ARTICLE

BEYOND *IRWIN TOY*: A NEW APPROACH TO FREEDOM OF EXPRESSION UNDER THE *CHARTER*

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CITED: (2012) 17 Appeal 21-45

INTRODUCTION

Not all expression is equally worthy of protection.[1] Yet all expression is *prima facie* constitutionally protected.[2] These two simple assertions—and the Supreme Court of Canada's struggle in resolving their inherent tension—are the subject of this paper.

The text of the *Canadian Charter of Rights and Freedoms* leaves much open to interpretation. Section 2(b) protects the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[3] The language, on its face, is broad and without apparent definitional limitations. As a result, picketing outside a business,[4] advertising to children,[5] publishing details of a divorce proceeding,[6] describing Jews to school children as "sadistic," "power hungry" "child killers,"[7] soliciting one's services as a prostitute,[8] denying the Holocaust in a pamphlet,[9] financing election advertisements,[10] creating child pornography,[11] comparing a public personality to Hitler,

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1. *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at para 50 (QL), 64 DLR (4th) 577, Wilson J [*Edmonton Journal*]; *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 at para 28 (QL), 71 DLR (4th) 68 [Rocket]; and *R v Keegstra*, [1990] 3 SCR 697 at para 83 (QL), 61 CCC (3d) 1 [*Keegstra*].
2. *Irwin Toy v Québec (AG)*, [1989] 1 SCR 927 at para 41 (QL), 58 DLR (4th) 577 ("Activity is expressive if it attempts to convey meaning") [*Irwin Toy*]. The single exception to this general rule, for reasons that are less than clear, is violence. See *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573 at para 20 (QL), 33 DLR (4th) 174 [*Dolphin Delivery*]. See also note 51, below.
3. *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
4. *Dolphin Delivery, supra* note 2.
5. *Irwin Toy, supra* note 2.
6. *Edmonton Journal, supra* note 1.
7. *Keegstra, supra* note 1.
8. *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 (QL), 56 CCC (3d) 65 [*Prostitution Reference*].
9. *R v Zundel*, [1992] 2 SCR 731(QL), 95 DLR (4th) 202 *[Zundel]*.
10. *Libman v Quebec (AG)*, [1997] 3 SCR 569, 151 DLR (4th) 385 *[Libman]; Harper v Canada (AG)*, 2004 SCC 33, [2004] 1 SCR 827 *[Harper]*.
11. *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 *[Sharpe]*.

the Ku Klux Klan and skinheads,[12] and advertising on the side of a transit bus,[13] among other things, have all been held to be protected means of expression under section 2(b).

The state can, however, seek to limit expression. Section 1 of the *Charter* permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[14] Similar to the language used in section 2(b), the constitutional dictate in section 1 is broad, leaving much to be filled in by those charged with interpreting our laws. The result, for example, is that certain limits on advertising to children are constitutionally acceptable,[15] but others on the sides of transit buses are not;[16] denying the Holocaust is permissible,[17] but calling all Jewish people "child killers" is not.[18]

These examples demonstrate that the Court has opted for a structure that defines expression very broadly, with almost every conceivable form of human expression *prima facie* protected under section 2(b).[19] The result is that section 2(b) is "little more than a formal step,"[20] leaving effectively all analysis to section 1. But at the same time, the Court has imposed a single, high bar for justification under section 1. As a result, illegally parking a car in order to make a point[21] and distributing pornography depicting real children[22] are each considered forms of expression that—in theory—require a "pressing and substantial purpose" if they are to be constitutionally limited.[23] Unsurprisingly, the Court has thus struggled mightily in the two decades since its early section 2(b) cases to find meaningful ways to assess limits under section 1. Its solutions to this dilemma include the adoption of a "contextual approach" and "deference" to the legislative branch. However, these solutions have often served to further muddy the jurisprudential waters of section 2(b).

The overall result is a jurisprudence that, according to one scholar, is replete with "contradictions and double standards,"[24] is "capricious, and [is] a captive of instincts which shift from judge to judge, case to case, and issue to issue."[25] In this view, the myth of a monolithic *Oakes* test under section 1 is belied by "case-by-case manipulation"[26] where the Court has "transformed section 1 review into an ad hoc exercise that exalts flexibility

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12. *WIC Radio v Simpson,* 2008 SCC 40, [2008] 2 SCR 420 [*WIC Radio].*
13. *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31, [2009] 2 SCR 295 [*Translink].*
14. *Charter, supra* note 3, s 1.
15. *Irwin Toy*, *supra* note 2.
16. *Translink, supra* note 13.
17 *Zundel, supra* note 9.
18. *Keegstra, supra* note 1.
19. See note 2, above and note 51, below.
20. Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40 Osgoode Hall LJ 337 at 339 [Moon, "Collapse of the General Approach"].
21. *Irwin Toy, supra* note 2 at para 41. As Peter Hogg has cheekily observed, "Fortunately, most drivers are unaware of their constitutional right to disregard parking restrictions of which they disapprove." Peter W Hogg, *Constitutional Law of Canada,* student ed (Toronto: Carswell, 2009) at 987 n 55 [Hogg, *Constitutional Law*].
22. *Sharpe, supra* note 11.
23. See *R v Oakes,* [1986] 1 SCR 103 at 138-9, 26 DLR (4th) 200 *[Oakes]* ("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").
24. Jamie Cameron, "Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on *Vancouver Sun* and *Harper v. Canada*" (2005) 17 NJCL 71 at 103 [Cameron, "Governance and Anarchy"].
25. *Ibid* at 71.
26. Jamie Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on *R. v. Butler*" (1992) 37 McGill LJ 1135 at 1147. See also *Oakes, supra* note 23.

at the expense of principle."[27] Others express frustration with a highly deferential section 1 analysis that is "unprincipled and unpredictable,"[28] "inherently indeterminate and, consequently, open to manipulation,"[29] and "a highly subjective exercise with little predictability."[30] Lest there be any doubt, these criticisms matter: The Court's struggle in crafting its jurisprudence "has resulted in a lack of transparency and a general state of confusion among lawyers, scholars and *Charte*r litigants."[31] Most troublingly, however, the purported stringency of a single *Oakes* test is contradicted by precedents that confirm the "dominant narrative" of recent scholarship that the Court's section 1 analysis has been weakened over the last two decades.[32] In the expression context, the adoption of the contextual approach and a more deferential posture in applying section 1 has eroded the foundations of expressive freedom, especially in core areas such as political speech.

The purpose of this paper is to suggest a potential solution to the "methodological anarchy" of the Court's section 2(b) jurisprudence.[33] Though there exists ample criticism of the Court's current approach, there has been little in the way of proposed alternatives. This paper is an attempt to fill that void. I argue that a new methodology is needed, one that builds a structure that explicitly contemplates what history and experience have taught us and what the Court itself has recognized on multiple occasions: Not all expression is equally worthy of protection and, consequently, not all expression should be equally protected. The Court's current section 2(b) methodology, including its application of section 1, falls short because it lacks a framework within which to concretely apply that normative judgment. Several piecemeal attempts at reform, as the criticisms above suggest, have also proved wanting.

The foundation of a new methodology lies in a purposive analysis of section 2(b), focusing on which categories of expression lie at the core of the guarantee and which lie farther afield. Those forms of expression closest to the core should be subject to the strictest form of scrutiny under section 1, while those outside the core should be subject to attenuated standards of review. Crucially, these distinctions must be evidenced by explicit tiers of scrutiny. I stress that such an approach weights neither the analysis under section 2(b) nor that under section 1 more heavily than the other, but rather matches the conceptual

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27. Jamie Cameron, "The Past, Present, and Future of Expressive Freedom under the *Charter*" (1997) 35 Osgoode Hall LJ 1 at 5 [Cameron, "Past, Present, and Future"].
28. Hogg, *Constitutional Law, supra* note 21 at 990.
29. Terry Macklem & John Terry, "Making the Justification Fit the Breach" (2000) 11 Sup Ct L Rev (2d) 575 at 593.
30. Christopher D Bredt & Adam Dodek, "The Increasing Irrelevance of Section 1 of the *Charter*" (2001) 14 Sup Ct L Rev (2d) 175 at 185.
31. Christopher D Bredt, "Revisiting the s. 1 *Oakes* Test: Time for a Change?" (2010) 27 NJCL 59 at 66 [Bredt, "Revisiting Oakes"].
32. Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian *Charter's* Section 1" (2006) 34 Sup Ct L Rev (2d) 501 at 515-521.

    Our precedents, including for example those concerning hate speech, campaign financing, and defamation, belie the notion that free speech in Canada is more strongly protected as a result of the *Oakes*. On hate speech, *c.f. Keegstra, supra* note 1, with *RAV v St Paul (City)*, 505 US 377 (1992) (a unanimous court struck down a municipal ordinance and in doing so overturned the conviction of the teenaged accused for burning a cross on the lawn of an African-American family). On campaign finance, *c.f. Harper, supra* note 10, with *Citizens United v Federal Election Commission*, 130 S Ct 876 (2010) (a 5-4 majority struck down a federal statute on the basis that corporate funding of independent political broadcasts in candidate elections cannot be limited under the First Amendment). And on defamation, *c.f. Hill v Church of Scientology of Toronto,* [1995] 2 SCR 1130, 126 DLR (4th) 129 [*Hill*] with *New York Times v Sullivan,* 376 US 254 (1964) (a 6-3 majority held that an actual malice standard must be met before press reports about public figures can be considered to be defamation). The *Hill* approach has been somewhat attenuated by two recent cases. See *WIC Radio, supra* note 12; *Grant v Torstar Corp*, 2009 SCC 61, [2009] 3 SCR 640.
33. Cameron, "Governance and Anarchy," *supra* note 24 at 71.

value attached to a category of speech under section 2(b) with an appropriate justificatory standard under section 1. Somewhat like an accordion, when section 2(b) "expands" by virtue of greater value attached to a category of speech, section 1 must similarly grow to accommodate a more searching analysis in the form of stricter scrutiny. Accordingly, the analytical work done under each of section 2(b) and section 1 can be quite unlike that done under the current approach: In some cases, there may be extensive analysis under section 2(b), while in others there may minimal review under section 1.

