Understandably, courts have been reluctant to inflate the normative dimensions of the rule of law to include substantive elements, and have tended to recognize it as signalling commitment to formal notions of legality. Thus, this thesis confines its analysis to the exploration of the rule of

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Montgomery Publishing, 2008) 77 at 90.

[827] *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

[828] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

[829] Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) at 195.

[830] *Ibid*.

[831] *Singh v. Canada (Attorney General)*, [2000] 3 FC 185 (C.A.) at para. 33.

law as an embodiment of those principles.[832] It is an uncontroversial approach that sits well within Supreme Court's jurisprudence. As posited in *Imperial Tobacco*, the Court "has described the rule of law as embracing three principles":

> The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": . . . The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": . . . The third requires that "the relationship between the state and the individual . . . be regulated by law."[833]

In a similar vein, Raz argued that the rule of law is "an ideal of constitutional legality"[834] that should be limited to formal values that include, but are not confined to, the requirements that the law must be publicly declared, with prospective application, and possess the properties of generality, equality, and certainty. Essentially, Raz sought to analyze the ideal of the rule of law in the spirit of Hayek's famous exposition of it, specifically, that "stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[835] To put this proposition in a broader philosophical context, Raz argued that the rule of law is one of the ("negative")[836] virtues of the legal system, whereby the law must be

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[832] Though it is acknowledged that some substantive, or thick, conceptions of the rule of law would bear on the discussion of arbitrariness and judicial discretion differently than formal conceptions.

[833] *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, at para. 58, [2005] 2 SCR 473 [*Imperial Tobacco*].

[834] *Ibid.*

[835] Friedrich Hayek, "The Road to Serfdom" (1944) at 80.

[836] Raz famously conceptualizes rule of law as a "negative virtue" in "two senses": "conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have

capable of "guiding the behaviour of its subjects"[837] and "curbing" various forms of arbitrary power.[838] The role of the rule of law in limiting capricious and self-serving exercises of power is echoed in the Supreme Court of Canada's jurisprudence. The rule of law, as stated by the Court in *Reference re Manitoba Language Rights*,[839] means that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power."[840]

3.3.2.2 The Rule of Law is Not Equivalent to the Rule of Judges

When it comes to the dangers of unfettered arbitrary power, the major efforts of rule of law theory have traditionally been directed at the phenomenon of administrative discretion. At the same time, the potential of the rule of law to fetter epistemic discretion inherent in the dispensation of justice is rarely focused on. This paradox has been aptly pinpointed by Judith Shklar who argues that we often associate the rule of law itself with the rule of judges, assuming that they, as agents of reason, would be able to control the excesses of administrative and

been caused by the law itself" (Joseph Raz, "The Rule of Law and its Virtue" in *Auth Law Essays Law Moral* (Clarendon Press, 1979) 211 at 225.)

[837] Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) at 214.

[838] *Ibid* at 221.

[839] *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, [1985] SCJ No 36.

[840] *Ibid* at para 59.

legislative power.[841] The rule of law principle as conceptualised by Aristotle offers an apt example.

In Shklar's interpretation, Aristotle's argument focuses not so much on the structural limitations imposed on the law as a body of rules, but on the rationality of the judging agent called upon to deal with these rules—i.e. on the "dispenser of legal justice."[842] Central to this understanding of the rule of law is the "character one must impute to those who make legal judgements."[843] As a rational agent, according to this argument, the judge would be able to use syllogistic reasoning to preserve "the basic standards of the polity"[844] and to maintain "reasonable modes of discourse in the political arena."[845] Stripped of its "passions",[846] the rule of judges would be translated into the "rule of rationality."[847]

Perhaps the most aggrandized version of Aristotle's account of a judge as a rational agent can be found in Dworkin's theory of the rule of law, according to which the maintenance of the legal order must be shouldered by Herculean judges who cannot go astray in their reasoning as they always rely on their superhuman acumen and learning.[848] For Dworkin, the rule of law is inescapably and inevitably "the rule of reason."[849] Of course, and this goes to the heart of

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[841] Judith Shklar, "Political Theory and the Rule of Law", in Allan Hutchinson & Patrick J. Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto, 1987) 1 at 6.

[842] *Ibid* at 4.

[843] *Ibid* at 3.

[844] *Ibid* at 4.

[845] *Ibid* at 4.

[846] *Ibid* at 3.

[847] *Ibid.*

[848] R. Dworkin, "Judicial Discretion" (1963) 60 J of Philosophy 624-638.

[849] Judith Shklar, "Political Theory and the Rule of Law", in Allan Hutchinson & Patrick J. Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto, 1987) 1 at 12.

Dworkin theory, the whole argument comes with a caveat that the epistemic reliability of judicial decisions is not practically achievable, but rather aspirational.

Unfortunately, such archetypes of the rule of law—which are anchored in the ability of judges *qua* rational agents to produce rational arguments and, in so doing, to control excesses of coercive government power—can demonstrate "rational potentiality"[850] but not much more. They are very much divorced from the political contexts in which all judges operate and, as Shklar insists, are stated at a "level of abstraction so high as to make them politically irrelevant."[851]

Indeed, such arguments, like Dworkin's, conceive of judicial review as a discretion-free phenomenon[852] and, therefore, eschew the reality that judges can engage in the production of new law. However, as Kelsen has demonstrated, believing that judges are legal automata is not only institutionally naive, as such a position is oblivious to the practical realities of the policy-making discretionary power of judges, but it also undermines any laudable goal of working towards limiting judicial discretion. Unless and until we acknowledge the fact that the danger of unchecked arbitrary power can emanate not only from the executive and legislative, but also from the judicial branch, we cannot begin problematizing the doctrinal toolkit for limiting such power.

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[850] *Ibid* at 12.

[851] *Ibid* at 13.

[852] Ronald Dworkin, *Taking Rights Seriously* (London, 1977) at 116-117.

3.4 Rule of Law as a Mechanism for Fettering Judicial Discretion: Guarding the Guardians

3.4.1 The Need to Limit Judicial Discretion

We have already seen that courts, on account of their policy-making power, do not fulfill the (stereotypical)[853] account of impartial tribunals that deliberate in a syllogistic manner on the basis of the pre-existing standards. Instead, as Hans Kelsen has argued, when authorized to annul unconstitutional laws courts fulfill a classical legislative function.[854] They have a wide scope of discretionary power and, wherever warranted, can revise policy put forward by the government.[855]

In the context of proportionality, which places policy questions at the analytical heart of constitutional review, discretionary political power enjoyed by judges (normative and empirical discretion alike) only broadens. There is a risk, therefore, that an ordinary rights claimant can be left at the mercy of judicial whims unfettered by predetermined rules or that judges would use their discretionary power to impose their personal ideological priors on the rest of the population—the risk that finds its partial conceptual manifestation in the theory of judicial activism.[856] This section will argue that such risk can, and should be, minimized and that the

[853] See, e.g., Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353.

[854] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) at 272.

[855] *Ibid* at 183.

[856] As Trevor Allan argues, the demand for judicial deference is prompted by "the close interaction between law and discretion, legal principle and public policy"(T R S Allan, "Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review" (2010) 60:1 Univ Tor Law J 41 at 42).

proper conceptual vehicle for fettering excessive judicial discretion is the principle of the rule of law.

It must be observed at the outset that the constitutional restraints imposed by the rule of law operate differently in relation to different branches of government;[857] however, all these constraints unite in one single idea that the rule of law is always an antithesis to the rule of men—i.e. arbitrary power. As Raz observes: "The law inevitably creates a great danger of arbitrary power—the rule of law is designed to minimize the danger created by the law itself."[858] At the same time, in many domains of decision-making arbitrary power cannot be fully extinguished, so that the degree of arbitrary power that can be tolerated in any given system "varies with the nature of the power."[859] For instance, the legislator, even when technically conforming to the requirements of the rule of law, can still arbitrarily use their power "for personal gain, out of vengeance or favoritism."[860] Rule of law can "drastically restrict" but cannot fully eliminate these possibilities.[861] At the same time, as Raz emphatically posits, "[t]he one area where the rule of law excludes all forms of arbitrary power is in the law-applying function of the judiciary where the courts are required to be subject only to the law and to conform to fairly strict procedures."[862]

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[857] Joseph Raz, "The Rule of Law and Its Virtue", in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 211.

[858] *Ibid* at 225.

[859] *Ibid* at 221.

[860] *Ibid* at 220.

[861] *Ibid.*

[862] *Ibid.*

Just to be clear, discretionary and arbitrary power, though potentially overlapping, are not coextensive phenomena. The existence of discretion "implies the absence of a rule dictating the result in each case";[863] it provides the reviewing courts with the margin of appreciation to navigate the interpretive, normative, and empirical landscape of each particular case. Discretion is a "normative scenario" where more than one alternative is legally admissible.[864] It is not necessarily a negative phenomenon. While some commentators (such as Dicey and Hayek) suggest that discretion is always antithetical to the precepts of the rule of law,[865] I believe that this stance is unwarranted. As Kelsen has extensively documented, it is impossible to banish discretion from the exercise of political power, including the judicial one.

Conversely, power that is exercised "in breach of the rules, or at least in conflict with the policies or purposes publicly acknowledged as their proper ends or purposes, is arbitrary in the sense that there is no applicable standard of judgement."[866] On this understanding, we can define the normative core of arbitrariness as the "substitution of private for public purposes by individuals in positions of power."[867] As Joseph Raz reasons:[868]

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[863] Jones and de Villars, *Principles of Administrative Law*, 3rd ed. (Ontario: Carswell, 1999) at 177.

[864] David Duarte, "From Constitutional Discretion to the Positivist Weight Formula" in Jan-R Sieckmann, ed, *Proportionality Balanc Rights Robert Alexys Theory Const Rights* Law and Philosophy Library (Cham: Springer International Publishing, 2021) 11 at 11.

[865] See, e.g., Albert Dicey, *Introduction to the Study of the Law of the Constitution* (London: McMillan and Co.,1982 [1885]), online at http://files.libertyfund.org/files/1714/0125_Bk.pdf; Friedrich Hayek,The Road to Serfdom, Chicago: University Of Chicago Press, 1972).

