SCC File No. 38921

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CITY OF TORONTO

Appellant

AND:

ATTORNEY GENERAL OF ONTARIO

Respondent

AND:

TORONTO DISTRICT SCHOOL BOARD, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, CITYPLACE RESIDENTS' ASSOCIATION, CANADIAN CONSTITUTION FOUNDATION, INTERNATIONAL COMMISSION OF JURISTS (CANADA), FEDERATION OF CANADIAN MUNICIPALITIES, DURHAM COMMUNITY LEGAL CLINIC, CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY, CANADIAN CIVIL LIBERTIES ASSOCIATION, ART EGGLETON, BARBARA HALL, DAVID MILLER AND JOHN SEWELL, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, PROGRESS TORONTO, MÉTIS NATION OF ONTARIO, MÉTIS NATION OF ALBERTA, AND FAIR VOTING BRITISH COLUMBIA

Interveners

BOOK OF AUTHORITIES OF THE INTERVENER,
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

ST. LAWRENCE BARRISTERS LLP
33 Britain Street, 2nd Floor
Toronto ON M5C 1G8

Alexi N. Wood
Jennifer P. Saville
Tel: 647.245.8283
Fax: 647.245.8285
Email: alexi.wood@stlbarristers.ca
jennifer.saville@stlbarristers.ca

Lawyers for the Intervener,
David Asper Centre for Constitutional Rights

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4

Matthew J. Halpin
Tel: 613.780.8654
Fax: 613.230.5459
Email: matthew.halpin@nortonrosefulbright.com

Agent for Counsel for the Intervener,
David Asper Centre for Constitutional Rights

ORIGINAL TO:

TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

TO: **CITY SOLICITOR'S OFFICE**
City of Toronto,
Legal Services Metro Hall,
55 John Street, 26th Floor
Toronto, ON M5V 3C6

Diana W. Dimmer | Glenn K.L. Chu
Fred Fischer | Philip Chan
Tel: 416 392 7229 | 416 397 5407
416 392 7224 | 416 392 1650
Fax: 416 397 5624
Email: diana.dimmer@toronto.ca
glenn.chu@toronto.ca
fred.fischer@toronto.ca
philip.k.chan@toronto.ca

Counsel for the Appellant

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613 787 3562
Fax: 416 367 6749
Email: neffendi@blg.com

Ottawa Agent for the Appellant

AND TO: **ATTORNEY GENERAL OF ONTARIO**
Constitutional Law Branch
McMurtry-Scott Building
720 Bay Street, 4th Floor Toronto, ON
M7A 2S9

Robin Basu
Yashoda Ranganathan
Otto Ranalli
Tel: 416 326 4476
416 326 4456
416 326 4473
Fax: 416 326 4015
Email: robin.basu@ontario.ca
yashoda.ranganathan@ontario.ca
otto.ranalli@ontario.ca

Counsel for the Respondent

POWER LAW
130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613 702 5573
Email: mvincelette@powerlaw.ca

Ottawa Agent for the Respondent

AND TO: **TORONTO DISTRICT SCHOOL BOARD**
Legal Services
5050 Yonge Street
Toronto, ON M2N 5N8

Leola Pon | Paul Koven
Tel: 416 395 4932
416 397 3565
Fax: 416 393 8973
Email: leola.pon@tdsb.on.ca
paul.koven@tdsb.on.ca

Counsel for the Intervener, Toronto District School Board

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613 695 8855
Fax: 613 695 8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener, Toronto District School Board

AND TO: **ATTORNEY GENERAL OF BRITISH COLUMBIA**
Legal Services Branch
1301 – 865 Hornby Street
Vancouver, BC V6Z 2G3

Mark Witten | Ashley Caron
Tel: 604 660 5476
604 660 6797
Fax: 416 393 8973
Email: mark.witten@gov.bc.ca
ashley.caron@gov.bc.ca