The proposed approach yields important benefits that address the specific criticisms levelled at the Court's current methodology, including clarity and predictability, prudential limits on the flexibility the Court affords itself, and a more efficient use of the *Oakes* test, especially its third branch. That said, my aim is not to turn the existing jurisprudence on its head. Though I hope to grapple with what I judge are valid criticisms, I hope to do so by harmonizing existing precedent with the proposed methodology to the extent reasonably possible. As I will attempt to show, the basis for the normative judgments contemplated in the proposed tiers can be found in existing jurisprudence. However, where there are inconsistencies between the existing jurisprudence and the proposed approach, they are confronted.

This paper is organized into two principal parts. In Part I, I examine existing theoretical conceptions of section 2(b) and section 1 and lay the groundwork for a new approach by highlighting existing methodological problems. In Part II, I attempt to articulate and explain that new approach. I also suggest several benefits and attempt to rebut potential objections. I conclude by briefly revisiting the Court's precedents in the area of political expression, where I anticipate the methodology proposed here will have the most significant implications. In the interests of brevity, a complete analysis on this aspect, however, is left for another day. Finally, it bears noting that this paper, with its focus only on the prototypical limits on freedom of expression, is limited in its ability to scour the vast expanse of jurisprudence concerning section 2(b). Nevertheless, I hope to offer the beginnings of an idea which can be explored further in subsequent work.[34]

I. *IRWIN TOY* AND ITS PROGENY

The *Charter's* bifurcated structure—first, the right in section 2(b) and, second, any limit imposed upon it under section 1—has resulted in a two-step adjudication process. Each step, as noted, leaves much work to the courts, as the chief interpreters of our laws, requiring that they construct an edifice to rest on the foundation provided by the *Charter*. The two steps, while intellectually distinct, are nonetheless interrelated. Given the realities of our modern regulatory state, widening the ambit of the substantive guarantee in section 2(b) necessarily increases the number of limits that must be justified under section 1. Conversely, interpreting section 2(b) as having a narrower scope would, at least theoretically, yield fewer acts of protected expression that could potentially be limited under section 1. In what follows, I will explore the theoretical background for these two steps and then chart the evolution of the Court's approach to each stage.

A. Definition and Justification

In any system of constitutional adjudication, there are at least two distinct intellectual queries that must be undertaken when the state seeks to limit a putative right: What

34. For example, I do not attempt to grapple with limits on press freedoms, including the open court principle. That said, the principle articulated here—that differentiated standards of review based on the value of the *category* of expression protected under section 2(b)—can and should guide the adaptation of the test proposed here for use in those contexts.

is the scope of the right? And is the proposed limit on it justifiable?[35] This logic, which is expressly recognized in the text of the *Charter* in its separation of the substantive guarantee provisions, such as section 2(b), from the limitations provision in section 1, creates an interpretive dilemma: How much "work" should be done by each section? Phrased another way, the question is whether rights can be restricted "as a matter of definition, or whether restrictions should be imposed exclusively under section 1."[36] The *Charter* itself is equivocal on these questions. It offers a conclusion—collective values can sometimes trump individual rights—but it fails to indicate "how the tension between its rights and limits should be resolved."[37] The language of section 1 is "as flexible as it is blunt."[38]

There are ostensibly two ways in which to approach the question of how to conceptualize the work of section 2(b) and section 1. First, one could adopt a definitional conception that focuses on the meaning of the substantive entitlement. Second, one could adopt a justificatory interpretation that focuses on defining exceptions to a broad substantive entitlement. As Jamie Cameron has noted, "a definitional conception of the rights assumes that the guarantees are themselves qualified by political, social and cultural values."[39] To extend this thought further, a definitional conception is necessarily a *purposive interpretation* because it is founded on the values underlying the right.[40] Even though both the definitional and justificatory conceptions ultimately require normative judgments—which, of course, are inherent in any attempt to balance competing values—by engaging in these analyses at different stages of the adjudication process, each approach reflects a fundamentally different notion about how individual rights are understood and protected.

The American approach to the First Amendment serves as a useful illustration. The *Bill of Rights*, unlike the Canadian *Charter* with its "synergistic" relationship between the rights guarantees and section 1,[41] lacks a limitations clause, leaving the enumeration of rights in unqualified terms to suggest a "rigid presumption in favour of individual liberty."[42] The U.S. Supreme Court, in this vein, has rejected the idea of limiting First Amendment

35. As Hogg has observed, such inquiries are required whether a limitations clause exists explicitly in the text of the constitutional document, as in the case of the Canadian *Charter and the European Convention on Human Rights*, or whether limitations have been implied by the judiciary, as in the case of the American *Constitution*. Hogg, *Constitutional Law, supra* note 21 at 818-19. See also Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 UTLJ 369 at 369-70 [Barak, "Proportional Effect"].
36. Jamie Cameron, "The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy Ltd v. Attorney-General of Quebec*" (1989) 35 McGill LJ 253 at 254 [Cameron, "Original Conception"].
37. Cameron, "Past, Present, and Future," *supra* note 27 at 7.
38. Jamie Cameron, "The First Amendment and Section 1 of the *Charter*" (1990) 1 MCLR 59 at 65 [Cameron, "First Amendment"].
39. Cameron, "Original Conception," *supra* note 36 at 260.
40. See Aharon Barak, *Purposive Interpretation in Law*, trans by Sari Bashi (Princeton: Princeton University Press, 2005) [Barak, *Purposive Interpretation*]; *R v Big M Drug Mart*, [1985] 1 SCR 295 (QL), 18 DLR (4th) 321 [*Big M*].
41. *Keegstra, supra* note 1 at para 46.
42. Cameron, "First Amendment," *supra* note 38 at 60.

rights through balancing tests as "startling and dangerous."[43] Such balancing, of course, is routine under the *Charter*; indeed, it is the very purpose of section 1. That said, common sense suggests that a right to "freedom of speech"[44] cannot be absolute, because, "as a matter of practical reality, collective life and an atomistic conception of the individual cannot co-exist."[45] The result, unsurprisingly, has been a definitional limitation of the First Amendment right. In other words, the U.S. Supreme Court has concluded that some speech is not—in law, if not in fact—"speech." In these "discrete, isolated exceptions,"[46] identified with the aid of the nation's history and traditions, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[47] Accordingly, one cannot claim First Amendment shelter for obscenity, fraud, defamation and a host of other forms of expression.[48]

In Canada, the seminal case in the Supreme Court's freedom of expression canon is *Irwin Toy v Québec (AG)*. On first blush, it might have appeared that the initial language of *Irwin Toy* suggested that the Court would also adopt a definitional limitation on section 2(b). The three-judge majority acknowledged that "[c]learly, not all activity is protected by freedom of expression," and "the first step to be taken in an inquiry of this kind is to discover [what activity] may properly be characterized as falling within 'freedom of expression.'"[49] Surprisingly, then, the Court went in the opposite direction in its ultimate decision, adopting an essentially literal interpretation of the guarantee.

In *Irwin Toy,* the Court came to the sweeping conclusion that "[a]ctivity is expressive if it attempts to convey meaning" and thus "prima facie falls within the scope of the guarantee."[50]

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43. Roberts CJ, writing for eight members of the court, concluded in unequivocal terms:

    > The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document prescribing limits, and declaring that those limits may be passed at pleasure [internal citations and quotation marks omitted].

    United States v Stevens, 130 S Ct 1577 at 1585 (2010) [*Stevens*].

44. The relevant portions of the First Amendment to the U.S. Constitution reads: "Congress shall make no law … abridging the freedom of speech, or of the press …" US Const amend I.
45. Cameron, "Original Conception," *supra* note 36 at 257, n 16.
46. Cameron, "First Amendment," *supra* note 38 at 60.
47. Stevens, *supra* note 43 at 1585-86, citing New York v Ferber, 458 US 747 at 763-64 (1982) [Ferber].
48. See e.g., *Roth v United States*, 354 US 476 at 483 (1957) (obscenity); *Beauharnais v Illinois*, 343 US 250 at 254-55 (1952) (defamation); *Virginia Bd of Pharmacy v Virginia Citizens Consumer Council,* 425 US 748 at 771 (1976) (fraud); *Brandenburg v Ohio*, 395 US 444 at 447-49 (1969) (incitement); *Giboney v Empire Storage & Ice*, 336 US 490 at 498 (1949) (speech integral to criminal conduct); and *Ferber, ibid* (child pornography depicting real children).

    The U.S. Supreme Court has permitted qualifications on First Amendment rights in certain instances, effectively creating a common law limitations clause. For a brief overview of this point, see Hogg, *Constitutional Law, supra* note 21 at 819. For a more detailed study, see Cameron, "First Amendment," *supra* note 38.
49. *Irwin Toy, supra* note 2 at para 40.
50. *Ibid* at para 41.

This is the language of a justificatory approach, not a definitional one.[51] Arguably, the Court went even further along the justificatory path when it suggested that the existence of any "meaning" is to be judged not objectively, but subjectively, from the perspective of the person alleging a section 2(b) infringement.[52]

Strong arguments have been advanced in favour of a justificatory approach. In contrast to the "doctrinal subterfuge" of the American approach,[53] the *Charter's* limitations clause legitimized the concept of balancing collective interests against individual rights claims and allowed for the development of a "coherent theory of justification."[54] In doing so, section 1 also brought a kind of "realism" to Canadian jurisprudence.[55] As a corollary, it has been argued that a definitional conception, which necessarily "invokes collective values to restrict the substantive guarantee," is flawed because it "will inevitably conflict with [the *Charter's*] self-conscious separation of the rights and their limitations."[56]

Ultimately, though, the argument in favour of a justificatory approach is unsatisfactory for two reasons. First, the approach is deeply counterintuitive. There is a compelling cultural instinct and a historic orthodoxy that suggest not all speech is created equal.[57] And yet a justificatory interpretation of section 2(b) treats all speech as equal because it must; it is a literal, acontextual reading of the guarantee. This is troubling not only for the speech that lacks relative value, but also for the speech that we purport to hold dear. As Cameron observes, "finding a prima facie violation in *all* cases of interference legitimizes *no* expression because it does not determine the outcome in *any* case."[58] Furthermore, a justificatory approach stage presupposes that a single freedom of expression right actually exists. There is no basis for this conclusion. One cannot reasonably argue that perjury and fraud, for example, have a history of being protected though they are undoubtedly expressive acts.[59] One might reasonably doubt whether framers of the *Charter* intended to constitutionalize such expression and subject it to justification anew. Rather, our legal heritage suggests—and twenty years of *Charter* jurisprudence confirms—that the right

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51. There was one aspect of the decision that was definitional in nature: It was "clear" to the Court that "a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen." *Ibid* at para 42. As authority, the majority cited the opinion of McIntyre J in *Dolphin Delivery*, which merely repeated the same assertion, resulting in a tautology. McIntyre J had said in *Dolphin Delivery* that "freedom [of expression], of course, would not extend to protect threats of violence or acts of violence." The majority in *Irwin Toy* confirmed this by adding that "freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure." Though one can easily infer why a purposive analysis of section 2(b) would result in the exclusion of violence from the right's ambit, neither statement offers a thorough explanation of the exclusion.
52. Three years later, eight justices of the Court, for example, joined an opinion that held:

    > The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which, in some cases, may amount to no more than physical arousal or shock. Rather, the meaning of the work derives from the fact that it has been intentionally created by its author. To use an example, it may very well be said that a blank wall in itself conveys no meaning. However, if one deliberately chooses to capture that image by the medium of film, the work necessarily has some meaning for its author and thereby constitutes expression.