[866] T.R.S. Allan, "The Rule of Law", in David Dyzenhaus & Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law*, (Oxford University Press, 2016) 201 at 202.

[867] Mary Liston, "Witnessing Arbitrariness: *Roncarelli v. Duplessis* Fifty Years On" (2011) 55:3 McGill Law J 689 at 693.

[868] Joseph Raz, "The Rule of Law and Its Virtue", in The Authority of Law: Essays on Law and Morality (Clarendon Press, 1979) 211 at 220 [emphasis added].

> "Arbitrary power" is a difficult notion, and a detailed analysis of it is not required here. It seems however, that an act which is the exercise of power is arbitrary only if it was done either with indifference to serving the purposes that alone justify use of such power, or with belief that it will not serve them. ... This condition represents *arbitrary power as a subjective concept.* It all depends on the state of mind of the men in power. As such the rule of law does not bear directly on the extent of arbitrary power. But around its subjective core the notion of arbitrary power has grown a hard objective edge.

While it is far beyond the scope of this paper to analyse the minute differences between arbitrary ("subjectively capricious") and discretionary power, my operating assumption is that the possibilities of arbitrary power dominating judicial reasoning are drastically restricted by fettering the normative and empirical discretion afforded to judges.

Which means that, while discretion will always remain an endemic part of the judicial function, not all discretion is created equal. Excessive discretion that borders on a political *carte blanche* for judges to do what they please should always be viewed as suspect. As such, we need to think deeply about the structural and institutional constraints we want to impose on judges as they fulfill their institutional role because we do not want the rule of law to turn into the rule of judges.

The idea that judicial discretion must be limited can be traced back to the account of rule of law originally espoused by Montesquieu. Judith Shklar provides the following exposition of Montesquieu's argument:[869]

[869] Judith Shklar, "Political Theory and the Rule of Law", in Allan Hutchinson & Patrick J. Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto, 1987) 1 at 2 [emphasis added].

> The Rule of Law is meant to put a fence around an innocent citizen so that she may feel secure in these and all other legal activities. That implies that public officials will be hampered by judicial agents from interfering in these volatile and intensely personal forms of conduct. *The judicial magistracy will, moreover, impose rigid self-restraint upon itself* which will also enhance the sense of personal security of the citizenry. They will fear the office of the law, not its administrators.

In a sense, the normative power of the claim to judicial self-restraint is derived not only from the abstract constitutional principle of the rule of law, but also from the Kantian principle of universalizability, according to which one must act according to the maxim that one would wish all other rational people to follow, as if it were a universal law. On this account, a judge should be expected to exercise self-restraint and stick as closely to the rules as possible, "because that is how he would want to be treated as a litigant."[870] A similar, and related, logic can be produced by placing this hypothetical judge in the Kant-inspired Rawlsian original position:[871] What terms of judicial review would a judge agree to if placed behind a veil of ignorance? Such conceptualisation of the judicial task unwittingly shifts the discussion into Aristotle's terms: because the rule of law is a rule of reason, every judge as a rational agent must "possess the psychological ability to recognize the claims of others as if these were their own."[872]

[870] *Ibid* at 3.

[871] John Rawls, *A Theory of Justice* (1971).

[872] Judith Shklar, "Political Theory and the Rule of Law", in Allan Hutchinson & Patrick J. Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto, 1987) 1 at 3.

3.4.2 Proportionality and a Broad Margin of Judicial Discretion

Recall that one of the main objections to proportionality as a framework of review is its legally unaided nature. It is submitted, by a growing community of commentators, that proportionality's individual sub-tests provide a barely disguised carte-blanche for unconstrained moral reasoning and that, viewed overall, its balancing component is just an euphemism for unbridled judicial discretion.[873] Indeed, some argue that proportionality judges have so much latitude in their reasoning that they often get away with purely "impressionistic" decisions[874]—something akin to a "black box"[875] which, as Stavros Tsakirakis bemoans, "does not lend itself to a rational reconstruction of the argumentative path that has led to a particular decision."[876] All the more so because proportionality is not just a balancing test—it is an *ad hoc* balancing test.[877] Guy Davidov summarises the fears of judicial arbitrariness in proportionality reasoning that ultimately gave rise to the deference doctrine as follows:

> The problem with the application of constitutional review is not the counter-majoritarian difficulty *per se*, then. There is a different difficulty, however, which jeopardizes the legitimacy of the process: the problem of subjectivity. . . . "There can be no law without interpretation, no interpretation without interpreters, and no interpreters without politics." We simply do not want judges invalidating legislation or government actions — which represent the wishes of society — merely because of their personal views. Subjectivity

[873] Francisco J. Urbina, *Proportionality and the Problems of Legally Unaided Adjudication* (Cambridge University Press, 2017) at 198.

[874] *Ibid* at 199.

[875] *Ibid.*

[876] Stavros Tsakyrakis, "Proportionality: An assault on human rights?" (2010) 7:3 Int J Constitutional Law 468 at 482.

[877] Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press, 2017) at 55.

means indeterminacy, and when decisions are taken in a subjective and indeterminate way the judiciary and the process of constitutional review lose their legitimacy.[878]

Strictly speaking, the fear of judicial subjectivity is not unfounded. However, while it cannot be fully banished from constitutional review (and many advocates of proportionality do make this concession),[879] it would be a fallacy to suggest that the antidote to judicial discretion (and, hence, subjectivity) is no discretion at all. Rather, the proper alternative to excessive judicial discretion is limited discretion. Indeed, as Kelsen admonishes, we should not rush to the conclusion that, if the power of the judiciary is political in nature, then it cannot, or should not be, limited.

3.4.3 Fettering Judicial Discretion: Institutional Constraints

Although it is rarely spelled out in any detail, constitutional doctrine already has at its disposal an impressive toolkit for constraining the political function of judges. According to Jack Balkin, these constraints "come from many different features of the constitutional and political system."[880]

[878] Guy Davidov, "The Paradox of Judicial Deference" (Rochester, NY: Social Science Research Network, 2006) SSRN Scholarly Paper at 147-148.

[879] For instance, as Kai Möller acknowledges, "the principle of proportionality does not provide a substantive test as to how to conduct the balancing: rather, it directs judges to 'balance' all the relevant considerations in order to decide whether the policy in question is proportionate or not." (Kai Möller, "Proportionality: Challenging the Critics" (2012) 10 Int'l J C L at 727).

[880] Jack Balkin, "The Framework Model and Constitutional Interpretation" in David Dyzenhaus & Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 241 at 247.

For instance, as Kelsen observes, the very form in which judicial deliberation is carried out—the adversarial system—by itself is quite useful in fettering "a wide sphere of free discretion."[881] In fact, as he elaborates, it is helpful "precisely with respect to [the] creative and 'political' activity of the courts, and especially insofar as the judgement aims to perform a '*balancing of interest*'."[882] How exactly does the adversarial nature of judicial procedure help to reign in the political nature of a conflict of interest? Here, Kelsen's answer is strikingly similar to the orthodox justification of proportionality: because it "at least makes sure, even if it does nothing else, *that the actual constellation of interests is clearly exposed*."[883]

3.4.4 Fettering Interpretive Judicial Discretion

Similarly, existing public law doctrine is well-equipped to limit judicial latitude with respect to constitutional interpretation (at least to a certain degree). Here, as everywhere, the role of the rule of law is to impose more detailed and less flexible rules[884] on judicial exercises of discretion so as to further the values of legal certainty and predictability.

[881] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law,* translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) at 195.

[882] *Ibid* at 195 [emphasis added].

[883] *Ibid* at 196 [emphasis added].

[884] Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press, 2017) at 55

The fact that constitutional judges, in their interpretive reasoning, are expected to defer to their own earlier precedents[885] is a germane example of setting the constraints on the political function of judging (though it must be acknowledges that Canadian courts have been slowly departing from this approach).[886] Theories of constitutional interpretation supply yet another illustration of imposing structural constraint on judicial behaviour (though some authors believe that the rhetorical function of interpretive constitutional theories far supersedes their practical value).[887] Neighbouring to interpretive constraints are what Philip Bobbitt calls "constitutional modalities" which, at least in theory, are supposed to offer some guidelines for judges in exercising their power of review.[888]

Perhaps equally important, the proportionality principle itself supplies a familiar example of a doctrinal tool that is supposed to impose interpretive methodological constraints on judicial

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[885] Aileen Kavanaugh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding Const Essays Const Theory* (Cambridge: Cambridge University Press, 2008) 184 at 185.

[886] See e.g. *Carter v Canada (Attorney General),* 2015 SCC 5 .

[887] For instance, a Jack Balkin maintains:

> Theories of interpretation probably do very little to constrain judges in practice. Most judges are not constitutional theorists, and their assimilation of constitutional theory is likely to be quite haphazard. On a multi-member court, each judge may have a different view, so the court as a whole will have no guiding constitutional theory. There is no way of ensuring that judges apply a theory of constitutional interpretation correctly or consistently, and any single judge's attempt to apply a theory will inevitably require compromises with other judges.

(Jack Balkin, "The Framework Model and Constitutional Interpretation" in David Dyzenhaus & Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law*, (Oxford University Press, 2016) 241 at 247.

[888] See Philip Bobbitt, "Constitutional Law and Interpretation", in Dennis Patterson, (ed), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed (West Sussex, UK: Blackwell Publishing, 2010) 132. Note, however, that amhy commentators criticised Bobitt's theory of modalities on the ground that it is pretty useless in guiding the judge when two modalities conflict or pull in different directions (on the notion of conflicting constitutional constitutional modalities, see Jesse Merriam, "Where Do Constitutional Modalities Come From? Complexity Theory and the Emergence of Intradoctrinalism," (2009) 3:1 J . Jurisprudence. 191 at 191–-218.

reasoning. It has been argued at great length, in Canada and elsewhere, that interest balancing inherent in any constitutional case works best when operationalised in conjunction with a formulaic proportionality superstructure (as in *Oakes*) that mandates strict following of certain steps. Indeed, by structuring the judicial reasoning and channeling the ultimate interest balancing into the last stage of the review process, proportionality is supposed to reduce arbitrariness and human bias, hence reaffirming and amplifying the common perception that the courts' decisions are made according to the rule of law, and not its antithesis—the rule of men.