Counsel for the Intervener, Attorney General Of British Columbia

GIB VAN ERT LAW
148 Third Avenue
Ottawa, ON K1S 2K1

Gib van Ert
Tel: 613 408 4297
Fax: 613 651 0304
Email: gib@gibvanertlaw.com

Ottawa Agent for the Intervener, Attorney General of British Columbia

AND TO: **GOLDBLATT PARTNERS LLP**
20 Dundas St. W., Suite 1039
Toronto, ON M5G 2C2
Fax: 416-591-7333

Steven M Barrett
Simon Archer
Geetha Philipupillai
Tel: 416-977-6070
Email: sbarrett@goldblattpartners.com
sarcher@goldblattpartners.com
gphilipupillai@goldblattpartners.com

Counsel for the Intervener, Canadian Civil Liberties Association

GOLDBLATT PARTNERS LLP
30 Metcalfe St., Suite 500
Ottawa, ON K1P 5L4
Fax: 613-235-3041

Colleen Bauman
Tel: 613-482-2463
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Intervener, Canadian Civil Liberties Association

AND TO: **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
155 Wellington St. W., 35thFloor
Toronto, ON M5V 3H1
Fax: 416-646-4301

Donald K Eady
Tel: 416-646-4321
Email: don.eady@paliareroland.com

Glynnis Hawe
Tel: 416-646-6309
Email: glynnis.hawe@paliareroland.com

Counsel for the Intervener, Progress Toronto

DENTONS CANADA LLP
99 Bank St., Suite 1420
Ottawa, ON K1P 1H4
Fax: 613-783-9690

David R Elliot
Corey Villeneuve (Law Clerk)
Tel: 613-783-9699
Email: corey.villeneuve@dentons.com

Ottawa Agent the Intervener, Progress Toronto

AND TO: **BORDEN LADNER GERVAIS LLP**
3400 – 22 Adelaide St. W.
Toronto, ON M5H 4E3
Fax: 416-367-6749

Christopher D Bredt
Pierre N Gemson
Tel: 416-367-6165
Email: cbredt@blg.com
pgemson@blg.com

OSGOODE HALL LAW SCHOOL
York University
4700 Keele St.
North York, ON M3J 1P3

Jamie Cameron, Professor Emeritus
Tel: 416-294-1512
Email: jcameron@osgoode.yorku.ca

Counsel for the Intervener, Centre for Free Expression at Ryerson University

BORDEN LADNER GERVAIS LLP
1300 – 100 Queen St.
Ottawa, ON K1P 1J9
Fax: 613-230-8842

Nadia Effendi
Tel: 613-787-3562
Email: neffendi@blg.com

Ottawa Agent for the Intervener, Centre for Free Expression at Ryerson University

AND TO: **SELWYN A. PIETERS**
Barrister & Sollicitor
P.O. Box 518, 31 Adelaide St. E.
Toronto, ON M5C 2J6
Fax: 416-787-6145

Selwyn A Pieters
Tel: 416-787-5928
Email: selwyn@selwynpieters.com

Counsel to the Intervener,
CityPlace Residents' Association

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3
Fax: 613-695-8580
Marie-France Major
Tel: 613-695-8855
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
CityPlace Residents' Association

AND TO: **DURHAM COMMUNITY LEGAL CLINIC**
200 John St. W., Unit B1
Oshawa, ON L1J 2B4
Fax: 905-728-6362

Omar Ha-Redeye
Tel: 905-728-7321
Email:
omar@durhamcommunitylegalclinic.ca

Counsel for the Intervener,
Durham Community Legal Clinic

SUPREME ADVOCACY LLP
340 Gilmour St.
Ottawa, ON K2P 0R3
Fax: 613-695-8580

Marie-France Major
Tel: 613-695-8855
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
Durham Community Legal Clinic

AND TO: **MCCARTHY TÈTRAULT LLP**
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Fax: 416-868-0673

Adam Goldenberg
Jacob Klugsberg
Tel: 416-601-8357
Email: agoldenberg@mccarthy.ca

Counsel for the Intervener,
Canadian Constitution Foundation

JURISTES POWER LAW
130 Albert St., Suite 1103
Ottawa, ON K1P 5G4
Fax: 613-702-5566