    R v Butler, [1992] 1 SCR 452 at para 72 (QL), 89 DLR (4th) 449, Sopkina J.
53. Cameron, "Original Conception," *supra* note 36 at 259.
54. *Ibid* at 258.
55. *Ibid* at 259.
56. *Ibid* at 261.
57. See note 1, above.
58. Cameron, "First Amendment," *supra* note 38 at 64 [emphasis in original].
59. The U.S. Supreme Court, which tends to indulge in historical analysis more than the Supreme Court of Canada, has observed that a few "historic and traditional" forms of expression, including perjury, defamation, and fraud, have never been entitled to any legal protection in the common law world. *Simon & Schuster v Members of NY State Crime Victims Bd*, 502 US 105 at 127 (1991).

to freedom of expression is better conceptualized as a panoply of distinct protections that share a common thread and emerge organically from our legal tradition, even though they may evolve over time.[60]

The second reason a justificatory approach is unsatisfactory is more pragmatic, emerging from two contradictory doctrines that have been "warmly, even fervently, embraced" by the Court.[61] On the one hand, we have the doctrine that rights must be given a generous interpretation.[62] On the other, we have the doctrine from *R v Oakes* that a stringent standard of justification is required under section 1.[63] As Peter Hogg has observed, it is essentially impossible to reconcile these two assertions:

> The broader the scope of the rights guaranteed by the *Charter*, the more relaxed the standard of justification must be. The narrower the scope of rights, the more stringent the standard of justification must be. It is not possible to insist that the *Charter* rights should be given a generous interpretation, that is, wide in scope, and at the same time insist that the standard of justification under section 1 should be a stringent one. One of these two contradictory positions must give way.[64]

Hogg, writing in 1990, was prescient in suggesting that "judicial review [under section 1] will become even more pervasive, even more policy-laden, and even more unpredictable than it is now" were this contradiction to remain unresolved.[65]

The Court would grapple in the years after *Irwin Toy* with the implications of these two criticisms. Though the Court has not adopted a definitional conception of section 2(b), as its American counterpart did with the First Amendment, subsequent cases have seen the generosity of *Irwin Toy* tempered by a halting willingness to distinguish between the value ascribed to different kinds of expression under section 2(b). At the same time, the stringency of *Oakes* has been substantively diluted with the emergence of the contextual approach and a pronounced willingness to defer to the judgement of the legislative branch. These developments, and the Court's attendant struggles with them, are explored in the subsequent two sections.

B. Section 2(b): Finding the Core of the Guarantee

The Supreme Court has long recognized it as "obvious" that the *Charter* is "a purposive document."[66] Justice Dickson (as he then was), writing for a unanimous Court in *Hunter v Southam*, concluded that "[i]ts purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines."[67] In *R v Big M Drug Mart*, decided the next year, Chief Justice Dickson extended that reasoning to conclude that "[t]he meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee."[68] The Chief Justice counselled that the interpretation should be "a generous rather than legalistic one" but at the same time

60. *Keegstra, supra* note 1 at para 192, McLachlin J, dissenting ("The enactment of s. 2(b) of the *Charter* represented both the continuity of these traditions, and a new flourishing of the importance of freedom of expression in Canadian society").
61. Peter W Hogg, "Interpreting the Charter of Rights: Generosity and Justification" 28 Osgoode Hall LJ 817 at 818 [Hogg, "Generosity and Justification"].
62. *Hunter v Southam,* [1984] 2 SCR 145 (WL Can), 11 DLR (4th) 641 *[Hunter]; Big M, supra* note 40.
63. *Oakes, supra* note 23.
64. Hogg, "Generosity and Justification," *supra* note 61 at 819.
65. *Ibid.*
66. *Hunter*, *supra* note 62 at para 19.
67. *Ibid.*
68. *Big M*, *supra* note 40 at para 116.

it should "not … overshoot the actual purpose of the right."[69] It would thus seem that a purposive interpretation of the *Charter*, somewhat like Goldilocks' taste in porridge, should not be too hot or too cold, but just right.[70] It is clear from the Chief Justice's language that generous interpretation is part of a purposive one and not the other way around or, as Hogg has counselled, "[g]enerosity is a helpful idea only if it is subordinate to purpose; otherwise, it is bound to lead to results that are inconsistent with a purposive approach."[71]

Given the importance accorded to a purposive interpretation of rights in early *Charter* cases, it is perplexing that the approach was deemphasized, if not ignored, in the Court's interpretation of section 2(b). Though the Court's decision in *Irwin Toy* does briefly contemplate the purpose of the guarantee, expression itself is defined without "any explicit reference to the values that are said to underlie the freedom."[72] So, while the Court did identify three "principles and values underlying the vigilant protection of free expression in a society such as ours"—namely seeking the truth, participating in social and political decision-making and human flourishing—the Court failed to use values to animate the definition of expression.[73]

The logic of *Irwin Toy* is further disappointing because the same Court just months earlier, in its first interpretation of section 15, had grounded its opinion in an analysis of the underlying purposes of the equality guarantee. In *Andrews v Law Society of British Columbia,*[74] the Court openly tackled the difficult question of "[w]hat does discrimination mean?" and considered multiple potential options along the definition-justification spectrum. On one end of the definition spectrum, Justice McLachlin (as she then was) advocated an approach that would capture only those distinctions that were "unreasonable or unfair," suggesting a heavily values-driven inquiry.[75] On the other end of the spectrum, Hogg argued that "a distinction between individuals, on any ground" was sufficient to constitute a breach of section 15.[76] It is not without some irony, in light of its later holding in *Irwin Toy*, that the Court unanimously rejected the Hogg approach on the basis that "it virtually denies any role for s. 15(1)."[77] The Court ultimately settled on a middle ground, concluding that the now famous "enumerated and analogous grounds" approach "most closely accords with the *purposes* of s. 15."[78] My point here is not to pass judgment on whether the Court's decision in *Andrews* was correct or not, but rather to emphasize that an inquiry as to the purpose of section 15 was the principal guide in that case.[79] Indeed, though the *Andrews* methodology has not survived wholly intact,[80]

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69. *Ibid* at para 117 [emphasis added].
70. See e.g., "The Story of the Three Bears," in Maria Tatar, ed, *The Annotated Classic Fairy Tales* (New York: Norton, 2002) 245.
71. Hogg, "Generosity and Justification," *supra* note 61 at 821.
72. Moon, "Collapse of the General Approach," *supra* note 20 at 341.
73. *Irwin Toy*, *supra* note 2 at para 53. Indeed, the values only come into play, under the *Irwin Toy* framework, if an impugned law infringes expression in effect, but not in purpose, in which case the onus is on the party claiming an infringement to show their expression is tied to one of the three identified values. This purpose/effects branch of *Irwin Toy* has all but fallen into disuse. I see no point in revisiting it.
74. [1989] 1 SCR 143 (QL), 18 DLR (4th) 321 [*Andrews*].
75. *Ibid* at para 42.
76. *Ibid* at para 41. The respective positions of McLachlin CJC and Hogg in the context of section 15 are somewhat ironic, as each has advocated the inverse position in the context of section 2(b).
77. *Ibid* at para 44.
78. *Ibid* at para 46 [emphasis added].
79. *Ibid* at para 32 (citing *Hunter* and *Big M* for their emphasis on a purposive interpretation of *Charter* rights).
80. See generally *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

a purposive interpretation of section 15 is very much alive.[81] Though it was decided only months after *Andrews*, the decision in *Irwin Toy* never explained why section 2(b) must be interpreted more broadly than section 15.[82]

As the contrast between section 2(b) and section 15 illustrates, a "[p]urposive approach will normally narrow the right,"[83] while a generous approach will do the opposite. For this reason, a purposive approach works "in perfect harmony" with a stringent standard under *Oakes*.[84] It is thus perhaps unsurprising that only once in the last decade of section 15 cases has the Court upheld an infringement among all the cases it has considered.[85] That record, of course, stands in marked contrast to the bevy of limits of section 2(b) that have been deemed both reasonable and justifiable.

Though the Court has never backtracked from the assertion in *Irwin Toy* that the purpose of section 2(b) is to protect all expression, it has introduced a unique concept to more closely tie certain forms of speech to the guarantee. In addressing what he called the "lacuna" of section 2(b) jurisprudence, Chief Justice Dickson in *R v Keegstra* concluded that it would be a mistake "to treat all expression as equally crucial to those principles at the core of s. 2(b)."[86] As an example, the Chief Justice noted that he was "very reluctant to attach anything but the highest importance to expression relevant to political matters."[87] The innovation in *Keegstra* of creating a core of the guarantee can be seen as a proxy for a new purposive analysis, much like that advocated here.[88] That political expression lies at the "core" of the section 2(b) guarantee is now—in theory—an article of faith at the Court.[89] In contrast, as the Court would later conclude, "[i]t can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression."