All these constraints imposed on the judiciary by extant legal doctrine demonstrate that, despite the open-textured nature of constitutional texts, judges' ability to wield their political power in the guise of constitutional review is rather limited. At the same time, it is possible to narrow it down even more. Kelsen used to argue that one of the best methods of reigning in the political character of judicial function is by formulating the provisions concerning constitutional rights rigorously, so that they would "not operate with vague slogans like 'freedom', 'equality', 'justice', and so forth."[889]

3.4.5 Fettering Epistemic Judicial Discretion: The Rule of Law Edition

When it comes to fettering judicial discretion, proportionality operates as a dualistic phenomenon—almost like a double-edged sword. In its capacity as an interpretive framework, it imposes methodological constraints on judicial reasoning, thereby providing a disciplining and

[889] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law,* translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) at 193.

organising effect on judicial deliberation. At the same time, however, proportionality augments the sphere of free discretion left to the judges with respect to their assessment of normative and empirical realities inherent in rights disputes. All the more so because at its core, proportionality review is closely focused on policy measures adopted by the offending government. As Jack Balkin aptly sums up, "[w]hen constitutional courts use proportionality analysis to resolve constitutional controversies, it is common to say that they are engaged in constitutional interpretation, but they are actually engaged in constitutional construction",[890] meaning that proportionality courts make law as much as they interpret it.

On this understanding, proportionality can be understood as vesting judges with three types of broad discretionary power. The first one, as mentioned above, is interpretive and concerns the latitude judges enjoy in determining the proper construction to be placed on the governing legal rules. The second one is empirical; it speaks to judicial assessments of the reliability of factual assumptions made by the government in the course of proportionality review. Finally, the third type of discretion is normative: in the course of their reasoning, judges are routinely asked to assign moral weight to conflicting social values and goals for the purpose of balancing them against each other.[891] Singularly or in tandem, the court's exercise of normative or empirical discretion can be determinative of the outcome of the case. Indeed, as Matthias Jestaedt explains, the significance and explanatory power of the proportionality formula stands and falls on

[890] Jack Balkin, "The Framework Model and Constitutional Interpretation", in David Dyzenhaus & Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 241 at 254.

[891] As the Supreme Court has repeatedly acknowledged, proportionality "entails difficult value judgments." See, e.g., *R v KRJ*, 2016 SCC 31 at para 160, (Brown J, dissenting in part).

whether we can correctly identify the ways in which the factual and normative circumstances of the specific case are "factored into the calculation."[892]

Hence, in addition to doctrinal constraints related to constitutional interpretation, a desired institutional design for rights protection must also feature specific constraints related to empirical and normative discretion of judges. Otherwise, as Kelsen admonished:[893]

> [T]here is a danger of a politically highly inappropriate shift of power, not intended by the constitution, from the parliament to some other institutions external to it that may turn into the exponent of political forces completely different from those that express themselves in parliament.

Below I argue that the rule of law can help avert this danger by cajoling the judiciary to reallocate part of its epistemic discretionary power back to the body that made the impugned decisions in the first place—i.e. the legislature or the government. As explored in greater detail below, doctrinal constraints meant to reign in the epistemic discretion of judges should come in the form of a lower standard of proof (civil as opposed to criminal) and the balancing component of proportionality (which allows the government to retain some normative control over the version of the public good employed in determining the contours of constitutional rights). The logic here is not that the primary decision-making body is more competent to pass judgement on epistemically uncertain policy issues (as explained in the previous sections, there is no good

[892] Matthias Jestaedt, "The Doctrine of Balancing—Its Strengths and Weaknesses", in Matthias Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, 2012) at 164.

[893] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" (1931), in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law,* translated by Lars Vinx (United Kingdom: Cambridge University Press, 2015) at 193.

reason to believe that it is), but that the judges cannot be entrusted with the power to single-handedly decide the fate of the state on account of their own political preferences. Hence, deference to government is not a positive concept inasmuch as it does not render the outcome of the case more epistemically reliable, but rather a negative one—it polices the ways the judiciary navigates the contested and deeply uncertain landscape of proportionality reasoning. It *limits the subjective moral and empirical insight judges can bring to bear on the resolution of the Charter disputes*. All in all, it prevents the judiciary from usurping political power and using proportionality as an "instrument of self-empowerment."[894]

In the context of judicial law-making, the import of the rule of law's constraining force is unique. While the legislature naturally enjoys a very broad margin of appreciation in designing the policy landscape for the state, the process of making and promulgating statutes and other laws usually comports with Fuller's formal desiderata of stable and consistent laws fixed and announced beforehand. Now, because the results of judicial law-making are not known in advance—the outcomes of the case can always go one way or another depending on numerous extra-legal factors—such law-making technically trumps the main precepts of the principle of the rule of law. Hence, we ought to be particularly vigilant when policing the political discretion of judges.

It is worth mentioning that in Canada, there are already some doctrinal checks in place to limit epistemic discretion of constitutional judges. For instance, at least in theory appellate judges ought to defer to factual findings of lower courts[895]—the mechanism which is meant to narrow

[894] Niels Petersen, "Avoiding the common-wisdom fallacy: The role of social sciences in constitutional adjudication" (2013) 11:2 Int J Const Law 294–318.

[895] Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding Const Essays Const Theory* (Cambridge: Cambridge University Press, 2008) 184 at 185.

down judicial discretion during section 1 review. Unfortunately, in practice the appellate courts (especially the Supreme Court) usually decide to take the fact-finding process in their own hands and do not defer to the findings of lower courts, despite the fact that their own factual research might be extremely limited (e.g., they would not have the capacity to summon witnesses or conduct any other rigorous inquiry into the social facts of the case.)[896] This again invites the usual misgivings about the potential for judicial activism.

One last point regarding judicial discretion warrants mention. Notwithstanding all the (laudable) attempts of curbing curial latitude, its full elimination is neither possible (think Kelsen's argument about the political nature of judging), nor desirable. Indeed, as Joseph Raz admonished, no discretionary power at all may be even worse than unlimited discretion.[897] Thus, judges must hold an irreducible core of discretionary power and the doctrinal vehicle of deference must be used to prevent judicial discretion from becoming excessive.

3.4.6 Rule of Law vs Flexible Model of Deference: The Perils of Contextualism

There is yet another interesting and important feature of our rule-of-law-based account of deference that has quite tangible ramifications for the application of the *Oakes* test. The rule of law, in its functional capacity as a constitutional principle, not only allows for the imposition of

[896] For a detailed overview of the problem, see, e.g., Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Hart Publishing, Oxford 2018) at 19-21.

[897] Joseph Raz, "The Rule of Law and Its Virtue", in *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 211.

the limits to judicial discretion, but it also militates in favour of setting these limits in a predictable—uniformed—fashion.

This point is worthy of special consideration due to a bevy of pro-deference accounts of judicial review that argue for a contextual approach to deference. On such accounts, the decision regarding correct intensity of judicial review, and the attending balancing between the legislative and judicial competences, "cannot be made in the abstraction."[898] Instead, many commentators believe that such decision must be sensitive to the circumstances of each particular case,[899] "contingent on a number of context-sensitive circumstances."[900]

Aileen Kavanaugh makes a similar point. According to her:[901]

> [T]he determination of how much deference is due to the elected branches of government is deeply contextual and cannot be answered by simply demarcating subject-areas where deference is appropriate. Rather, it is the (complex) task of assessing whether the court's competence, expertise, and legitimacy equip them to judge this particular issue with confidence.

[898] Wojciech Sadurski, "Judicial Review and the Protection of Constitutional Rights" (2002) 22 OJLS 275 at 280.

[899] Matthias Klatt, "Positive Rights: Who Decides? Judicial Review in Balance" in Jan-R Sieckmann, ed, *Proportionality Balanc Rights Robert Alexys Theory Const Rights* Law and Philosophy Library (Cham: Springer International Publishing, 2021) 163 at 174.

[900] Wojciech Sadurski, "Judicial Review and the Protection of Constitutional Rights" (2002) 22 OJLS 275 at 298.

[901] Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding Const Essays Const Theory* (Cambridge: Cambridge University Press, 2008) 184 at 197.

As Kavanaugh readily acknowledges, such an approach cannot equip us in advance with any clear-cut method of identifying which issues are appropriate for judicial decision-making and which are not.[902] Instead, judges should assess their relative institutional competence with respect to the policy context of the case *de novo* in each particular case.

By the same token, Mattias Klatt urges proportionality judges to eschew any abstract reasoning that seeks to establish a certain standard of review and deference generally, and to opt instead for what he calls "the flexible model."[903] According to the latter, "the correct intensity of control must be chosen in each particular case, depending on the factual and normative circumstances"[904] (he himself proposes five: the quality of the decision, the epistemic reliability of epistemic premises used for a decision, democratic legitimacy of a decision, the material principles at stake, and the specific function fulfilled by the relevant competence in a system of appropriate division of labour between courts and legislatures).[905] Only then, as Klatt contends, can we ensure that the correct balance is achieved "between the extremes of too much and too little control" in all cases.[906]

From the perspective of the rule of law, however, such a proposition sounds alarming. Not only does it entrust the judges with the power to determine, on a purely *ad hoc* basis, the scope and the extent of deference to be extended to the legislature, but, in so doing, it only compounds the

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[902] *Ibid* at 198.

[903] Matthias Klatt, "Positive Rights: Who Decides? Judicial Review in Balance" in Jan-R Sieckmann, ed, *Proportionality Balanc Rights Robert Alexys Theory Const Rights* Law and Philosophy Library (Cham: Springer International Publishing, 2021) 163 at 172.

[904] *Ibid.*

[905] *Ibid* at 176-182.

[906] *Ibid.*

concerns about unbridled judicial subjectivity that engendered the doctrine of deference to begin with. If judges reason that they lack institutional wherewithal to decide a particular issue every time that they want the law to be upheld, without having to comply with any semblance of predetermined standards, how can such decisions be held to any standard of accountability? More importantly though, how can the rights claimants know what standard is going to be applied *before* they petition their grievance to court?