Darius Bossé
Tel: 613-702-5566
Email: DBosse@juristespower.ca

Ottawa Agent for the Intervener,
Canadian Constitution Foundation

AND TO: **STEPHANE ÉMARD-CHABOT**
MARY EBERTS
WILLIAM B HENDERSON
24 Clarence St.
Ottawa, ON K1N 5P3
Tel: 613-241-5221
Email stephane@emard-chabot.ca

Counsel for the Intervener, Federation of Canadian Municipalities

SUPREME ADVOCACY LLP
100 – 340 Gilmour St.
Ottawa, ON K2P 0R3
Fax: 613-695-8580

Marie-France Major
Tel: 613-695-8855, ext. 102
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener, Federation of Canadian Municipalities

AND TO: **PAPE SALTER TEILLETT LLP**
546 Euclid Ave.
Toronto, ON M6G 2T2
Fax: 416-916-3726

Jason T Madden
Tel: 416-916-3853
Email: jmadden@pstlaw.ca

Marc E Gibson
Tel: 416-855-2649
Email: mgibson@pstlaw.ca

Counsel for the Intervener, Métis Nation of Ontario and Métis Nation of Alberta

GOWLING WLG
160 Elgin St., Suite 2600
Ottawa, ON K1P 1C3
Fax: 613-788-3573

Matthew Estabrooks
Tel: 613-786-0211
Email:
matthew.estabrooks@gowlingwlg.com

Ottawa Agent for the Intervener, Métis Nation of Ontario and Métis Nation of Alberta

AND TO: **GOLDBLATT PARTNERS LLP**
20 Dundas St. W., Suite 1039
Toronto, ON M5G 2C2
Fax: 416-591-7333

Howard Goldblatt
Christine Davies
Tel: 416-977-6070
Email: hgoldblatt@goldblattpartners.com
cdavies@goldblattpartners.com

Counsel for the Interveners, Art Eggleton, Barbara Hall, David Miller, and John Sewell

GOLDBLATT PARTNERS LLP
30 Metcalfe St., Suite 500
Ottawa, ON K1P 5L4
Fax: 613-235-3041

Colleen Bauman
Tel: 613-482-2463
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Interveners, Art Eggleton, Barbara Hall, David Miller, and John Sewell

AND TO: **GOWLING WLG (CANADA) LLP**
Barristers & Solicitors
2600 – 160 Elgin St.
Ottawa, ON K1P 1C3
Fax: 613-563-9869

Guy Régimbald
Tel: 613-786-0197
Email: guy.regimbald@gowlingwlg.com

Counsel for the Intervener, The International Commission of Jurists (Canada)

AND TO: **DEPARTMENT OF JUSTICE CANADA**
120 Adelaide St. W., Suite 400
Toronto, ON M5H 1T1
Fax: 416-973-0809

Michael H Morris
Tel: 647-256-7539
Email: michael.morris@justice.gc.ca

Gail Sinclair
Tel: 647-256-7549
Email: gail.sinclair@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

AGENT FOR THE INTERVENER, ATTORNEY GENERAL OF CANADA
Civil Litigation Branch, East Tower
234 Wellington St.
Ottawa, ON K1A 0H8
Fax: 613-954-1920

Christopher M Rupar
Tel: 613-941-2351
Email: crupar@justice.gc.ca

Ottawa Agent for the Intervener, Attorney General of Canada

NICOLAS ROULEAU PROFESSIONAL CORPORATION
41 Burnside Drive
Toronto, Ontario M6G 2M9

Tel: (416) 885-1361
Fax: (888) 850-1306
Email: rouleaun@gmail.com

Counsel for the Intervener, Fair Voting British Columbia

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613 787 3562
Fax: 416 367 6749
Email: neffendi@blg.com

Ottawa Agent for the Intervener, Fair Voting British Columbia

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The Theoretical Foundation for Protecting Freedom of Expression

Keith Dubick [a1]