The Court, however, has been highly inconsistent in its application of the "core" concept and, in the process, has undermined the very idea. For example, in *Thomson Newspapers*

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81. *Kapp*, *ibid* at para 14 (discussion concerning "The Purpose of Section 15").
82. I do not mean to suggest, however, that section 2(b) cannot be more broadly interpreted, merely that justification for that conclusion is wanting in *Irwin Toy*.
83. Hogg, "Generosity and Justification," *supra* note 61 at 821.
84. *Ibid*.
85. See *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381. An earlier analysis has shown only once prior to 2000 has the outcome of a section 15 case turned on the application of section 1. See Bredt & Dodek, *supra* note 30 at 179 n 13.
86. *Keegstra*, *supra* note 1 at para 82.
87 *Ibid* at para 92.
88. It is remarkable, however, that a majority of the Court has never actually provided an exhaustive analysis of the purpose of section 2(b). The most significant analysis was offered in *Keegstra* by McLachlin J (as she then was), writing in dissent. See *ibid* at paras 168-93.
89. See *Harper*, *supra* note 10 at para 11, McLachlin CJC & Major J, dissenting ("Political speech, the type of speech here at issue, is the single most important and protected type of expression. It lies at the core of the guarantee of free expression"); *R v Guignard*, 2002 SCC 14 at para 20, [2002] 1 SCR 472 [*Guignard*] ("Some forms of expression, such as political speech, lie at the very heart of freedom of expression"); *Sharpe*, *supra* note 11 at para 23 ("some types of expression, like political expression, lie closer to the core of the guarantee than others"); Thomson Newspapers v Canada (AG), [1998] 1 SCR 877 at para 92 (QL), 159 DLR (4th) 385 ("there can be no question that opinion surveys regarding political candidates or electoral issues are part of the political process and, thus, at the core of expression guaranteed by the *Charter*") [*Thomson*]; *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at para 76 (QL), 77 DLR (4th) 385 ("Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State") [*Committee for the Commonwealth*]; and *Edmonton Journal*, *supra* note 1 at para 3 ("Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions").

v Canada (AG),[90] a case concerning a ban on publishing opinion poll results, Justice Bastarache concluded that "there can be no question that opinion surveys regarding political candidates or electoral issues are part of the political process and, thus, at the core of expression guaranteed by the *Charter*."[91] But a decade later, in *R v Bryan*,[92] a case concerning a ban on publishing election results, Justice Bastarache concluded that such information was "at the periphery of the s. 2(b) guarantee."[93] Two points are notable here: First, no explanation was offered for why election results were at the periphery of the right while opinion poll results were at the core. Second, the dissenting opinion in *Bryan* concluded that the speech in question was "political expression [and thus] at the conceptual core of the values sought to be protected by s. 2(b)."[94] Crucially, while the Court in *Thomson* and the dissent in *Bryan* declined to distinguish between types of political expression (conceptualizing them at a higher level of abstraction), the majority in *Bryan* was willing to conclude that certain political expression is at the core of the guarantee, whereas other types are not (conceptualizing the right at a lower level of abstraction). It is worth noting that in *Thomson*, the opinion poll results were at the core because they were "part of the political process."[95] No doubt it can also be said that election results are part of the political process. It is unclear then why Justice Bastarache and a majority of the Court evolved from conceiving of the right at a higher level of abstraction (as in *Thomson*) to a lower level (as in *Bryan*). It is clear, however, that the impact of this evolution was reduced protection for certain forms of political expression.

Similar problems surface with the Court's analysis in campaign finance cases. In *Libman v Quebec (AG)*,[96] a unanimous Court concluded that "[p]olitical expression is at the very heart of the values sought to be protected by the freedom of expression guaranteed by s. 2(b) of the Canadian *Charter*," with no distinction being drawn between political advertising and other kinds of political expression.[97] Less than ten years later, however, in *Harper v Canada (AG)*,[98] the next major campaign finance case, Justice Bastarache observed for the majority that "[m]ost third party election advertising constitutes political expression and therefore lies at the core of the guarantee of free expression," but that "in some circumstances, third party election advertising may be less deserving of constitutional protection where it seeks to manipulate voters."[99] The Court was silent on the question of what manipulative advertising meant, how it was to be distinguished from merely persuasive advertising which was ostensibly at the core of the guarantee, and on what basis manipulative advertising was outside the core of the guarantee. Again, there is a shift in the conceptualization of the right, evidencing a willingness to confidently slice and dice how the right is conceptualized: In *Libman*, all political expression is at the core; in *Harper, most* political expression is at the core, but *some* is not.

The initial recognition of a core of the expressive right under section 2(b) in *Keegstra* held out the promise that the Court would have a principled means to solve one half of the two-pronged conundrum posed by the breadth of *Irwin Toy* and the stringency of *Oakes*. Core expression, determined based on an assessment of the values underlying section 2(b), could have been met with the most stringent standards of justification under section 1,

90. *Thomson*, *supra* note 89.
91. *Thomson*, *supra* note 89 at para 92.
92. *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527 [*Bryan*].
93. *Ibid* at para 30.
94. *Ibid* at para 99.
95. *Thomson*, *supra* note 89 at para 92 [emphasis added].
96. *Libman*, *supra* note 10.
97. *Ibid* at para 29.
98. *Harper*, *supra* note 10.
99. *Ibid* at para 66.

while expression outside the core could have been met with a more attenuated standard of review. Unfortunately, however, the inconsistent manner in which the Court has gone about determining what lies at the core of the guarantee has left the innovation in *Keegstra* wanting. Moreover, the willingness to exclude certain forms of political expression from the core is especially alarming, because political expression is the prototypical form of core expression.[100] Unfortunately, the Court has fared no better in its approach to section 1, as the next section will attempt to demonstrate. Indeed, the Court's evolving methods under *Oakes* may also suggest why the Court has undervalued specific expression that one would otherwise have assumed lies at the core of section 2(b).[101]

C. Section 1: The Rise of Context and Deference

The first judicial innovation in the Court's approach to section 1 came less than a year after the decision in *Irwin Toy*. Justice Wilson, in a concurring opinion in *Edmonton Journal v Alberta* (AG), identified two potential approaches to the section—the "abstract" and the "contextual"—which she noted "may tend to affect the result of the balancing process called for under s. 1."[102] Justice Wilson observed that the majority and dissenting opinions had conceived of the free expression right at different levels of abstraction. While Justice Cory, writing for the majority, spoke principally of "freedom of expression" at large,[103] Justice La Forest, writing for the minority, spoke of "the right of the individual, even in the open forums of the courts, to shield certain aspects of his or her existence from public scrutiny."[104] Crucially, Justice Wilson, noted:

> It is of interest to note in this connection that La Forest J. completely agrees with Cory J. about the importance of freedom of expression in the abstract. He acknowledges that it is fundamental in a democratic society. He sees the issue in the case, however, as being whether an open court process should prevail over the litigant's right to privacy. *In other words, while not disputing the values which are protected by s. 2(b) as identified by Cory J., he takes a contextual approach to the definition of the conflict in this particular case.*[105]

The lesson was clear: "[O]ne should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case."[106] And so the "contextual approach," whereby "a right or freedom may have different meanings in different contexts," was born.[107] Significantly, Justice Wilson also noted that "[i]t seems entirely probable that the value to be attached to it in different contexts for the purpose of the balancing under s. 1 might also be different."[108]

The contextual approach, as articulated in *Edmonton Journal,* has had profound implications on section 2(b) jurisprudence. The invitation to focus on context necessarily involved subtle normative judgments about the value that should be attached to a particular form of expression—not merely to categories of expression, but to specific

100. See note 89, above.
101. *Prostitution Reference*, *supra* note 8 at para 5.
102. *Edmonton Journal*, *supra* note 1 at para 43.
103. *Ibid* at para 3.
104. *Ibid* at para 79.
105. *Ibid* at para 47 [emphasis added].
106. *Ibid* at para 48.
107. *Ibid* at para 52.
108. *Ibid.*

expressive acts within these categories.[109] The results were two-fold: First, as suggested in the previous section, a contextual analysis had the impact of taking specific instances of expression out of the core of the guarantee identified in *Keegstra*, though apparently not the reverse.[110] Second, and the focus of this section, the rise of the contextual approach required a new mechanism under section 1 through which to filter the results of any such analysis. Under the banner of judicial deference, the Court would announce that there were some matters better left to Parliament. For supporters of an expansive conception of section 2(b), these developments would turn the promise of *Irwin Toy's* broad guarantee into an "empty gesture."[111] More alarmingly, however, there would be no bounds to the scope of this deference. Not only was the Court willing to defer to Parliament's judgments concerning limits on forms of expression farther from the core of section 2(b), but it would do so in cases concerning political expression as well. This approach thus had the effect of diluting the stringency of *Oakes* in the one area it had recognized as absolutely fundamental to the free expression guarantee.

The notion of deference to Parliament, as originally conceived, appeared to have limited application. As early as *Irwin Toy*, the Court had suggested that where Parliament is "mediating between the claims of competing groups," courts "must be mindful of the legislature's representative function."[112] Of some significance, however, the Court suggested only one example of such mediation: where Parliament is "regulating industry or business."[113] The use of deference, however, would soon be expanded. In *Libman*,

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109. For example, the publication of election results would be the subject of an independent contextual analysis; that election results are a form of political expression is not determinative. See e.g., *Bryan*, *supra* note 93.

110. I have been unable to find an example where the opposite happened and a form of expression putatively outside the core of section 2(b) was held to be a part of the core as a result of a contextual analysis. This is not to say, however, that litigants have not tried to achieve such a result. In *Butler,* for example, the intervener British Columbia Civil Liberties Association encouraged the Court to conclude that "sexual norms, behaviours and identities have a bearing on the structure of political life" and, thus, that sexually explicit expression is in fact a form of political expression and thereby at the core. See Choudhry, *supra* note 32 at 517. That argument did not find favour with the Court. See *Butler, supra* note 52 at para 97.