Recall that according to Kavanaugh's and Klatt's schemes (that also have meaningful conceptual purchase in the broader Canadian deference literature), there cannot be an announced-in-advanced standard of relative institutional competence, meaning that the degree of deference afforded to governments is inevitably unpredictable. And that is unpredictable, then instances of deference are also unpredictable, as are, it follows, the general contours of constitutional rights. The flexible models of deference, hence, "offend our sense of being governed by the rule of law and legal principle,"[907] as Jeff King states. He further suggests:[908]

> [I]t seems unfair to the losing party not to announce the applicable standard [of deference] in advance. It offends the moral and legal idea that a party must know the case to be met. While the 'I know it when I see it' standard has obvious practical advantages, it has an equally obvious Kafkaesque undertone.

Admittedly, Klatt is not oblivious to this possibility and does acknowledge the potential tension of the contextual approach to deference with the principle of the rule of law. However, he believes that if we can reconstruct judicial review as a conflict of institutional competences

[907] King, *supra* note 15 at 411.

[908] *Ibid.*

between the legislature and the judiciary, the concerns about predictability and the rule of law can be overcome.[909] The problem, unfortunately, is that Klatt's five contextual factors bearing on the proper degree of deference (with each of these factors themselves allowing for a range of sub-factors) are not arranged in any order of priority; nor are they decisive on their own.[910] This means that each of these assessments would conflict with each other and militate in favour of different degrees of deference; courts would be left essentially directionless in their search for the proper intensity of review. While Klatt believes that such excessive flexibility afforded by his contextual model can be overcome with "a complex canon of precedents" developed over time,[911] the history of the Court's struggle with the contextual notion of deference attests to the opposite. "Contextual analysis", in practical terms, is often a proxy for the court retroactively justifying whatever outcome it pleases.[912]

Leonid Sirota opines on the historical tension between the rule of law and Canadian deference jurisprudence as follows:[913]

> The various deference doctrines applied by the Supreme Court of Canada, especially in their current state, run afoul of the requirements of the Rule of Law. The uncertain state of many of these doctrines—especially those that apply within the *Oakes* framework . . .—is of course a problem from the standpoint of the stability of the law and congruence between previously announced legal tests and those that are actually applied. Indeed, the Supreme Court's decisions lurch between deferential and non-deferential approaches in Charter

[909] *Ibid* at 172.

[910] *Ibid* at 182.

[911] *Ibid* at 184.

[912] Davidov, *supra* note 10 at 30 cited to SSRN Report. See also Sirota, "The Rule of Law", *supra* note 8 at 89.

[913] Sirota, "The Rule of Law", *supra* note 8 at 89.

> cases. These risks appearing random or, worse, result-oriented, and thus an epitome of arbitrary power which, on the Court's own view, the Rule of Law is supposed to preclude.

Elaborating on the perils of contextual approaches to deference, Mark Tushnet has rightly pointed out that a close sensitivity to the context of the case for the purposes of calibrating the intensity of review may be problematic because in the absence of any hard rules, judicial review "may be unstable in practice."[914] Vacillating from one extreme to another, it "may degenerate into a return to a parliamentary supremacy or escalate into strong form review."[915]

It follows, thus, that a court faithful to the principle of the rule of law cannot decide on a case-by-case basis when judicial intervention is appropriate and when it is not. The very deliberation not only usurps judicial resources that are better employed elsewhere, but also creates unprecedented opportunities for tailoring the choice of the deference framework to the preferred judicial outcome. True, the orthodox deference schemes assume an ostensibly neutral stance: according to them, judges must defer to elected bodies when the deference factors so dictate. But it should not escape our notice that it is the *judges that have the last word on whether the deference factors have been met or not.*

This engenders a paradox. On the one hand, the main functional role of deference is fettering judicial discretion; yet on the other, the very act of deciding whether the conditions for affording deference in each particular case have been met creates a new—even wider—margin of judicial discretion. It is for this reason that Matthias Klatt and Johannes Schmidt have observed that true

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[914] Mark Tushnet, "New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries" (2003) 38 Wake Forest L Rev 813 at 824.

[915] *Ibid* at 814.

epistemic discretion is *discretion of classification*.[916] To decide whether empirical or normative assumptions that underlie the justification of rights-infringing policy measures are reliable (and, if so, then to what degree) is to *classify*.[917] This classification may be dispositive of the outcome of the case. It is in such situations that, as Guy Davidov aptly sums up, "deference really makes all the difference."[918]

The phenomenon may be especially pronounced in Canadian deference jurisprudence whereby the Court purports to be restrained in its deliberation of certain issues, but it is up to the Court to determine—often on an *ad hoc* basis—whether the issue is such that it warrants judicial restraint. This discretion of classification—the latitude the court has in differentiating between the issues that counsel deference and the issues that do not—"creates an illusion of limiting subjectivity, but at the same time gives the courts unlimited discretion to achieve any desired result."[919]

It is important to clarify that the problems stemming from discretion of classification do not solely afflict the "flexible and contextual" frameworks of deference. They can equally plague the bifurcated frameworks that rely on a *single-factor* distinction between cases that warrant deference and cases that do not.

Consider, for instance, one of the earliest examples of a deferential factor proposed by the Supreme Court of Canada. In *Irwin Toy*, the Court held that the legislature is entitled to margin

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[916] Matthias Klatt & Johannes Schmidt, "Epistemic Discretion in Constitutional Law" (2012) 10:1 Int J Const Law 69–105.at 71

[917] *Ibid* at 82-83, 92.

[918] *The Paradox of Judicial Deference*, SSRN Scholarly Paper, by Guy Davidov, papers.ssrn.com, SSRN Scholarly Paper ID 920607 (Rochester, NY: Social Science Research Network, 2006) at 28.

[919] *Ibid* at 30.

of appreciation on matters requiring "an assessment of conflicting scientific evidence."[920] The problem here (as elsewhere), as Niels Pietersen sharply pinpoints, is that "it is up to the courts to decide whether the social science evidence is inconclusive."[921] As he further explains:[922]

> The Courts thus have to make their own assessment of the social science evidence . . . Furthermore, they have to determine standards for evaluating whether the social science evidence is conclusive or not. However, this will be difficult to determine because there are probably few relevant questions on which there is no scientific debate. Consequently, there is often severe disagreement among the judges of the Canadian Supreme Court on whether the social science evidence is inconclusive.

This observation brings us closer to the larger point about the feasibility of devising a workable deference framework based on a single bifurcated category or factor. As decades of Supreme Court deference jurisprudence illustrate, all the "deference factors" ever proposed by the Supreme Court have served as conceptual proxies for differentiating between epistemically "easy" and epistemically "hard" cases in section 1 reasoning. Indeed, as theorized in Chapter 2 of this thesis, the current doctrine of deference proceeds on the tacit assumption that all section 1 cases can be divided into epistemically straightforward, in which the original standard of Oakes applies, and epistemically problematic—cases where multiple interests conflict and precision is elusive. While epistemically compromised cases counsel deference, epistemically easy cases—cases where the accuracy of facts and validity of assumptions is relatively uncontested—should

[920] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 at para 74.

[921] Niels Petersen, "Avoiding the common-wisdom fallacy: The role of social sciences in constitutional adjudication" (2013) 11:2 Int J Const Law 294 at 19.

[922] *Ibid.*

be decided on a non-deferential standard because their resolution does not result in judges stepping on the legislature's toes, or so we are told. On this reading of the jurisprudence, the traditional bifurcated deference factors (such as the presence or absence of the vulnerable group, polycentricity of the dispute etc) serve as shorthands for the court's attempts to divide cases into epistemically "hard" and epistemically "easy."

The problem, however—and this explains why not a single deference factor proposed by the Court has ever worked—is that, as noted above, there is no such thing as an epistemically easy section 1 case. The courts would never be able to come up with external summary generalizations that would allow them to divide constitutional cases into cases which warrant deference and cases which are amenable to the rigorous scrutiny because the basic assumption behind bifurcated deference categories is irrevocably flawed.

It follows, thus, that the only way to solve the problem of discretion engendered by the process of classification of deference cases is to remove the need to classify in the first place. The extension of deference should not depend upon arbitrarily created categories and the level of deference must be fixed and announced beforehand. The unified, across-the-board level of deference cannot be justified by the traditional competence-based concerns related to relative institutional advantages of various branches of government. As Matthias Klatt and Johannes Schmidt observe, the "establishment of a competence cannot be done universally."[923] Instead,

[923] Matthias Klatt & Johannes Schmidt, "Epistemic Discretion in Constitutional Law" (2012) 10:1 Int J Const Law 69 at 103. As the authors argue, the establishment of competence "must be done depending on the specific relation of control."

this thesis proposes to predicate a unified level of deference on the constitutional principle of the rule of law and its concomitant requirement of certainty and predictability.

Preliminary summary

This Chapter has offered an articulation and defense of the rule-of-law rationale for curial restraint in section 1 reasoning. As has been explained, the function of judicial review vests constitutional judges with broad policy-making powers and these powers only expands with the invocation of the proportionality principle as the main vehicle for interest balancing in rights reasoning. Against this background, it is important that the contours of constitutional rights would not be left "at the mercy" of judicial discretion "unfettered by previously published rules."[924] So conceptualised, the question for deference becomes not so much about the attainment of competence-based deliberation about rights, but about constraining judicial behaviour. The principle of deference demands that judges reallocate part of their epistemic discretionary power back to the primary decision-makers and that the standard for this reallocation is set in a predictable and, most importantly, unified manner.

In addition to having stronger explanatory power compared to the conventional, competence-based, justifications for deference, the rule-of-law rationale is particularly compelling because it appeals directly to a constitutional principle, rather than epistemological expediency (as is the case with the expertise-based rationale for deference) or a now-defunct version of constitutional legitimacy (as it the case with the legitimacy-based rationale that presupposes the *prima facie*

[924] Trevor Allan, "The Rule of Law", in David Dyzenhaus & Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 201 at 202 [emphasis in the original].

primacy of the majority rule). The rule of law justification also best explains available data on deference and, moving forward, can serve as a stable conceptual platform giving rise to a predictable and principled body of deference jurisprudence.