1. INTRODUCTION

To what end is the freedom of expression protected? This is a question that must be determined by a judicial system dedicated to a "purposive approach" of interpreting constitutionally entrenched rights and freedoms. [1] By this, members of our judiciary are being called upon to formulate a common conceptualization of freedom of expression in light of its perceived purposes. This understanding will in effect serve as a theoretical foundation for its protection by our courts. Such a foundation must be well laid, for it will have a heavy responsibility to bear. Of the various rights enjoyed in any free society, freedom of expression ***2** may well be the most important. In Western democratic theory, it is often considered to be the fundamental freedom upon which all other rights depend. This is because it is primarily through the process of normal communication that rights are developed, defined, and defended. To dispense with the freedom of expression is to invite incursions on other rights and an authoritarian system of government. It is in this sense that the constitutional guarantee of freedom of expression has no equal. Without it there can be no true freedom of "life, liberty and security of the person." Thus, while the judicial conceptualization of free expression is largely a theoretical exercise, its application will not be without tangible consequences.

In Canada, the theoretical foundation for protecting freedom of expression is generally understood to be constructed of three fundamental postulates. Each stands for the proposition that either; 1) democratic government, 2) knowledge, or 3) self-fulfilment, is promoted by this freedom, depending on the forum in which it is exercised. On this there is now general agreement, at least at the level of the Supreme Court of Canada. Differences of opinion only begin to emerge from its members when they are called upon to articulate the basic constructs of each theory and apply them in the context of the case before it. What these differences reveal is that a tension exists between those in favour of individual autonomy and traditional liberal theory and those sceptical of it. There are even disagreements over what each theoretical proposition means or entails in the abstract. In some cases, Court members have either misconstrued some of the tenets, or abandoned them in favour of group interests and social engineering. In other instances, they have apparently dismissed section 2(b) challenges without first considering the purpose of the guarantee, contrary to its preferred approach to *Charter* interpretation. This state of affairs reveals that the theoretical foundation for protecting freedom of expression stands on shaky ground and may be suffering from erosion through judicial discord and neglect. To repair the situation, a common understanding of what principles each theory in the abstract embodies should be revisited. With this groundwork in place, an evaluation can be made of the Court's application of each theory in context.

2. THE ROAD TO RECOGNITION OF FREEDOM OF EXPRESSION

Prior to 1982, the value of free speech in Canada was assessed almost exclusively in terms of its contribution to parliamentary democracy. By ***3** this view, open public debate and criticism on the issues of the day are important means by which citizens become involved in the political process, and ensure that government remains accountable to its electorate. This view was perpetuated in a number of prominent cases decided by the Supreme Court of Canada in a 20-year period that began in the late 1930's.

The Court in *Reference re Alberta Legislation* first recognized a right of free speech. [2] The case concerned the constitutional validity of a legislative scheme that included an "*Act to ensure the Publication of Accurate News and Information*." The proposed Act would have permitted a representative of the government to compel newspapers in Alberta to print "corrections" submitted by him, of any articles written on the subject of the provincial government's policy or activities. It would also have required the proprietors of such newspapers to disclose their sources of information if requested to do so by the representative. The Court had little difficulty in finding that this Bill was a poorly disguised attempt to minimize the publication of views contrary to the Social Credit policy of the governing party in Alberta at that time. [3]

Though the Court was only prepared to invalidate the impugned Bill on the basis that the province had superseded its jurisdictional authority, the judgments of Duff C.J.C. and Cannon J. provided a strong defence of free speech as a fundamental postulate of democratic government. Duff C.J.C., stated that: "... it is axiomatic that the practice of this right of free public discussion of public affairs ... is the breath of life for parliamentary institutions." [4] Such institutions thrive on the public support and dissension generated from the open examination of government initiatives. Cannon J. was of a similar view when he added that under our political system imported from England:

> no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political ***4** opinions of the political parties contending for ascendancy .... Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State .... [5]

That the Parliamentary system in Canada is understood to operate "under the influence of public opinion and public discussion," [6] follows from our inheritance of British political traditions, in the view of the two judges. Both Duff C.J.C. and Cannon J. pointed to the preamble of the *B.N.A. Act, 1867*, [7] which states that the Dominion of Canada is to have "a Constitution similar in Principle to that of the United Kingdom," as the expression of this intention.