    There is, however, one case where one might argue that the Court *did* expand the core, albeit without saying so. In *Guignard,* it struck down a municipal bylaw restricting certain commercial signage. LeBel J noted that commercial expression has "substantial value" and that the particular counter-advertising in this case "may be of considerable social importance" as "a right not only of consumers, but of citizens." *Guignard, supra* note 89 at paras 21-24. Despite this rhetoric, I think the case is better understood as having hinged not on the importance of the expressive act, but on the silliness of the impugned bylaw. As LeBel J noted, the bylaw "prohibits only those signs that expressly indicate *the trade name of a commercial enterprise* in residential areas" and that "[a]ll other types of signs of a more generic nature are exempt from the by-law" (at para 29 [emphasis added]). This aspect illustrated its "arbitrary nature" and led the Court to conclude that the bylaw failed to meet *any* of the justification requirements under section 1—something that it essentially never does.

111. Cameron, "Past, Present, and Future," *supra* note 27 at 5.

112. *Irwin Toy*, *supra* note 2 at para 79. In contrast, the Court also concluded that where the state is the "singular antagonist" against an individual, no deference is necessary by dint of the Court's ability to adjudicate such claims. At para 80.

    Christopher Bredt has observed that "[t]he distinction drawn by the Court in *Irwin Toy* has frequently been characterized as setting out a higher section 1 standard in criminal law cases than in other contexts." However, as he points out, even if we were to accept this as true, "it is difficult to understand why the criminal law would be considered an area where the 'right choices' are more obvious to the judiciary and thus Parliament's choices entitled to less deference." The bottom line thus is that "[t]he Court's attempt to rationalize its section 1 jurisprudence in *Irwin Toy* arguably raised more questions than it answered." Bredt, "Revisiting Oakes," *supra* note 31 at 63.

113. *Irwin Toy, supra* note 2 at para 79, citing *R v Edwards Books and Art*, [1986] 2 SCR 713 at 772, 35 DLR (4th) 1.

decided less than a decade after *Irwin Toy,* a unanimous Court noted that "in the social, economic *and political spheres*, where the legislature must reconcile competing interests in choosing one policy among several that might be acceptable, the courts must accord great deference to the legislature's choice because it is in the best position to make such a choice."[114] As a result, even though the campaign finance restrictions at issue "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."[115]

The Court declined to defer to Parliament on only one occasion—*Thomson*—on the basis that the government had failed to demonstrate sufficient harm to warrant such deference.[116] Though the Court in *Thomson* had concluded unambiguously that lowering the standard for establishing a social harm at the rational connection stage of *Oakes* was limited to low value contexts, such as obscenity and commercial advertising,[117] this conclusion was soon forgotten. In *Harper,* a majority would actually scold the lower courts for "not giv[ing] any deference to Parliament's choice of electoral model" and "demanding too stringent a level of proof."[118] That reasoning was affirmed in *Bryan.*[119]

Justice Wilson's act of judicial innovation in *Edmonton Journal* can be understood as the first attempt to solve the riddle posed by *Irwin Toy's* expansiveness and *Oakes'* stringency by paving the way for bespoke treatments of proposed limits on the section 2(b) right. "To the extent that *Irwin Toy* may have privileged or overvalued section 2(b), the contextual approach provided a corrective."[120] With respect, however, the cure has proven worse than the ailment. Though deference was surely needed in certain contexts—principally where limits on lesser-valued categories of expression were at issue—as the Court's latest treatment of political expression shows, deference now permeates effectively every realm of section 2(b) and operates at every stage of section 1.[121]

II. BUILDING A NEW EDIFICE

In the above discussion, I have endeavoured to survey the evolution of the Court's section 2(b) jurisprudence as it grappled with the challenges created by the methodological approach adopted in *Irwin Toy*. The case of *Irwin Toy* signalled a commitment to a justificatory (and thus inherently generous) interpretative approach over a definitional (and thus inherently purposive) alternative. Though the Court flirted with aspects of a definitional conception in *Keegstra*, it ultimately failed to marry that idea to its approach in *Irwin Toy*. Furthermore, the prevalence of the contextual approach, including an increasing willingness to defer to Parliament, has steadily eroded the expansive protection of freedom of expression that *Irwin Toy* first suggested. That result is unsurprising: *Irwin Toy* attempted to counter powerful cultural and political instincts and a historical orthodoxy that tells us that not all speech is equal. Troublingly, however, the evolution in the Court's thinking, while having created some constitutional space for the regulatory needs of the modern state, has also weakened—intentionally or unintentionally—protection for what it recognises as expression at the core of section 2(b).

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114. *Libman, supra* note 10 at para 59.
115. *Libman, supra* note 10 at para 61.
116. *Thomson*, *supra* note 89 at paras 118-19.
117. *Ibid* at para 115. See also Christopher D Bredt & Margot Finley, "*R. v. Bryan*: The Supreme Court and the Electoral Process" (2008) 42 Sup Ct L Rev (2d) 63 at 81, 85.
118. *Harper, supra* note 10 at paras 64, 104.
119. *Bryan, supra* note 93 at para 41.
120. Cameron, "Past, Present, and Future," *supra* note 27 at 18.
121. See Bredt, "Revisiting *Oakes,*" *supra* note 31 at 62.

The time then has come to look beyond *Irwin Toy* and articulate a new methodology for section 2(b). In order to do so, first, one must reassess the theoretical foundations of section 2(b) and section 1. Second, that theory must be applied to construct an edifice that can rest on that foundation. I will also attempt in this part to explicitly articulate the benefits of the proposed approach and respond to anticipated objections.

A. Reassessing the Foundations of Section 2(b)

A theory of section 2(b) must reconcile the assertions that I began this paper with: Not all expression is equally worthy of protection. Yet all expression is *prima facie* constitutionally protected. The easy answer is to deny the continuing validity of one of these two assertions, thereby allowing the other to stand alone and unhindered. The most obvious candidate, in light of the discussion in the above sections, is the notion that *all* expression is *prima facie* protected under section 2(b). Ridding ourselves of this assertion, however, is unattractive for at least two reasons. First, it runs counter to the actual text of section 2(b), which offers no explicit qualification on its ambit and offers no apparent basis for implying exclusions to the guarantee. In that regard, to imply such exclusions smacks of the "doctrinal subterfuge" that has troubled the American approach to the First Amendment.[122] Second, to exclude certain forms of expression from the ambit of section 2(b) also runs counter to over two decades of precedent, which in itself should give sufficient reason for pause. Recall the goal of this paper is to maintain harmony with the Court's jurisprudence insofar as reasonably possible.

There is, however, an avenue to reconciliation that does not involve the rejection of either of the two assertions. The answer is exceedingly simple: If not all expression is equally worthy of protection, it should not be equally protected, even though all expression may be afforded *some* protection. A purposive interpretation of section 2(b) has suggested that political expression is at the absolute core of the substantive guarantee and that other categories, including commercial expression, lie further afield.[123] Violence, a lone exception, is regarded as wholly anathema to the guarantee's underlying values.[124] These are not my personal views, but conclusions articulated by the Court itself. These conclusions suggest what might be called the triumph of a "soft" definitional conception of the section 2(b) right over an exclusively justificatory alternative.

Such a definitional conception differs markedly from the American definitional approach, in that the Canadian approach need not reject the notion of balancing. Significantly, the Canadian definitional conception is limited to a discussion of section 2(b) alone; it does nothing to limit the application of section 1. In other words, the adoption of a definitional conception under our *Charter* does not end the judicial inquiry as it effectively does in the United States. This is because the definitional approach does not involve the inherent balancing of competing values; it merely speaks to the value that particular expression has independently. As an example, to assign commercial expression lower value is a normative judgment that can be made independently of asking whether competing collective interests can trump such expression.[125] With reference to the text of section 2(b), Canadian history and values, and the larger framework of the *Charter* ,

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122. Cameron, "Original Conception," *supra* note 36 at 259.

123. See note 89, above; *Rocket*, *supra* note 1 at para 14.

124. *Irwin Toy*, *supra* note 2 at para 42.

125. See e.g., Robert J Sharpe, "Commercial Expression and the Charter" (1987) 37 UTLJ 229; Allan C Hutchinson, "Money Talk: Against Constitutionalizing (Commercial) Speech" (1990) 17 Can Bus LJ 2. Though Sharpe does not go as far as Hutchinson, there is basic agreement on the idea that it would be inappropriate to accord commercial expression protection equal to that given to expression closer to the core of the section 2(b) guarantee.

each of which are essential to a purposive interpretation,[126] one can reasonably conclude that advertising is of low value, as the Court has done,[127] without ever getting to the question of whether advertising can be limited by a governmental interest in, say, protecting children. I stress this point to anticipate objections that a definitional approach inherently conflates independent inquiries into rights and limits. Such an approach does no such thing; it merely recognizes that values come into play not only in the balancing of competing interests under section 1, but also in the articulation of rights.

To shift then from the definition of the right to potential limits on it: It is not controversial, in light of the Court's jurisprudence, to suggest that the more valuable a right, the more pressing any interest in limiting the right must be if the limit is to be justified. The more valuable a right is, the more damaging the effects of a limitation on it will be and, as the Court has recognized, "[t]he more severe the damaging effects of the measure, the more important the underlying objective must be in order to be constitutionally justified."[128] The necessary innovation then is to craft a justificatory test under section 1 that aims for symmetry between competing values: A free expression right that is of particular importance can plausibly be limited only by a competing value of equal or greater importance.

In this vein, certain theoretical tiers of justification may emerge. Let us proceed for a moment on the basis that expression at the core of the section 2(b) guarantee (*e.g.*, political expression) is of such importance that only a governmental purpose of *surpassing* importance could justify an infringement, that expression outside the immediate core (*e.g.*, commercial expression) may be limited by a *compelling* purpose, and that content-neutral time, manner, and place limits (*e.g.*, restricting noise levels in urban zones) could be justified where the government has a *reasonable* purpose.[129] Proceeding further on this basis, and in order to map this to the structure of the *Oakes* test, three tiers of scrutiny could emerge: strict scrutiny, intermediate scrutiny, and reasonableness scrutiny. Each of these tiers can be applied under section 1 to ratchet up—or down—the level of scrutiny given by courts to proposed limits on the right, including the appropriate level of deference given to Parliament.