Chapter 4: Proportionality as a Moderately Deferential Standard of Review

The previous two chapters combed through the tangled yarn of conceptual and normative accounts of deference. To lend more concrete dimension to the discussion, this chapter asks what we can learn by applying our theoretical findings to practice. Chief among my observations is that it is imprudent to view deference as a doctrine that exists wholly o*utside* of the proportionality framework and that can be superimposed on it if need be. Instead, I argue that the original standard of *Oakes* enunciated in 1986 was already a moderately deferential standard of review, which means that any deference extended to the legislature in excess of "*Oakes* deference" results in a form of overly relaxed scrutiny that risks collapsing into non-justiciability. The main thrust of this chapter consists in elaborating this point.

4.1 The Received Approach

There is a tendency in Canadian constitutional jurisprudence to treat deference in falsely dichotomous terms: as an "either/or" phenomenon. Indeed, it is often assumed that, in the course of section 1 reasoning, a court should either defers to the legislature (in which case the attenuated version of the *Oakes* standard applies), or it should not (meaning that the case is decided based on the original stringent standard).

On this account, deference is viewed, in effect, as a "counter-principle" to proportionality.[925] It is problematized as a doctrinal tool that tempers the tendencies of proportionality courts to overstep the boundaries of their institutional roles[926] and is "based on the idea that in some cases the 'regular' standard should be relaxed."[927] The implicit assumption here is that the "regular" standard is non-deferential and, potentially, unduly intrusive; it purportedly requires the legislature to live up to the demands of scientific exactitude, which means that in some instances, where such exactitude might be hard to achieve, the "baseline" *Oakes* framework must be attenuated and the legislature must be afforded some latitude. A good summary of this perspective can be found in the decision in *Carter*. According to its doctrinal logic, "the courts must accord the legislature a measure of deference" because it is not wise to require "perfection."[928]

The problem, however, as will be explained below, is that it is something of a misnomer to call the original judicial treatment of the legislative facts under *Oakes* as "non-deferential." Properly understood, the *Oakes* test is already a moderately deferential standard, both as a matter of judicial fact-finding as well as its justificatory standard.

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[925] Alan D P Brady, Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach (Cambridge: Cambridge University Press, 2012) at 1. Similarly, Taggart claims that "proportionality and deference are complementary and counterbalance each other." (Proportionality and the Rule of Law Rights, Justification, Reasoning by Grant Huscroft, Bradley W. Miller, Grégoire Webber at 237, 239).

[926] Janet L. Hiebert, *The Canadian Charter of Rights and Freedoms* at 5 [unpublished], cited in Michael A. Johnston, " Section 1 and the Oakes Test: A Critical Analysis (2009) 26 Nat'l J. Const. L. 85 at 88.

[927] Guy Davidov, "The Paradox of Judicial Deference" (Rochester, NY: Social Science Research Network, 2006) SSRN Scholarly Paper at 20.

[928] *Carter v Canada (Attorney General),* 2016 SCC 4, [2016] 1 SCR13 at para 97. See also the decision in *Saskatchewan (Human Rights Commission) v Whatcott,* 2013 SCC 11, [2013] 1 S.C.R. 467, which stipulated, at para. 78 that in constitutional adjudication, "perfection" (or "scientific accuracy", or ...) is not required."

When this basic reality is denied, the result is an undiagnosed paradigm slip: the *Oakes* test (at least at the rhetorical level) ends up being improperly equated with substituting judicial policy in place of legislative policy (i.e. *merits review*), and deference is improperly conceptualized as a remedial doctrine necessary to rein *Oakes* in, and ensure it an appropriately modest place in light of the complex realities of social policy making. This approach—superimposing deference onto the purportedly non-deferential framework of *Oakes* (which is *de facto* deferential) —results in applying deference twice. As a result, the government is given a chance to prevail in a constitutional argument based on an unduly relaxed justificatory standard (or, as many observers conclude, sometimes based on hardly any scrutiny at all).[929]

4.2 Why "Proportionality Standard" does not Equate to "Merits Review"

To reiterate, the orthodox narrative suggests that only two alternatives are available to the court hearing a section 1 claim: either it holds the arguments adduced by the government to a standard of "perfection" (allegedly, pursuant to the original *Oakes* standard) or, based on the presumption that *Oakes*' stringent requirements are not "consonant with reality",[930] relaxes the strictures of *Oakes*. The problem, however, is that the starting point in this line of reasoning is misguided. Even the 1986 iteration of *Oakes* never required perfection. By its very nature, proportionality review is something entirely different from correctness standard or from merits review.

[929] Danielle Pinard, "Institutional Boundaries and Judicial Review — Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence" (2004) 25:1 SCLR 213.

[930] *RJR-MacDonald Inc v Canada,* 1995 at para 67 (per LaForest J, dissenting).

From the methodological perspective, this point is nicely summarized by Aharon Barak. As he explains the difference between proportionality and merits review:[931]

> In the course of proportionality analysis, the court does not substitute the legislator's considerations with its own. The court does not put itself in the legislator's shoes. The court does not ask itself what means it would have chosen if it were a part of the legislative body. The court exercises judicial review. It examines the constitutionality of the law, not its wisdom.

A similar point is made by Alison Young who argues that proportionality differs from merits review because judges do not have to "step into the shoes of the legislature" and "substitute their own assessment of the facts for that of the public authority."[932] The Court of Appeal for Ontario makes a similar point in *Rauca*:[933]

> The question is *not* whether the court ***agrees*** with the limitation but whether it considers that there is a rational basis for it, *i.e.*, a basis that would be regarded as being within the bounds of reason by fair-minded people accustomed to the norms of a free and democratic society.

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[931] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) at 395 [references omitted].

[932] Alison L Young, "In Defence of Due Deference" (2009) 72:4 Mod Law Rev 554–580 at 555.

[933] *Germany (Federal Republic) v Rauca* (1983), 4 C.C.C. (3d) 385, 34 C.R. (3d) 97 (Ont. C.A.) [emphasis added].

Again, proportionality analysis, as the name suggests, only inquires into the proportionality of the imposition of a putative limit on a *Charter* right; it does not require courts to substitute their opinions for legislative ones. Nor does it require epistemic impeccability. As Chief Justice McLachlin (as she then was) noted for the majority in *Hutterian Brethren*:[934]

> Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified."

Hence, the analytical point of departure for grappling with the notion of deference in proportionality reasoning is to recognize that proportionality cannot be equated to merits review. Proportionality neither requires nor licences court to step into the shoes of legislatures, only to assess the reasonableness of legislative measures from some analytical distance. To argue otherwise is to succumb to an unconscious paradigm slip.

4.3 Revealing the Nexus between Deference and Proportionality

4.3.1 *Oakes* as a Moderately Deferential Doctrinal Framework

As mentioned above, the *Oakes* test is already a moderately deferential standard of review. The qualifier "moderate" is not accidental. While it has been asserted by one British commentator

[934] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 37.

that proportionality has a presumptive minimal deference incorporated in it,[935] that does not quite capture it.

Recall that Chapter 2 defines deference as a doctrinal framework for reallocation of epistemic discretion from courts to the legislature achieved through the attenuation of traditional proportionality's standard of review and standard of proof. Once we put some practical flesh on the bare conceptual bones of this account of deference, it becomes clear that the proportionality principle provides to government almost as much control as it does to courts in regard to shaping the normative and empirical premises that "go into" section 1 reasoning.

Consider, first, the civil standard of proof that the government is supposed to meet in order to discharge its burden under section 1 of the *Charter*.[936] As explained in Chapter 2, as long as a rational epistemic actor (i.e. a judge) has at least partial confidence in the truth-value of the putative contention ("more confident than not"), then the contention stands. According to this approach, the judge may have pretty significant misgivings about the likelihood of the legislative plan succeeding; however, as long as these misgivings are outweighed by the inclination to believe in the reasonableness of the plan, the latter survives section 1 analysis. Chief Justice McLachlin (as she then was) summarized the requisite evidentiary standard as follows: "the government must show that it is *reasonable to suppose* that the limit [on the *Charter* right] may further the goal, not that it *will do* so."[937]

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[935] Alison Young, "In Defence of Due Deference" (2009) 72:4 Mod Law Rev 554.

[936] *R v Oakes* [1986] 1 SCR 103.

[937] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 37. *Ibid* at para 48.

Because, as Kyriakos Kotsoglou submits, "the standard of proof is best conceived as a mechanism for distributing errors",[938] it is logical to infer that the epistemic risks associated with factual and normative uncertainty in policy-laden section 1 cases are being almost equally distributed among the judicial and legislative branches of government (with a slight tilt towards the former). In other words, the government has almost as much epistemic authority over the normative and empirical claims that bear on the outcome of a section 1 case as the court. Hence, any doctrinal test that relies on the civil standard of proof is deferential by default.

It follows that courts, contrary to prevalent notions, do not have unqualified epistemic discretion to make factual assessments when deciding section 1 cases. They do not ask themselves whether they would be satisfied with epistemic reliability of causal connections if they were the policy decision-makers in the first instance. Instead, they ask whether they have at least partial confidence in the factual assessments made by those original decision-makers. If the answer is yes, and the court, *qua* a reasonable epistemic agent, is more confident than not in the truth-value of a particular factual hypotheses, then the civil standard of proof is satisfied, and the government prevails.

The same holds true for the normative considerations that are part and parcel of proportionality analysis. Recall that proportionality deals with two types of epistemic concerns. The first type is factual: what is the reliability of factual assumptions made by the court in order to draw the requisite inferences of fact? The second type is normative: what weight should be assigned to conflicting social values and goals for the purpose of balancing them against each other? In a

[938] Kyriakos N Kotsoglou, "How to become an epistemic engineer: what shifts when we change the standard of proof?" (2013) 12:3–4 Law Probab Risk 275 at 275. See also Larry Laudan, Truth, Error, and Criminal Law: An Essay in Legal Epistemology, Cambridge Studies in Philosophy and Law (Cambridge: Cambridge University Press, 2006) at 68.

world where, in constitutional decision-making, had 100% control over the weight of values that could potentially outweigh individual rights, and could simply disqualify any public good considerations that did not align with their personal system of ideological priors., things would be a lot different than in the world of proportionality. If a judge presiding over a case happened to be a free speech absolutist who did not think expression could be abridged for any reason at all, including the need to pre-empt violence (not to mention the commitment to equality and the respect for the inherent dignity owed to all human beings including vulnerable ones), there would be nothing stopping them from invalidating pretty much any abridgement of speech on constitutional grounds. If the governing analytical framework did not command deferential review, the government would be out of luck.