Ten years after *Alberta Legislation* was decided, Justice Rand of the same Court, in *R. v. Boucher*, [8] provided a more broad rationale for protecting free speech. Boucher was prosecuted for publishing a pamphlet that was alleged to have constituted a seditious libel. In stating his reasons for restricting the scope of this offence, Rand J. pointed to the countervailing need to permit a wide range of free discussion on controversial matters:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality .... Controversial fury is aroused constantly by differences in abstract conceptions ... but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly, in discontent, disaffection and hostility: as subjective incidents of controversy, *they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, ... in the search for the constitution and truth of things generally*. [9]

In this passage of his judgment, Rand J. has implied that free speech advances other important values; by enhancing social stability; by providing an avenue for self-development; and by furthering the search for truth or understanding on all matters.

In two subsequent decisions, the Court failed to embrace the relatively broad scope accorded to the right of free speech by Rand J. in ***5** *Boucher*. Even Rand J., in *Saumur v. Quebec (City)*, [10] a case involving a by-law prohibiting the public distribution of written material unless prior authorization was obtained by the Chief of Police, dealt with the restriction on the exercise of free speech primarily in terms of its effect on the political process. [11] This case was followed by *Switzman v. Elbling*, [12] where the Court struck down Quebec's *Communistic Propaganda Act* [13] as being *ultra vires*. The Act prohibited the publication of material *promoting* communism, and also made it unlawful to use residential premises for this purpose. Again the view, first propounded in *Alberta Legislation*, that the democratic functioning of government depended upon free public discourse, was predominant in the judgments rendered by Rand [14] and Abbott J.J. [15] In focusing almost entirely on this ***6** single justification, the Supreme Court of Canada left unexplored other possible benefits derived from the free exercise of speech in society.

(a) The Emerging Jurisprudence Under The *Charter*

The Court was provided with an opportunity to re-examine the theoretical foundation of freedom of expression with the enactment of the *Canadian Charter of Rights and Freedoms* [16] in 1982. Whatever its status may have been prior to this event, freedom of expression is now protected under our constitutional framework. Section 2(b) of the *Charter* guarantees everyone the "fundamental" freedom of "thought, belief, opinion and expression, including freedom of the press and other media of communication." The Court's first interpretation of this provision, however, offered little promise that it was now prepared to adopt a broader perspective of this right. In *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, a case involving an injunction prohibiting secondary picketing, Justice McIntyre's discussion of the section 2(b) issue emphasized the democratic utility of free speech. [17] In paying homage to the *Boucher, Switzman*, and *Alberta Legislation* decisions, McIntyre J. was able to show that, even "[p]rior to the adoption of the *Charter*, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy." He further stated that it is in this context that free speech can be said to have received "constitutional status" from these decisions. [18]

***7** It was not until *Ford c. Quebec (Procureur général)*, [19] that the Supreme Court signalled that freedom of expression could be conceptualized in more broad terms. Citing passages from two articles written by professors Thomas J. Emerson, [20] and Robert Sharpe, [21] the Court found reason to extend section 2(b) protection beyond speech serving some political function, to speech which promotes truth and self-fulfilment. What is lacking in *Ford* with respect to the free speech theories mentioned is an elaboration of what each entails. When it was again confronted with this issue in *Irwin Toy Ltd. c. Quebec (Procureur général)*, the majority would only commit to the following statement:

> (1) seeking and attaining the truth is an inherently good activity;
>
> (2) participating in social and political decision-making is to be fostered and encouraged; and

> (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. [22]

There may be at least two reasons why members of our highest Court have failed to provide a more detailed discussion of the values at stake. One is that there are strong differences of opinion among them on what some of the basic tenants of each theory are. That such a division exists is readily apparent from its reasons given in its two cases on hate propaganda. The other explanation is directly attributable to the rather ridged analytical framework that was also set out in *Irwin Toy* for deciding section 2(b) claims. Though probably not intended, this approach seems to relegate a consideration of the principles involved away from the forefront of a section 2(b) inquiry.