Proceeding still on the assumption that such tiers of scrutiny under section 1 have greater fidelity to the definitional conception of the right under section 2(b), there is still the question of how to harmonize over two decades of jurisprudence that does not—at least explicitly—adopt such a framework. This task, however, does not present an insurmountable challenge. The basis for the normative judgments contemplated in the proposed tiers exists in our jurisprudence both *broadly*, as one charts the Court's acceptance or rejection of proposed limits in various cases in particular categories of

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126. *Big M*, *supra* note 40 at para 117. See also Barak, *Purposive Interpretation*, *supra* note 40 at 377-84.

127. *Canada (AG) v JTI-Macdonald Corp,* 2007 SCC 30 at para 68, [2007] 2 SCR 610 [*JTI-Macdonald].*

128. *Prostitution Reference, supra* note 8 at para 104.

129. I recognize that these labels, without more, are merely labels. Their full definition requires precedent, which can only come with time. In what follows, however, I do attempt to sketch out the contours of each standard. In addition, I note that my use of the label "compelling" should not be understood in the American sense, *i.e.* indicating strict scrutiny in the context of equal protection under the Fourteenth Amendment. Finally, I note that the Court's exclusion of violence from the ambit of section 2(b) is consonant with the approach proposed here. The decision in *Dolphin Delivery* seems to assume that violence is so far removed from the values underlying section 2(b) that it is not worthy of protection. (I say "assume" because neither *Dolphin Delivery* nor subsequent cases explicitly grappled with this point; see note 51, above.) However, even if one were to assert that my approach requires violence's *prima facie* inclusion under section 2(b)'s ambit because violence *is* in fact expressive, the result is the same: Violence is so tangentially related to the values underlying section 2(b), if it is at all, that the most basic analysis under section 1 should be sufficient to satisfy reasonableness scrutiny.

expression, and also *specifically*, in particular cases when one looks at the Court's analysis of the third branch of the proportionality analysis conducted under *Oakes*.

The third branch of the proportionality analysis under *Oakes*, which seeks to weigh the deleterious impact of a particular limitation against its salutary effects, is often ignored.[130] But because this is the only aspect of the Court's existing section 1 analysis to explicitly engage with the deleterious consequences of the proposed limit—the only part to acknowledge that "a constitutional right has been violated"[131]—the Court's conclusions on this branch speak volumes about its conception of the value of particular forms of expression. For example, in *Irwin Toy*, the Court recognized that the "real concern animating the challenge to the legislation is that revenues are in some degree affected."[132] The implication was that concerns motivated by profit were of lesser importance than concerns motivated for other reasons. Crucially, the impact of the limit is assessed in a value-laden context. It is not that a loss of revenue is not important to the *Charter* claimant—no doubt, any commercial enterprise would consider such a loss as quite deleterious—but to what extent Canadian society (through our courts) is willing to recognize that loss as being of normative significance. As is now trite, not all expression is equally worthy of protection. Similar reasoning led to the conclusion in *Canada (AG) v JTI-Macdonald* that "the expression at stake is of low value."[133] In contrast, in *Thomson*, a case that concerned limits on the publication of information concerning poll results, the limit's impact on freedom of expression was "profound."[134] Conversely, one can also look to the salutary effects analysis for the Court's normative judgments about the value of the impugned limit. In *JTI-Macdonald*, for example, Chief Justice McLachlin noted that "the objective is of great importance, nothing less than a matter of life or death for millions of people."[135] In contrast, the salutary effects of limits on political expression have—albeit principally in the early cases—been downplayed.[136] In *Thomson*, Justice Bastarache scoffed at the notion that the government's goal to ensure that "some indeterminate number of voters might be unable to spot an inaccurate poll result and might rely to a significant degree on the error, thus perverting their electoral choice" was a sufficiently salutary effect. Taken together, the Court's analyses of deleterious and salutary factors in these cases offer compelling evidence of the value it ascribes to various forms of expression.

130. Hogg, *Constitutional Law*, *supra* note 21 at 859.

131. Cameron, "First Amendment," *supra* note 38 at 66.

132. *Irwin Toy*, *supra* note 2 at para 89.

133. *JTI-Macdonald*, *supra* note 127 at para 68.

134. *Thomson*, *supra* note 89 at para 127.

135. *JTI-Macdonald, supra* note 127 at para 68. Note that though this language is excerpted from a paragraph concerned with "proportionality of effects," *i.e.,* deleterious and salutary effects, McLachlin CJC speaks of the importance of the "objective," harkening back to the first stage of the *Oakes* test, *i.e.,* a "pressing and substantial purpose."

136. As discussed above, the Court's opinions in *Harper* and *Bryan* downplay the value attached to political expression over the vehement protests of the minority justices.

B. A New Approach

Moving then from the abstract to the mechanics of how the above theoretical framework can be adapted in a new methodology, I propose the following. First, the Court should openly acknowledge its adoption of a definitional conception to the right to freedom of expression under section 2(b). Such an approach acknowledges that normative judgments as to the value of particular speech, as aided by a purposive interpretation of the guarantee, will guide the level of scrutiny that challenged limits are subject to under section 1. The broad contours of two decades of section 2(b) jurisprudence and the specific analysis of deleterious effects under *Oakes* indicate, with a reasonable measure of clarity, which forms of expression are closest to the core of section 2(b). Limits on political expression, as an example of speech at the core of the right, would be subject to strict scrutiny under section 1, requiring a surpassing purpose and a rigorous analysis of minimal impairment. Commercial expression, as an example of speech outside the core, would be subject to intermediate scrutiny, requiring a compelling purpose and a less exacting analysis of minimal impairment, including more deferential standards as to Parliamentary conclusions on social science evidence. Finally, restrictions on time, place and manner, to the extent they are content neutral, would be subject to reasonableness scrutiny, requiring only a reasonable purpose and a heavily attenuated proportionality analysis.[137] To the extent that any proposed limit breaches content neutrality, it would be subject to the subject matter-specific level of scrutiny.[138] Finally, the third branch of the proportionality analysis under *Oakes* would be retired as regard for the deleterious and salutary consequences are, under this new approach, infused into the level of scrutiny applied.[139]

In short, the proposed methodological approach would be as follows:

Section 2(b)

- Is the activity in question *prima facie* expressive?
- How closely tied to the core of the section 2(b) right is the expression at issue? (Accordingly, reasonableness, intermediate, or strict scrutiny will be applied under section 1.)

Section 1

- Is the limit prescribed by law?
- Is the purpose for which the limit is proposed of sufficient importance (*i.e.,* reasonable, compelling, or surpassing importance)?
- Is the limit rationally connected to the purpose?
- Does the limit minimally impair the right?

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137. I have not undertaken a full analysis of time, manner, and place restrictions in this paper, but offer this third category to complete the tiers of scrutiny that I propose. Like the other tiers, I note that the Court has modulated the strength of scrutiny to suit such limits, in this case attenuating it, albeit sometimes without expressly saying so. See e.g., *Montréal (City) v 2952-1366 Québec*, 2005 SCC 62, [2005] 3 SCR 141 [*Montréal*].

138. For example, a time, place, and manner restriction that restricted political expression, but no other form of expression, should be subject to strict scrutiny. For an example with such facts, see *Translink*, *supra* note 13. Of course, courts must be alive to the possibility that content-neutral time, place, and manner restrictions could be used to limit *all* expression so as to benefit from an attenuated form of review. Accordingly, to use the facts of *Translink*, the transportation authority should not be able to turn around and ban all speech on public buses (subject to reasonableness review) instead of banning *some* but not *all* speech (subject to category-specific review). In such cases, the Court's precedents concerning locations continue to be helpful, because they ask whether the place in question has traditionally been a forum for public expression. That approach is fully compatible with the standard of reasonableness review proposed here.

139. Hogg, *Constitutional Law*, *supra* note 21 at 859.

C. The Benefits of the New Approach

The above approach is proposed with several benefits in mind. First, the proposed approach makes explicit the level of scrutiny a court will apply to an impugned governmental act, thereby yielding clarity and predictability to all concerned parties. As previously noted, the evolution in the Court's jurisprudence under section 2(b) suggests a realization that its jurisprudence cannot stray too far from accepted cultural and political orthodoxy, lest the Court voluntarily engender doubts about its democratic legitimacy. And so, notwithstanding the breadth of *Irwin Toy* and the rigours of *Oakes*, the Court adopted the contextual approach and deference to Parliament as indispensable handmaidens to section 2(b) adjudication. But in doing so, it created a black box. Simply too much information concerning the rigour with which the Court will approach a particular case is known only to the Court. The adoption of explicit tiers of scrutiny, which are grounded in a purposive analysis of the section 2(b) right, will allow in some necessary sunlight. Parliament will know, for example, that the Court will be willing to accommodate less-than-definitive social science evidence in commercial expression cases under intermediate scrutiny, but that evidence will be subjected to more rigorous review under strict scrutiny in political expression cases.

Second, the proposed approach will ensure that limits on expression at the core of the section 2(b) guarantee are properly subjected to a heightened level of scrutiny. There is no point in assigning value to the speech if the methodology adopted by the Court does not take account of that value. Members of the Court have spoken eloquently about the dangers in diluting the *Oakes* standard,[140] and I do not disagree. But there *has* been a dilution of *Oakes*. That dilution, however, is problematic not because of its application to low value speech, but because of that diluted standard's application to high value speech, as I have attempted to show. This is broadly apparent from the lower protection given to expression rights in Canada as compared with other Western democracies, most especially our neighbour to the south,[141] but it is also specifically apparent from the recent treatment of limits on political expression, as discussed above. The proposed approach, it is hoped, will serve as a needed corrective because it imposes prudential limits on the flexibility available to the Court: Political expression cases must be subject to strict scrutiny, while commercial expression cases, for example, will be subject to intermediate scrutiny.[142]

Third and finally, the proposed test should serve to make more effective use of the analytical tools available to the Court. Even the Court has recognized that the third branch of *Oakes'* proportionality analysis is not doing much work, instead leaving the