That is not, however, how proportionality works. In order to prevail under section 1 proportionality analysis, the government only has to prove that the societal good furthered by the impugned policy measures is marginally more important than the individual interest safeguarded by the *Charter* right. The Court cannot substitute this deferential review of the policy scheme with an assessment of how it would strike the normative balance (and what exactly would be put on the balancing scales) if it were a policy decision-maker in the first instance. It inquires into proportionality of the government measures—not their eternal wisdom.

It follows, thus, that the current *Oakes* test properly respects the key spheres of epistemic authority normally enjoyed by the legislature and the court. On the factual (empirical) level, *Oakes* allows the government's policy plan to be empirically contestable and still prevail as long as judges are "more confident than not" (as opposed to 100% confident) that the plan would achieve its stipulated goals. Indeed, instead of "requiring perfection", the question, as Beverley McLachlin, the former Chief Justice of Canada, puts it "is whether, on evidence, the government

has a 'reasonable basis' for concluding that a particular problem exists, that the means chosen would address it and that those means infringe rights as little as possible."[939] "Scientific demonstration", as she insists, "is not required."[940] On the normative level, proportionality allows the government to have meaningful input on the normative parameters of the balancing exercise that lies at the heart of *Oakes*.

It is not hard to see why the deferential nature of *Oakes* has been overlooked for so long. As commentators repeatedly observe, the *Oakes* test has acquired a near-folkloric status and the invocation of its individual steps has been turned into "ritualistic mantra."[941] Hence, like all rituals, it slowly became devoid of its original meaning. Consequently, in responding to the epistemic demands of section 1 adjudication, the courts ended up reinventing the wheel, including by creating a separate doctrine of deference on top of the original standard, which was already functionally deferential.

4.3.2 Bifurcated Deference Factors are Already Part of *Oakes*

There is a similar problem to the one described above. If we look closer, it turns out that all of the bifurcated deference categories that the Court resorted to over the years had already been part of *Oakes'* original analytical framework, before they were "reinvented" as part of the deference doctrine. Indeed, what the Court actually did when searching for criteria of deference was to

[939] Beverley McLachlin, "The Right Honourable Beverley McLachlin: Former Chief Justice, Supreme Court of Canada" (2020) 1:1 Wrongful Convict Law Rev 1 at 20.

[940] *Ibid.*

[941] Christopher M Dassios & Clifton P Prophet, "Charter Section 1: The Decline of Grand Unified Theory and the Trend towards Deference in the Supreme Court of Canada" (1993) 15 Advocates Q 289 at 290.

replicate the analytical work performed by various *internal* elements of the proportionality test and assign it to the newly created doctrines that seemingly existed outside of the test. While this problem of double-counting has been briskly touched upon in the course of my descriptive analysis of the individual deference factors in Chapter 1, I think it warrants further amplification.

Consider, again, the notion of vulnerable groups. According to the conventional approach, the presence of the interests of vulnerable groups militates in favour of a more relaxed scrutiny under section 1 of the *Charter*, as compared to the original stringent standard of *Oakes*. Amelioration of the standing of vulnerable people is being carved out of the remit of the courts on the theory that the legislature is more institutionally competent to attend to the issue. Indeed, pursuant to the traditional account of deference, the legislature possessed greater democratic credentials than the judiciary, which, purportedly, makes the legislature better positioned to protect parts of its constituency that are most at risk.

While it may be intuitively appealing to view the application of the "vulnerable groups" framework as a *rights-enhancing* move (as it explicitly champions the "overlooked" types of rights that might otherwise be sidelined by the competing rights explicitly enshrined in the *Charter*), the appearances dissipate once we zoom in closer. Instead of "adding" to the menu of possibilities of how vulnerable groups can be better protected, this deference factor, even on the most generous interpretation, merely replicates the existing analytical features of *Oakes.* And on a less generous one, it has the possibility of impeding the emancipatory prospects of the very people it is meant to protect because, in principle, it would allow the government to pass an attenuated version of the *Oakes* test even if a vulnerable group would be challenging the laws on *Charter* grounds *in the capacity of a claimant*. Lastly, as painstakingly explained in Chapter 3, the idea that the judiciary may lack democratic credentials to probe certain constitutional issues

(e.g., to decide how to properly assign weight to the interests of vulnerable groups in the course of *Charter* review) is rooted in a British-Canadian tradition of parliamentary supremacy which, arguably, no longer exists with the advent of a regime of constitutional supremacy institutionalized by the *Charter*.

To reiterate, there is nothing, in principle, that would prevent judges from assigning extra weight to the interests of vulnerable groups when balancing them against the claims of better-positioned *Charter* claimants in the course of an *Oakes* proportionality review. For one thing, protection of rights and freedoms (especially the rights of the most marginalized groups in society) lies at the heart of the judicial task in a constitutional democracy, so it is not clear why judges would be disqualified from performing this particular assessment. Moreover, and even more importantly for the purposes of this project, the original proportionality test already envisions the option of framing the protection of vulnerable groups as part of the salutary effects of the impugned governmental measures. Normatively and analytically, outsourcing this task to the political branches of government under the aegis of deference is a counterproductive move.

A similar analysis can be performed in relation to other deference factors. The "nature of the right" approach duplicates the analytical work that would otherwise have to be performed as part of considering the deleterious effects of *Charter*-infringing measures. The "complex regulatory response vs blanket ban" framework walks in the analytical footprints of the minimal impairment leg of *Oakes* (as originally framed). The "epistemic uncertainty" approach mirrors the job that would be normally performed by the regular standard of proof. All in all, none of the deference factors proposed by the Supreme Court add any redeeming value to the original *Oakes* framework and only result in double-counting of its existing features, not to mention the fact

that, as explained at the end of Chapter 3, all of them serve as poor conceptual proxies for the real epistemic problems that give rise to the need for courts to defer to legislative judgement.

4.3.3 Non-Traditional Evidence and the Civil Standard of Proof: Fitting A Square Peg into a Round Hole

There is yet another issue that has been intermittently mentioned throughout this thesis but that, in my opinion, merits additional emphasis. There is a widespread misconception, curial[942] and otherwise,[943] that deference in proportionality reasoning is an inevitable response to the problem of non-traditional types of evidence that must be assessed and weighed by the judiciary.

The argument goes something like this. As emphasized throughout this thesis, when tackling complex and polycentric social problems that may implicate *Charter* rights, legislatures often act with limited and potentially inadequate knowledge. As Peter Hogg elaborates, "in the realm of public policy, cogent social-science evidence often does not exist for a perceived harm, although legislators may have a 'reasoned apprehension of harm'."[944] Similarly, many social problems, as noted by the Court in *Libman*, simply do not lend themselves to precise evidentiary demonstration,[945] so all that is often available is "the application of common sense to what is

[942] See, e.g., *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467 at paras 128-135.

[943] *Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations*, SSRN Scholarly Paper, by Jula Hughes & Vanessa MacDonnell, papers.ssrn.com, SSRN Scholarly Paper ID 2544469 (Rochester, NY: Social Science Research Network, 2013).

[944] Peter W Hogg, Constitutional Law of Canada, 5th ed (suppl) (Toronto: Carswell, 2007 (loose-leaf)) at 38-39 [references omitted].

[945] *Libman*, *supra*, at para. 39

known, even though what is known may be deficient from a scientific point of view."[946] As a result, judges struggle with applying the traditional evidentiary standard envisioned by *Oakes.*

This evidentiary predicament should come as no surprise. First, as Justice Brown, writing extra curially, so rightly observes, epistemology of legal fact-finding in Canada is not well-theorized,[947] which means that in the absence of a stable conceptual foundation even some benign evidentiary developments may come across as disruptive. Secondly, and related to the above, most facts implicated in proportionality reasoning are not "adjudicative" (or "historical") facts that can be discerned by reference to past events, but are "legislative" facts that speak to "facts about society at large."[948] When assessing these legislative facts, "not all relevant considerations can be 'proved'"[949] in the traditional sense of the word. For instance, as Grégoire Webber explains, "some questions of political morality are to be asserted and justified without being evidence-based."[950] Hence, the non-traditional types of evidence (such as common sense or reasoned apprehension of harm) may sometimes be the only evidence available to the legal fact-finder seeking to establish causal connections in the course of proportionality analysis. The task, thus, becomes one of fitting the square peg of non-traditional evidence into the round hole of the *Oakes*' standard of proof. The question is how.

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[946] McLachlin J., in writing for the majority in *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 137.

[947] Russell Brown, "The Possibility of 'Inference Causation': Inferring Cause-in-Fact and the Nature of Legal Fact-Finding" (2010) 55:1 McGill Law J Rev Droit McGill 1–45.

[948] McLachlin article at 19.

[949] Grégoire C N Webber, "Proportionality, balancing, and the cult of constitutional rights scholarship" (2010) 23:1 Can J Law Jurisprud 179–202. at 192.

[950] *Ibid.*

One prominent line of case law suggests that, whenever the proportionality court has no recourse to the traditional repertoire of evidentiary sources or whenever the probative force of section 1 evidence cannot be reliably established, the *Oakes*' civil standard of proof may be applied "flexibly."[951] The precise definition of "flexibly" varies, but usually suggests that the traditional standard of proof would be lowered. To give just one example, consider the dissenting opinion of Justice La Forest in *RJR-MacDonald*, according to which in hard cases—cases afflicted by the "lack of definitive scientific explanations"[952]—"it is unnecessary . . . for the government to demonstrate a rational connection according to a civil standard of proof."[953] Such seemingly minute changes in the formulation of the *Oakes* standard of proof are notable because, as numerous commentators point out, final resolution in many of the leading *Charter* cases has turned specifically on the evidentiary burden required by section 1.[954]

A particularly thorny issue in this connection is the need to reconcile section 1's requirement of "demonstrable justification" with the realities of deliberating constitutional issues under condition of epistemic uncertainty. On the one hand, as Chief Justice McLachlin (as she then was) observed in *RJR-MacDonald*:[955]

> The choice of the word "demonstrably" [in s.1 of the Charter] is critical. The process is not one of mere intuition, nor is it of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truth.