***8** Those values identified by the Supreme Court of Canada as being operative with respect to section 2(b) of the *Charter* are also susceptible to criticism when considered together. [23] Each of the values recognized in *Ford* is founded in liberal democratic theory. They are premised on the liberal view of society in which the individual is paramount, and where the economic market is founded on capitalistic or laissez-faire principles. There is an inherent distrust in this theory of government interference with the rights of individuals, and their desire to participate in a free market economy. Government, by this view, exists to preserve liberal institutions, and ensure that individual liberty and autonomy are protected from outside intervention. By relying on only those values that fall within the liberal conception of society, has the Court, at least for now, excluded from consideration other perspectives on the role of free expression? It may be premature in this early stage of *Charter* jurisprudence to exclude from consideration theories of the freedom that challenge the liberal democratic vision of a good society. There may be cases in which the merits of alternative or opposing theories on free speech should also be taken into account. [24]

***9** The liberal approach to protecting free speech interests is currently under attack by some feminists [25] and Critical Legal Scholars. [26] Their distrust lies not with governmental regulation of speech, but with the fundamental notion underlying liberal theory that society is for the most part neutral with respect to which kinds of speech are protected. They take the contrary position that the protection afforded to this right operates to preserve the status quo within society. Feminists argue that our entire social structure is biased in favour of male interests, while Marxists or critical legal scholars find such bias operating against economically disadvantaged groups in society generally. Both groups argue that what is said and heard in our society is either reflected or determined by this perceived bias. They accordingly hold less value in promoting freedom of expression in general. Other rights, such as the equality rights in section 15 of the *Charter*, are viewed as the more promising vehicle for true social change. For them, true free expression cannot be achieved until certain changes are made in our social structure so that all groups in society are more or less treated as equal. They tend to conclude, therefore, that more governmental regulation of free speech, not less, is required to even out the playing field.

One problem with these perspectives is that they tend to criticize the accepted theories of free speech without offering an alternative basis for protecting it. Although these criticisms should be raised in cases where they have merit, the liberal theories of free speech should not be abandoned in the process. After all, the *Charter* is, by and large, a liberal constitutional document. It recognizes the right to "life, liberty, and the security of the person," in section 7, while section 1 places the onus on the state to justify its intrusion on individual rights in light of what is reasonable in a "free and democratic society." The liberal theories should continue to constitute our primary basis for safeguarding activity falling under the *Charter*. At the same time, however, there is nothing to be gained from sheltering them from less mainstream views. In fact, to deliberately disregard those theories which fall "outside the normal liberal spectrum, would in itself be a denial of freedom of expression in the real sense." [27] Consideration of new theories of free speech might ***10** allow us to identify certain shortcomings with our current ones, so that they can be modified over time to meet some of the challenges faced in the modern era of communication.

3. THE ANALYTICAL FRAMEWORK

(a) Sections 1 and 2(b) of the *Charter*

Members of the Supreme Court of Canada have repeatedly stated [28] that a purposive approach should be followed whenever determinations are being made on the constitutionality of alleged violations of *Charter* rights and freedoms. This means that some consideration should be devoted to the interests or values that the right in question is understood to embody. With respect to section 2(b) of the *Charter*, the majority [29] of the Court in *Irwin Toy, supra*, has set out a particular analytical framework that is to be adhered to when assessing challenges raised under it. The nature of this procedure has a direct bearing on when a theoretical inquiry into the purposes of the section 2(b) guarantee is to be made by a court.

Whether the activity sought to be protected by the plaintiff constitutes "expression" will normally be the first matter addressed by a court. In *Irwin Toy*, the majority began to delineate the sphere of conduct protected by section 2(b) of the *Charter* by proclaiming that irrespective of its perceived worth, virtually all human activity having some measure of expressive content falls within its ambit. [30] From this standpoint, the net cast by section 2(b) will indiscriminately capture any form of individual endeavour that either conveys meaning, or has expressive content ***11** in itself. Quality control, in terms of an assessment of the theoretical value of the expression at stake, is not introduced at this stage of the analytical process.