140. See e.g., *R v Lucas*, [1998] 1 SCR 439 at para 115 (QL), 157 DLR (4th) 423 [*Lucas*].

141. See discussion at note 32, above.

142. One might reasonably argue that such limits, while ensuring that political expression cases are subject to maximum scrutiny, improperly impose a lower standard of review on commercial expression cases, for example, when in some instances strict scrutiny is more appropriate. There are two responses to this line of argument. First, I can find no example in the existing precedents where the Court has subjected commercial expression cases to higher scrutiny (with the possible exception of *Guignard,* discussed at note 110, above), suggesting that the normative value ascribed to commercial expression generally does not vary (though the Court has accepted such variation in the cases concerning political expression). Second, subject to further analysis, it may be that the proposed approach here should be seen as a floor and not a ceiling on the standard of review. In other words, perhaps courts should retain discretion to ratchet up the level of scrutiny they subject limits to, but never ratchet that level down. Such a modification, of course, potentially imposes a higher burden on the government, which may, if this view is adopted, lack certainty about which level of scrutiny is applicable to a proposed limit. As clarity and predictability is an expressed goal of the proposed approach here, further discussion of this modification is left for another day.

intellectual heavy-lifting to other branches.[143] Indeed, there is recognition that it is the contextual approach that has rendered the third branch redundant:

> The subsequent development of the *Oakes* test, particularly the broad contextual approach which has been adopted by this Court since the decision in the *Edmonton Journal* case, ensures that the rational connection and the minimal impairment tests are sufficient to determine whether there is a proportionality between the deleterious effects of a measure, and its objective.[144]

The recommendation to eliminate the third branch as it is currently structured thus has basis recognized by the Court itself. This is not to say that the intellectual query intended to be undertaken is without purpose. It is not, but as Justice Bastarache recognized in *Thomson*, the Court has usurped that inquiry under the banner of the contextual approach. The proposed approach merely takes that development one step further by formalizing it as a device to frame the entire inquiry. The third branch, as it stands, is a free-standing cost versus benefits analysis. This approach, however, fails to recognize that the *entire* section 1 analysis is a cost versus benefit analysis with each of its parts serving to provide analytical rigour. There is no need for a free-standing inquiry at the last stage.

D. Anticipating Objections

The principal thrusts of the proposal articulated here—the adoption of explicit tiers of scrutiny and the abandoning of the third branch of the proportionality analysis—are not, on their own, new ideas. Indeed, both have been considered and dismissed, albeit mostly in passing, in the Court's jurisprudence. The more recent case law, however, demands that this alternative approach be given a second look.

The argument against tiers of scrutiny rests on the idea that they hinder the Court's flexibility. Chief Justice Dickson briefly considered and dismissed the possibility of different tiers of scrutiny in *Keegstra*. Instead, he pointed to the contextual approach as a preferable alternative to "inflexible levels of scrutiny," lest courts "become transfixed with categorization schemes risks losing the advantage associated with this sensitive examination of free expression principles."[145] This is a version of the traditional rules versus standards debate.[146] It is perhaps not coincidental that the Chief Justice advanced this line of argument in *Keegstra*: The case concerned the validity of a statutory provision criminalizing hate speech, which may more properly be seen as a form of political expression, as Chief Justice Dickson himself recognized.[147] Too much flexibility, then, can sometimes be a bad thing. One might reasonably wonder whether the impugned

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143. In *Thomson*, Bastarache J commented in an opinion joined by five other justices:

    > This formulation has been criticized as merely duplicating what is already accomplished by the first two stages of the proportionality analysis. As a practical matter, this is confirmed by the jurisprudence of this Court: there appears to be no case in which a measure was justified by the first two steps of the proportionality analysis, but then found unjustified by an application of the third step.

    Thomson, supra note 89 at para 123.

144. *Ibid* at para 124.

145. *Keegstra, supra* note 1 at para 95.

146. See e.g., Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U Chi L Rev 1175; Pierre Schlag, "Rules and Standards" (1985-6) 33 UCLA L Rev 379; Kathleen M Sullivan, "Foreword: The Justices of Rules and Standards" (1992) 106 Harv L Rev 221; and Cass R Sunstein, "Problems with Rules" (1995) 83 Cal L Rev 953.

147. *Keegstra, supra* note 1 at para 90 ("I recognize that hate propaganda is expression of a type which would generally be categorized as 'political,' thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process"). See also Choudhry, *supra* note 32 at 517.

provision in *Keegstra* would have passed muster if held to the same exacting level of scrutiny that the dissent employed.[148]

Though the approach proposed here does, of course, sacrifice some flexibility, it is crucial not to overstate this point.[149] Adopting tiers of scrutiny is not an invitation for judges to shackle their minds. Rather, the tiers approach invites self-imposed prudential limits to ensure that a given category of expression is not under- or over-protected in a specific instance in a manner wholly out of line with the normative value ascribed to it by Canadian society. In time, if a bright-line rule requiring all political speech to be subject to heightened scrutiny is found to be out of step with *Charter* values as may well be the case, for example, with hate speech, the better approach is to carefully define an exception to the rule (effectively, the creation of a sub-category) as opposed to inviting *ad hoc* analyses of particular expressive acts on a case-by-case basis.[150]

More broadly, though, it is important to recognize that the tiers of scrutiny suggested here are not being imposed from above as much as they arise organically from the Court's own jurisprudence. Subjecting limits on political expression to a heightened standard, for example, merely reflects the broader judgment of Canadian society that it values political expression more than it values other forms of expression, as recognized by the Court.[151] A particular level of scrutiny does not suggest a default answer in each case or that no limit will ever pass muster, as seems to be the unspoken fears in the majority opinion in *Keegstra*.

Certain members of the Court have also been severe in their criticism of any variation in the scrutiny applied under section 1, let alone the recognition of category-based tiers. Writing in dissent in *Lucas*, Justice McLachlin (as she then was) cautioned that allowing the "perceived low value of the expression to lower the bar of justification from the outset of the s. 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."[152] She added that such an approach "risks reducing the s. 1 analysis to a function of what a particular judge thinks of the expression."[153] But this criticism is misdirected. First, the adoption of the contextual approach essentially serves as a screen for precisely the kind of subjectivity Justice McLachlin hoped to guard against. Second, there is a principled basis to treat different forms of expression differently, as the Court has repeatedly recognized elsewhere. Third, the proposal advocated herein proposes different standards of section

148. See *Keegstra, supra* note 1 at paras 156-340, McLachlin J, dissenting ("Accepting that the objectives of the legislation are valid and important and potentially capable of overriding the guarantee of freedom of expression, I cannot conclude that the means chosen to achieve them—the criminalization of the potential or foreseeable promotion of hatred—are proportionate to those ends" at para 334).

149. That said, the proposed approach will shift attention to the characterization of speech under section 2(b). There will be easy cases: For example, a television advertisement by a tobacco company encouraging Canadians to encourage their MPs to vote against a new cigarette tax would properly be characterized as political speech. But there may be other facts which pose a more difficult question as the government jockeys to secure a lower level of scrutiny, while the claimant seeks to convince the court that a higher level is called for. This discussion, which places tremendous emphasis on the purposes underlying section 2(b), is a positive development so long as the Court remains faithful to those purposes by continuing to draw clear distinctions between different forms of expression. However, where it begins to conflate the categories, as it sometimes has, even this approach will flounder as previous efforts have. See e.g., Choudhry, *supra* note 32 at 517-19.

150. The Supreme Court will soon have the opportunity to engage in such an analysis. See *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, 346 Sask R 210 (decision on appeal pending).

151. See note 89, above.

152. *Lucas, supra* note 140 at para 115.

153. *Ibid.*

1 justification based not on subjective perceptions of a particular judge as to *particular* expression, but on broader conclusions as to the value of *categories* of speech as drawn from the Court's own jurisprudence on the purpose of section 2(b). Indeed, the perils which Justice McLachlin was warning about in *Lucas* are in part precisely what this proposal hopes to guard against.

The third branch of the proportionality analysis has been the subject of sporadic defences from the Court. Chief Justice McLachlin offered a defence recently (and rearticulation) of it in *Alberta v Hutterian Brethren*.[154] She noted that while the earlier stages of *Oakes* "are anchored in an assessment of the law's purpose," the third branch is the only analytical element to take "full account of the severity of the deleterious effects of a measure on individuals or groups."[155] There are two responses here: First, the Court's opinions, including at least one crafted by Chief Justice McLachlin, have conceded that the analysis is actually duplicative.[156] Second, and more troublingly, the third branch as currently contemplated amounts to a naked balancing exercise, as apparently conceded by the Court.[157] Indeed, the rearticulation of the third branch points toward *more*, not less, subjectivity in *Oakes* so long as the Court continues to eschew differentiated

154. *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 SCR 567 *[Hutterian Brethren].* The rearticulation of the third branch was heavily influenced by the approaches to constitutional rights adjudication of the Supreme Court of Israel and the Federal Constitutional Court of Germany. See Barak, "Proportional Effect," *supra* note 35; Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 UTLJ 383. Though the Court adopted much from President Barak's article, it was, unfortunately, less receptive to one of his principal points: that "the object component"—or, in the language of *Oakes,* whether there is a pressing and substantial purpose—"should be given an independent and central role in examining constitutionality" and that "[w]ith respect to the need for realization of the object … the need varies according to the nature of the right" (at 371). In other words, the purpose of an impugned limitation deserves significant attention in the section 1 analysis and the importance of that purpose should depend on the nature of the particular right in question.

155. *Hutterian Brethren, ibid* at para 76. Indeed, the "decisive" analysis fell at the last stage in this case. See the discussion at para 78. I recognize a certain irony in advocating for the abolishment of the third branch of Oakes precisely at the time that the Court is bolstering its significance. As Grimm J observed of the difference between the Canadian and German approaches to rights adjudication (prior to *Hutterian Brethren*): "Perhaps the most conspicuous difference is that in Canada, most laws that fail to meet the test do so in the second step [minimal impairment under Oakes], so that not much work is left for the third step [proportionality] to do, whereas in Germany, the third step has become the most decisive part of the proportionality test." Grimm, *supra* note 154 at 384. In light of *Hutterian Brethren*, I hazard that observation will no longer hold true.