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[951] McLachlin, "The Right Honourable Beverley McLachlin", *supra* note 20 at 24

[952] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para 66.

[953] *Ibid* at par 82.

[954] Errol Mendes, "Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart?" at para 11. For some emblematic examples, see, e.g., *Irwin Toy*, *supra* note 5; *R v Butler*, [1992] 1 S.C.R. 452; *R v Sharpe*, 2001 SCC 2.

[955] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 S.C.R. 199 at paras 128-129.

Yet on the other hand, as McLachlin CJ again observes (now writing extra curially), empirical evidence is often simply "non-existent,"[956] and "experience and common sense"[957] as well as "reason or logic"[958] may be needed to "help bridge the gap."[959] Here is how the Supreme Court describes the application of common sense as part of a "reasonable apprehension of harm" approach in *Whatcott*:[960]

> This approach recognizes that a precise causal link for certain societal harms ought not to be required. A court is entitled to use common sense and experience in recognizing that certain activities, hate speech among them, inflict societal harms.

Apart from the fact that, as commentators decry, the Court has never been consistent in determining whether non-traditional evidence can support the evidentiary justification under section 1,[961] in theoretical terms the nexus between non-traditional evidence and the need for

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[956] McLachlin, "The Right Honourable Beverley McLachlin", supra note 20 at 20.

[957] *R v Sharpe*, 2001 SCC 2 at para 94.

[958] *RJR-MacDonald Inc v.Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para 154.

[959] McLachlin, "The Right Honourable Beverley McLachlin", supra note 20 at 20.

[960] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467 at para 132.

[961] For a particularly sharp criticism of the Court's unprincipled and inconsistent jurisprudence on the demands of section 1's evidentiary standard, see, e.g., Errol Mendes, "Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart?" at paras 10-27. While some cases, as Mendes explains, adopt a "more permissive" approach to evidence, others (such as, for instance, *RJR-MacDonald Inc. v. C*anada (Attorney General), [1995] 3 S.C.R. 199 or *Chaoulli v Quebec (AG)* [2005] 1 S.C.R. 791, 2005 SCC 35) seem to be "demanding a much higher evidentiary burden." Similarly, it looks like the same absence of evidence can be dubbed by the Court either a "clear commonsensical proposition" (hence leading to the acceptance of the government's argument) or "assertion[s] of belief" (meaning that the government's argument would not be accepted), depending on what the court's preferred outcome is.

deference may be tenuous at best. Indeed, in order for a court to rely on logic or common sense to draw factual inferences from inconclusive evidence, there is no need to lower the traditional civil standard of proof or be deferential in any other way. As established in Chapter 2 of this thesis, the shifting parameter in the civil standard of proof is the degree of a justified and rationally well-founded judicial belief in the truth-value of the government's factual hypothesis. This approach to the standard of proof, as H. L. Ho explains, is agnostic with respect to the way the putative belief is established as long as the courts are cognizant of the "rationality of the reasoning which led to that end-state."[962]

To recapitulate, it is true that we cannot require the government to lead perfect scientific evidence every single time it seeks to abridge a right: "social claims are not always amenable to proof by empirical evidence"[963] and "public policy is often made on the basis of incomplete knowledge."[964] Indeed, proportionality judges should be "sensitive to policy-makers' need for a measure of latitude to consider and try previously untried alternatives."[965] This sensitivity, however, can be successfully achieved within the doctrinal parameters of the traditional civil standard of proof, even absent any "conclusive scientific evidence." Conversely, if the government cannot convince the judges—*qua* rational epistemic agents—that its empirical

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For more criticism the Court's approach, see also Danielle Pinard, "Institutional Boundaries and Judicial Review — Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence" (2004) 25:1 SCLR 213 at 240.

[962] H. L. Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth*. Oxford: Oxford University Press, 2008. Oxford Scholarship Online, 2009 at 179

[963] *Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (S.C.C.) , at para. 144.

[964] Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR 501 at 524.

[965] *R v J (KR)*, 2016 SCC 31 at para 144.

hypothesis is more likely than not to be valid, then the case should rest on the fact that the government has not discharged its onus—not on the fact that the proportionality's standard of proof and standard of review should be relaxed.

4.4 The Emergence of Super-Deference in Post-Oakes Jurisprudence

As established earlier in this chapter, the original *Oakes* standard was already moderately deferential. However, by effectively ignoring or denying this fact, courts have succumbed to an undiagnosed paradigm slip, whereby they apply the doctrine of deference *on top* of the already deferential *Oakes* standard. This double-dipping often results in extreme attenuation of the original *Oakes* standard, pursuant to which the legislature is able to prevail in a case with hardly any effort at all (such as, for instance, when the "legislator's unverified factual hypotheses are taken for granted").[966]

This approach is best described as "super-deferential" because it allows courts to stretch the conceptual and methodological parameters of the deference doctrine by availing themselves of normative and institutional justifications that have already been featured in the original *Oakes* standard. Trevor Allan takes this point even further, arguing that, to the extent that deference "purports to implement a separation of powers between the courts and other branches of

[966] Danielle Pinard, "Institutional Boundaries and Judicial Review — Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence" (2004) 25:1 SCLR 213 at 214.

government",[967] it is an "empty"[968] doctrine that simply double-counts considerations already inherent in proportionality review. While this thesis partially disagrees with Allan's account which posits that "external considerations are not commensurable with the reasons that determine the justice of the substantive outcomes"[969] (in fact, it is external considerations that led to the *Oakes* standard of proof and standard of review being moderately deferential from the very beginning)[970] —his point about double-counting is well taken.

The application of super-deference in Canadian constitutional jurisprudence has far-reaching implications not only for section 1 and proportionality methodology, but for the regime of constitutional rights itself. First, practically speaking, super-deference amounts to something close to full judicial abdication, meaning that, whenever it is applied, the contours of rights are effectively defined by majoritarian processes, and thus vulnerable to falling prey to political whims of the day. This weakens constitutional rights to the point of futility. Second, by "bowing" to the greater expertise or experience or democratic credentials of public officials to the point of displacing their views for its own, a court "forfeits the neutrality that underpins the legitimacy of constitutional adjudication."[971]

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[967] T R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65:3 Camb Law J 671 at 675.

[968] *Ibid.*

[969] *Ibid* at 688.

[970] Again, this is contrary to Allan's suggestion that it is impossible for the court to decide the degree of deference which is due (*ibid* at 689). Arguably, that is exactly what the Court did in *Oakes* when setting the requisite standard of proof and standard of review.

[971] T R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65:3 Camb Law J 671 at 676.

Another problem with retaining super-deference is that it operates in ways which are methodologically analogous to non-justiciability in that it makes broad categories of cases immune to proper judicial review.[972] Interestingly, as Trevor Allan explains, these two doctrines (deference and justiciability) even refer to the same kinds of rationales for their existence, such as "governmental expertise or superior democratic credentials."[973] Still, severing entire categories of rights from the purview of *Charter* protection based on their alleged "non-justiciability,"[974] or something akin to that, is constitutionally suspect; it eviscerates original *Charter* guarantees and leaves protection of the rights "to the operation of the political process."[975] It is clearly a suboptimal solution from the perspective of rights protection.

4.5 Where Do We Go from Here?

As established above, not only does super-deference fail to adequately guard against unjustifiable infringements on rights (by making a content of individual rights a matter for majoritarian determination),[976] but it also undermines analytical clarity in *Oakes'* reasoning. Hence, the doctrine of deference in its current form—as an external analytical framework superimposed on the doctrinal skeleton of *Oakes*—should be banished from section 1 reasoning

[972] *Ibid* at 671-672.

[973] *Ibid.*

[974] T R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65:3 Camb Law J 671 at 688.

[975] *Ibid* at 671.

[976] Indeed, as Trevor Allan admonishes, the unadulterated sovereignty of Parliament—even in a limited range of cases— is "inconsistent with our commitment to human and constitutional rights" (*ibid* at 673). Even more practically speaking, it means that the doctrine of deference allows the courts to displace the constitution by a host of ordinary statutes.

altogether. That I the reasonable conclusion to be drawn from the above analysis. The question remains, however, whether deference—as opposed to freestanding *doctrine* of deference—has any useful work to do within section 1 proportionality reasoning guided by *Oakes.*

Some commentators answer in the negative. Trevor Allan, for example, suggests that "any search for an independent *theory* or *doctrine* of deference is almost certainly misguided."[977] He further adds that "no general criteria of deference can be discovered or expounded because no coherent doctrine of deference is feasible."[978]

Aharon Barak similarly pronounces that in the context of proportionality adjudication "the notion of deference should have no place."[979] If anything, he argues "[t]he approach that a judge should defer to the legislative or executive branches does not fit a constitutional democracy."[980]

While Allan and Barak are surely correct that deference as a freestanding constitutional principle has no place in proportionality adjudication, it is also true, as argued throughout, that courts should continue to appreciate the deferential attitude already embedded in the *Oakes* framework. Without this appreciation, it is easy to move to the opposite extreme—to collapse proportionality into merits review (which courts, admittedly, often do when they hold government to an untenably high evidentiary standard, say, the criminal standard of proof)[981]). In the context of

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[977] *Ibid* at 672.

[978] *Ibid.*

[979] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) at 399.

[980] *Ibid* at 399.

[981] Danielle Pinard, "Institutional Boundaries and Judicial Review — Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence" (2004) 25:1 SCLR 213; David Kenny, "Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland" (2018) 66:3 Am J Comp Law 537.

section 1 analysis, it reeks of inappropriate judicial activism.[982] Indeed, as Yasmin Dawood cautions, an unduly onerous scrutiny of government's social science evidence "will impair Parliament's ability to regulate the democratic process."[983]

[982] For a thoughtful analysis on how the complete abdication of the doctrine of deference leads to judicial activism in the context of a judicially-created Charter right, see the dissenting reasons of Rostein J in *Fraser v Canada (Attorney General),* 2020 SCC 28 (at paras 219-230).

[983] Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election Law Cases" (2014) 32 Nat'l J Const L 173 at 188.

Conclusion

This dissertation has undertaken to map out a theory of deference within proportionality reasoning—the *what*, *why*, and *how* of curial restraint under section 1 of the *Charter*. In so doing, it sought to challenge the prevailing views concerning the doctrinal logic of, and the theoretical justifications for, dialing up and dialing down the intensity of judicial scrutiny under the *Oakes* proportionality test.