Once section 2(b) is engaged, it is necessary to determine whether an infringement of the protected exercise of the right has occurred. At this second level of inquiry, the issue is whether government has acted to infringe the plaintiff's activities. Measures made by, or taken under, governmental authority can infringe section 2(b) either in their *purpose* or *effect*. If the government's immediate *purpose* in adopting a particular measure is to restrict expressive, as opposed to physical human activity, a violation of section 2(b) will be substantiated. The only other way to establish a deprivation of free expression is to implicate the *effects* of the governmental measure. It is for the plaintiff to demonstrate that such a violation occurred, by identifying the meaning of the expression he or she sought to convey, and how the legislation adversely affected his or her ability to convey it. For reasons that are not readily apparent, the court has decided that it is only when the *effects* of the government activity are under scrutiny that the theoretical underpinnings of section 2(b) become important. *Irwin Toy* places an obligation on the plaintiff relying on the *effects* of an impugned government measure to identify how his or her activities stood to further at least one of the free speech rationales established in *Ford*.

The purposes of free expression are also relevant when the third and final stage of this analysis is reached. Once an infringement has been found, it is necessary for a court to consider whether the means chosen to limit a right are "reasonable and demonstrably justified" under section 1 of the *Charter*. In *R. v. Oakes*, [31] a three part proportionality test has been developed to aid in this investigation. Under the first component of this test, it is necessary to establish whether there is a rational connection between the legislation and the government's objective in enacting it. The second part asks whether these legislative means minimally impair the right or freedom at risk. When the third and final component of the test is reached, consideration is to be given to whether the overall effects of the measure upon the right or freedom in question are proportionate to the importance of the objective served. It is with respect to the final two components of proportionality that one would expect to find some analysis of the free speech principles that may be operative in the circumstances of the case.

***12** Despite the repeated call for a purposive approach to *Charter* interpretation, the Supreme Court appears to have relegated its relevancy to the final stage of the inquiry. Part of the reason for this may be the broad scope accorded to the section 2(b) guarantee by the Court. Since section 2(b) automatically encapsulates all activity having expressive content, there is little need to justify the inclusion of any particular form of speech at this initial stage. Though they remain free to address section 2(b) values at any stage of their analysis, it is only "within the perimeters of section 1 that courts will in most instances weigh competing values in order to determine which should prevail." [32] To this extent, the Court has at least remained true to another one of its preferred approaches to *Charter* interpretation: the "contextual approach."

(b) The Abstract and Contextual Aspects of a Purposive Interpretation of the *Charter*

The Supreme Court of Canada has indicated on separate occasions [33] that an inquiry into the purposes served in protecting expression occurs at two levels and at different stages. At an abstract level of a purposive interpretation of section 2(b), those values informing the scope of the right are defined without reference to any one particular activity constrained by government. The need to embark on such an inquiry has already been largely discharged by the Court with its embrace of the three free speech rationales in *Ford*, and its broad interpretation of the scope of the section 2(b) guarantee in *Irwin Toy*. Due to the importance and range of values promoted by free expression generally, the Court was prepared to recognize that virtually all forms of expression should quality for at least some degree of *Charter* protection. This rather bold commitment to free speech can be justified on the basis that with the Court's recognition of the theory of individual self-fulfilment which, as will be explained later, is capable of accommodating all forms and content of expression, it is a foregone conclusion that any one particular act of communication qualifies for some degree of section 2(b) protection.

***13** Just how much protection that will be depends on the circumstances of each case. It is here, when section 1 of the *Charter* is reached, that a contextual level of inquiry is entered into. The contextual approach attempts to define the extent to which a particular exercise of freedom of expression can be understood to further one or more of its larger theoretical purposes. That is, it is not the right, in its broadest theoretical terms, that is important here. Rather, it is the context in which the right is being exercised that is determinative of its individual or social utility. Thus, when section 1 of the *Charter* is reached, and a balancing of interests becomes necessary, it will be a contextual interpretation of the freedom involved that will help determine the final disposition of the case.