156. In *Harper,* for example, McLachlin CJC and Major J, dissenting in part, wrote as part of their minimal impairment analysis: "The difficulty with the Attorney General's case *lies in the disproportion between the gravity of the problem … and the severity of the infringement on the right of political expression*." Then, under the third branch proportionality analysis, they conclude: "The same logic that leads to the conclusion that the Attorney General has not established that the infringement minimally impairs the citizen's right of free speech applies equally to the final stage of the proportionality analysis, which asks us to weigh the benefits conferred by the infringement against the harm it may occasion." *Harper, supra* note 10 at paras 32, 40 [emphasis added]. In *RJR-MacDonald v Canada* (AG), McLachlin J (as she then was) also noted that "it may not be of great significance where [the] balancing" of the salutary and deleterious effects takes place provided the balancing is done rigorously. *RJR-MacDonald v Canada* (AG), [1995] 3 SCR 199 at para 169, 127 DLR (4th) 1. In fairness, however, this counterargument has less weight in light of the rearticulation of the third branch in *Hutterian Brethren*, assuming the Court remains faithful to its new approach.

157. *Thomson, supra* note 89 at para 126 ("This weighing exercise necessarily admits of some subjectivity").

standards of review.[158] In this regard, strikingly neglected in the Court's defence of the third branch is the dissimilarity in its application from case to case and sometimes within the same case. In *Bryan*, for example, the majority and minority opinions came to fundamentally different conclusions about the deleterious impact of the same impugned law: The majority concluded it had an "extremely small"[159] impact, while the minority countered that with a "profound" harm to "core political speech."[160] A similar dichotomy existed on the salutary effects, where the majority focused on the law's positive impact on the "fairness and reputation of the electoral system as a whole, a pillar of the Canadian democracy,"[161] while the minority "saw speculative, inconclusive and largely unsubstantiated" benefits.[162] The distinction between these conclusions is telling: When a side wanted to emphasize an effect, it identified it at a higher level of abstraction, whereas when it wanted to deemphasize it, it identified it at a lower level of abstraction. In contrast to this see-saw approach to the third branch, the proposed tiers of scrutiny entrench the high-level abstract judgments into the test itself. In other words, under the approach articulated here, accounting for the severity of the infringement is hard-wired into the whole fabric of the section 1 analysis thereby constraining the normative value that can be ascribed to specific deleterious and salutary effects.[163]

The continuing use of the third branch may make some sense if the Court accepted the possibility of American-style as-applied challenges in *Charter* cases,[164] but it has not done so. For example, one might imagine a scenario where the deleterious impact on a particular *Charter* claimant is disproportionate as compared with others. In such cases,

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158. President Barak, whose ideas, as I noted above at note 154, are reflected in the new approach to the third branch, acknowledges this criticism: "The … argument is that the values-based understanding of the third step empties it of any objective standard, turning it into a mechanism for judicial subjectivity and judicial activism." His response to this criticism is that there is, in fact, an objective standard: the requirement that "the greater the limitation of human rights is, *the more important the purpose must be in order to justify it*." Barak, "Proportional Effect," *supra* note 35 at 381-82 [emphasis added]. But this rebuttal falls flat in the Canadian context: Though such differentiated standards may exist in the Israeli jurisprudence, the Supreme Court of Canada has all but neutered the first branch of *Oakes (*the finding of a pressing and substantial purpose). See e.g., *Hutterian Brethren, supra* note 154, LeBel J, dissenting ("In general, courts have only rarely questioned the purpose of a law or regulation in the course of a s. 1 analysis. The threshold of justification remains quite low and laws have almost never been struck down on the basis of an improper purpose" at para 188).

159. *Bryan, supra* note 93 at para 51.

160. *Ibid* at paras 107, 128.

161. *Ibid* at paras 49-50 [emphasis in original].

162. *Ibid* at para 107.

163. It is worth noting that the pattern identified here has continued since the rearticulation of *Oakes*' third branch. See *Hutterian Brethren, supra* note 154, McLachlin CJC ("While the limit imposes costs in terms of money and inconvenience as the price of maintaining the religious practice of not submitting to photos, it does not deprive members of their ability to live in accordance with their beliefs. Its deleterious effects, while not trivial, fall at the less serious end of the scale" at para 102) and Abella J, dissenting ("the constitutional right is significantly impaired; the 'costs' to the public only slightly so, if at all" at para 175); *Toronto Star Newspapers Ltd v Canada,* 2010 SCC 21, [2010] 1 SCR 721, Deschamps J ("I must find that in the context of the bail process, the deleterious effects of the limits on the publication of information are outweighed by the need to … guarantee as much as possible trial fairness and fair access to bail. Although not a perfect outcome, the mandatory ban represents a reasonable compromise at para 60) and Abella J, dissenting ("A mandatory ban on the evidence heard and the reasons given in a bail application is a ban on the information when it is of most concern and interest to the public" at para 76).

164. In the United States, litigants can challenge the constitutionality of federal statutes in two ways: They can bring a "facial" challenge to a law asking a court to hold it unconstitutional in all of its applications or they bring a narrower "as-applied" challenge asking a court to hold the statute unconstitutional *as applied to the particular facts* of the instant case. If the challenge is successful, in the former case the statute may no longer be enforced under *any* circumstances, whereas in the latter case it may still be enforced in circumstances dissimilar to those raised in the challenge. See Michael C Dorf, "Facial Challenges to State and Federal Statutes" (1994) 46 Stan L Rev 235.

the third branch may have some utility by offering an analytical mechanism to recognize claimant-specific consequences unrecognized elsewhere. The concept of as-applied challenges, however, has been rejected in Canada.[165]

Finally, it is worth noting that any suggestion that particular expression should be treated differently than other expression runs up against the long-standing prohibition against content-based distinctions.[166] It is important to recognize, however, that content neutrality actually materializes in two distinct forms: subject matter neutrality (not discriminating between commercial expression and political expression, for example) and viewpoint neutrality (not discriminating between prochoice and prolife advocates, for example). The experience with section 2(b) suggests that the Court has long gotten over subject matter distinctions and that this is no longer a serious concern. Viewpoint discrimination, however, should be guarded against, even though the Court has strayed on this as well.[167]

CONCLUSION

It is surely ironic that Chief Justice McLachlin, who has been one of the most ardent critics of differentiated review standards under section 1,[168] is now ostensibly comfortable with the Court's deferential approach to low value speech, including commercial advertising,[169] yet she appears deeply alarmed by its approach to high value speech like political expression. For instance, the Chief Justice and Justice Major, in their dissenting reasons in *Harper,* implored their colleagues to recognize that "political speech … is the single most important and protected type of expression" under the *Charter.*[170] What that plea could accomplish, however, was severely limited within the framework now employed by the Court: There was no mechanism to recognize the special value they—and the Court—have ascribed to political speech under section 1, including through a higher standard of review. I hope that this paper has suggested a remedy to that dilemma and the one with which I began: When not all expression is equally worthy of protection, not all expression should be equally protected. It is a conclusion that is as simple as it is obvious.

Though the full impact of the methodology proposed here is beyond the scope of this short paper, the most obvious implications are clear. In the realm of political expression, several of the Court's recent precedents would have been decided differently under stricter scrutiny. It is doubtful, for example, that the legislation in *Bryan* could fulfill the requirement of having a surpassing importance or even that the ban was rationally connected to the objective when so many alternative media sources could provide the

165. *Rocket, supra* note 1 at para 45. See also *Montréal, supra* note 137 at para 172, Binnie J ("The *Oakes* test … requires the Court to determine whether the means chosen are proportionate to the legislative objective, not what the effects of the infringing law are in the case of a particular accused. If it were otherwise, a law could be valid in some situations and not others, creating an unpredictable patchwork").

166. *Irwin Toy, supra* note 2 at para 49.

167. See earlier discussion regarding viewpoint discrimination in *Keegstra* at note 147, above.

168. *Lucas, supra* note 140 at para 115.

169. *JTI-Macdonald, supra* note 127 at para 68.

170. *Harper, supra* note 10 at para 11.

public with the targeted information.[171] It is also doubtful that the limits in *Harper* could be held to be minimally impairing. That said, it is difficult to assess such questions in isolation. The precise contours of one tier as compared to another are difficult to explain without a more detailed analysis and I leave for another day—and another paper—the question of how precisely to animate the particular standards proposed here. It also bears noting that I have not discussed how other categories of expression, including, for example, artistic expression and press freedoms, should be adjudicated under this new methodology. Though I will resist the temptation to offer any firm conclusions in the absence of a more rigorous analysis, the suggested approach should not come as a surprise: A purposive interpretation of section 2(b) must guide any determination as to the level of scrutiny to which limits on such categories of expression will be subject.

In an essay so focused on the legacy of a particular case, it is perhaps worth returning to it in closing. Justice McIntyre, in his often-overlooked dissent in *Irwin Toy*, concluded that the Court's decision to uphold limits on advertising to children "represent[ed] a small abandonment of a principle of vital importance in a free and democratic society."[172] He further observed: "Our concern should be to recognize that in this century we have seen whole societies utterly corrupted by the suppression of free expression. We should not lightly take a step in that direction, even a small one."[173] Though I would suggest that Justice McIntyre was likely too alarmist, his point nonetheless resonates. The result of steps taken by the Court over the last two decades has been to dilute the protections guaranteed by section 2(b).

It is time then to consider taking a step back.

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171. On 13 January 2012, after this article had been completed, the Minister of State for Democratic Reform announced—via Twitter, no less—that the government would seek to repeal the section of the *Canada Elections Act* that had been unsuccessfully challenged in *Bryan*. The Minister's explanation was telling: "The ban, [enacted] in 1938, does not make sense with widespread use of social media and modern communications technology." Notably, he added in another tweet that "Paul Bryan should be acknowledged for his advocacy on this issue." Tim Uppal's Twitter Feed (13 January 2012), online: <https://twitter.com/#!/MinTimUppal>. Just a few months earlier, the Chief Electoral Officer of Canada, in a report to Parliament, had advised that "the growing use of social media puts in question not only the practical enforceability of the rule, but also its very intelligibility and usefulness in a world where the distinction between private communication and public transmission is quickly eroding. The time has come for Parliament to consider revoking the current rule." *Report of the Chief Electoral Officer of Canada on the 41st General Election of May 2, 2011* (Ottawa: Elections Canada, 2011) at 49. See also Canada Elections Act, SC 2000, c 9, s 329 ("No person shall transmit the result or purported result of the vote in an electoral district to the public in another electoral district before the close of all of the polling stations in that other electoral district").

172. *Irwin Toy, supra* note 2 at para 104.

173. *Ibid.*