According to the orthodox narrative (which has yet to manifest itself as a coherent theoretical account of deference), whenever a court deems itself lacking in democratic or epistemic competence to inquire into normatively or empirically complex policy issues, it ought to outsource the decision-making on such issues, partially or in full, to the original decision-maker—i.e., the legislature. The absence or presence of the institutional competence to tackle the problematic epistemic questions, on this account, must be inferred contextually, having regard to the sets of bifurcated deference factors proposed by the Supreme Court.

In opposition to this approach, this thesis suggests that competence-based rationales for affording the legislature extra latitude in crafting *Charter*-suspect policy measures are misguided. Not only are they unsustainable in their own right (on both normative and descriptive grounds), but they also perpetuate unrealistic models of the separation of powers—ones which implicitly draw upon the Dworkinian distinctions between matters of principle (which are thought to be an exclusive preserve of the judicial branch) and matters of policy (which purportedly fall within the unique province of the legislature). The logical implication of this distinction, as the proponents of

mainstream accounts of deference posit, is that complex policy issues—issues that carry a *prima facie* democratic imprimatur—are not amenable to resolution by courts.[984]

Key to rejection of this approach has been Hans Kelsen's convincing demonstration, nearly 100 years ago, that among the core features of judicial review is a policy-making function, and that, by corollary, it is impossible to have judicial review without some latitude for judges to inquire into the substantive merits of governmental decisions and, therefore, to actually make policies or alter existing ones.[985] This observation, as Duncan Kennedy aptly pinpoints, is especially salient for proportionality which places judicial scrutiny of governmental policy at the analytical heart of its framework.[986] On this understanding, to stifle meaningful judicial scrutiny of policy issues under the aegis of deference is to deny any meaningful judicial review of *Charter* infractions, which runs counter to section 1 of the *Charter*.

Notably, the fact that judges *can* make policies does not suggest the political function of judging should be unfettered. Indeed, as Kelsen himself urged, there is a need to rein in excesses of judicial discretion inherent in constitutional adjudication. As this thesis explains, the prime normative motivation behind the need to limit judicial discretion is the formally construed

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[984] As the Supreme Court noted in *Vriend v Alberta*, [1998] 1 SCR 493, at para 139:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

[985] Hans Kelsen, "Who Ought to be the Guardian of the Constitution? (1931)" in Hans, "Who Ought to be the Guardian of the Constitution? (1931)" in *Guard Const Hans Kelsen Carl Schmitt Limits Const Law* (United Kingdom: Cambridge University Press, 2015).

[986] Duncan Kennedy, "Proportionality and 'Deference' in Contemporary Constitutional Thought" in Tamara Perišin & Siniša Rodin, eds, *Transformative Reconstruction of European Critical Legal Studies* (Rochester, NY: Social Science Research Network, 2020) 29 at 49.

principle of rule of law. Thus, deference in this thesis is conceptualized as a doctrinal vehicle for fettering some epistemic (normative and empirical) discretion within proportionality review and, correspondingly, reallocating that discretion back to the government. Such fettering can be achieved in any or all of these ways: (i) by attenuating the standard of proof under section 1 of the *Charter* (thereby bringing it to a moderately deferential civil standard); (ii) allowing the government to control the normative contours of the social good that can potentially outweigh an individual right, and, lastly, (iii) setting the standard of proportionality review at a unified level, which eliminates what has been described in this thesis as a discretion of classification and which brings proportionality jurisprudence closer into compliance with the rule of law principles of certainty and predictability. Because deference determines who controls knowledge in epistemically problematic legal disputes, the moderate standard of deference described above means that both the courts and the legislatures can control contestable knowledge in section 1 reasoning in almost equal measure.

On the practical level, this suggests that the *Oakes* test—in its original iteration—was already a moderately deferential standard of review. Contrary to a popular misconception, *Oakes* does not ask for "perfect scientific evidence"; rather, it gives the government a generous room for policy manoeuvre and uncertainty. Furthermore, again contrary to a common belief, proportionality does not turn adjudication into merits review, whereby judges decide issues of rights limitation as would policy decision-makers in the first instance. All of these functional requisites of proportionality are rooted in a deeper institutional perspective: the proportionality principle allows government to implement epistemically "imperfect" legislation because the alternative would be to bring the implementation of all governmental policy initiatives to a halt on account of their empirical or normative fallibilities.

Once the above points are appreciated, it becomes clear that, as a separate methodology superimposed onto the traditional *Oakes* framework, deference is an otiose doctrine. While it has an important role to play in shaping the analytical architecture of section 1 review, it has a limited application qua a doctrine *external* to *Oakes.* Its programmatic goals have already been achieved by the individual elements of the proportionality test. The only reason the separate doctrine of deference gained significant traction in section 1 jurisprudence, as explained in this thesis, is because the original *Oakes* framework was discredited by attributing to it qualities that it never actually had, and then attacking those qualities.

All in all, this dissertation proposes a more limited—but a more principled and sustainable—conception of deference in proportionality reasoning. Such a conception should not only mollify the worries of those objecting to judicial activism, but also allow judges to be faithful to their constitutional role under section 1 of the *Charter*. It should strike heretofore elusive balance between concerns about judicial usurpation and judicial abdication. Ultimately, it should constitute a middle ground between too much and too little judicial control over public policies.

The most obvious benefit of the theory of deference proposed in this thesis is that it does not require undertaking any substantive doctrinal revisions or alterations of the existing doctrinal landscape of *Oakes*, nor does it warrant the invocation of any additional deference factors or categories. Instead, it provides a solution *via negativa*. At the very most, it encourages judges to revisit the doctrinal and theoretical underpinning of the notion of the civil standard of proof in ways that align it with the conceptual models proposed by H.L Ho and Kyriakos Kotsoglou.[987]

[987] For more detail, see Section 2.4.4.2.

In addition to offering an alternative paradigm through which to theorize deference in section 1 reasoning, this thesis has a secondary ambition. It is to make a case for bringing epistemic uncertainty to the forefront of debates around judicial review. As explained above, in deciding proportionality cases, courts routinely must grapple with indeterminate facts and highly contestable normative assumptions that underlie impugned governmental measures. Unfortunately, these knowledge-related uncertainties have hitherto laid at the periphery of academic inquiry, and thoughtful debate about them has never properly emerged.[988] Most commentators suggest remedying epistemic uncertainty in rights reasoning through building epistemic competency of the judiciary, equipping judges to better process and evaluate evolving social science knowledge.[989] In other words, "better evidence" and "better judges." The problem, however, is that epistemic uncertainty cannot be fully banished from judicial review. It is not a "bug," but a "feature" of constitutional adjudication.

As such, this thesis suggests it is time for our institutional practices to become more comfortable with "not knowing" and to aim not so much for epistemic maximization, but rather for epistemic optimization in rights reasoning.[990] The first step towards this goal, as alluded to above, is

[988] Admittedly, the notion of empirical uncertainty in Charter reasoning is brought up in the landmark article by Choudhry, "So What is the Real Legacy of *Oakes*?", *supra* note 9. However, this article only raises the questions and is rather short on solutions. Furthermore, the issues raised by Choudhry have not gained adequate traction in the scholarly literature.

[989] See e.g. Jula Hughes & Vanessa MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32:1 NJCL 23; David Wiseman, "Managing the Burden of Doubt: Social Science Evidence, The Institutional Competence of Courts and the Prospects of Anti-Poverty Charter Claims Burden" (2014) 33:1 Nat'l J Const L 1; David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51:3 McGill LJ 503.

[990] Adrian Vermeule, *Law and the Limits of Reason* (New York: Oxford University Press, 2008) at 9. For more on epistemic optimization in rights reasoning, see e.g., Alexy, "Law's Ideal Dimension", supra note 26 at 184.

breaking free from the conceptual straightjacket of the traditional doctrine of separation of powers which dictates that only political branches of government can pass judgement on policy issues. Judges can and do partake in policy-making and, in so doing, routinely grapple with the limits of their knowledge and reason. Given the uncertainty that attends this judicial task, it is important that courts not have a monopoly on knowledge in deliberating the factual and normative matrix of any putative section 1 case. It is not because the legislature "knows better" and can get the facts "right." It is because, owing to the nature of uncertainty in rights reasoning,[991] more often than not *no one necessarily knows better or gets it rights.* Which is why, to avoid trampling the basic precepts of the rule of law, excessive discretionary power over the epistemically problematic landscape of policy-making must be curbed. This can be accomplished by apportioning the power of discretionary judgement on epistemic issues between the judicial and legislative branches of government (ideally, as explained in this thesis, via the analytical vehicle of deference within a proportionality analysis).

Having said all of that, the proposals of this thesis are no panacea for solving standard of review problems under section 1 of the *Charter*. Improving the *Oakes* test and ameliorating difficult epistemic issues that attend its application is a Herculean task, perhaps even a Sisyphean one. This dissertation is a step on a longer road. It is both a strength and a limitation of the theory of deference it proposes that it seeks to cover a very broad array of issues implicated in judicial review under section 1, which means that it could not possibly provide exhaustive treatment of

[991] As commentators emphasize, knowledge in proportionality cases is often "prognostic, speaking to propensities, trends, risks, future events or expected effects" (Julia Hughes & Vanessa MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32:1 NJCL 23 at 31). For a strong argument to the same end, see also Choudhry, "So What is the Real Legacy of Oakes", *supra* note 9.

all these issues within the confines of a single project. Still, I hope that the findings presented here will serve as an invitation for future research and will provide a conceptual skeleton on which to build a firmer theory of deference and judicial restraint in proportionality reasoning.

In the meantime, it is worth remembering that contrary to mainstream misconceptions, the original *Oakes* framework—with across-the-board moderate level of deference and properly understood standard of proof—already provides a great analytical blueprint for creating more principled and predictable section 1 jurisprudence which would not leave the right claimants at the mercy of ever-shifting doctrines and categories of deference. In the final analysis, as this thesis suggests, the best starting point towards addressing the epistemic dilemmas besetting section 1 reasoning is to return to *Oakes*' original roots—and then go from there.

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