4. THE THEORETICAL STRUCTURE

One of the consequences from the Court's emphasis on taking the freedom in context is that scant attention has been given to developing a common understanding, for the purposes of Canadian jurisprudence, on what the fundamental tenants of each theory of free speech are. With the possible exception of the political process rationale, the Court seems to have imported these theories wholesale from the United States and assumed that they are generally understood or need no further explanation. Yet the majority of the judgments rendered by the Supreme Court of Canada on section 2(b) betray possible misunderstandings, differences of opinion, and scepticism over some of the fundamental constructs of each theory. Revisiting the basis for each theory in the abstract might alleviate some of the difficulties that have arisen from the application of each theory in context.

(a) The Promotion of Good Government

(i) Abstract Theory

This rationale for free expression is generally considered the most powerful basis for defending the activity. The fact that it is the only rationale, identified in *Ford*, which was clearly recognized by the Supreme Court of Canada prior to the adoption of the *Charter* lends credence to this view. Freedom of expression is part of the democratic commitment. In a system of government based on free elections and representative democracy, it is vital that all persons are free to engage in public debate on the issues of the day. A measure of a properly ***14** functioning democracy is also the extent to which it is able to tolerate the dissemination of unpopular views of an individual or a minority. Thus, our commitment to this freedom largely corresponds with our commitment to democracy, and *vice versa*. There is, in fact, interdependency between freedom of expression and democratic government, such that letting down our guard on one front will serve to destabilize the other.

The relevant jurisprudence that is now developing under the *Charte*r tends to reinforce the perception that preferential treatment should be accorded to expression that is concerned with subject matters which are essentially political in nature. In general, the judiciary views such speech as more deserving of protection than other forms. On behalf of the Supreme Court of Canada in *Dolphin Delivery*, its first decision addressing section 2(b) of the *Charter*, McIntyre J. wrote of the guarantee almost exclusively in terms of its political ramifications, even though the subject of the case, secondary picketing by a union, might more properly

be categorized as "economic expression." [34] In an opening paragraph on freedom of expression, he described the right in words invoking those of Abbott J. in *Switzman*: [35]

> Freedom of expression ... is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, ... which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection. [36]

In *Edmonton Journal v. Alberta (Attorney General)*, a case involving press coverage, Justice Cory implied that free speech is our most important ***15** liberty because of its contribution to democratic government. [37] In a case concerning the right to distribute political pamphlets on public property; *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada*, L'Heureux-Dubé J. commented that "[a]ny grounds, perhaps otherwise legitimate, put forward for restricting freedom of expression are least compelling when advanced in the political context." [38] Though these three decisions do not add much to what has already been said about this rationale, they do affirm that expression made in the political arena will generally constitute the most important exercise of the section 2(b) guarantee.

There are a number of goals that freedom of expression can serve on the political front. Of these, four deserve special mention: 1) promoting self-government, 2) preserving social stability, 3) building accountability and 4) increasing public confidence in our political system. [39] These objectives are often interrelated, so that the attainment of one tends to advance the others. *Self-government* [40] is arguably the most important goal that the exercise of free speech may advance. This ideal is perhaps best summarized by the well-known phrase; "government of the people, by the people, for the people." [41] This concept can also be located in our founding constitutional document. Section 91 of the *Constitution Act, 1867*, [42] defines the powers of Parliament to make laws for the "good Government of Canada." In *Switzman*, Rand J. stated that ***16** "Parliamentary Government postulates a capacity in men, acting freely and under self-restraints, to govern themselves ...." [43] Self-government is fostered whenever citizens are provided with a meaningful opportunity to have some input in the political process. Freedom of speech and the press facilitates self-government in different ways. First, it provides a forum where opinions or concerns on the issues of the day can be voiced. This forum can in turn be used to provide feedback on the performance of our elected representatives, and of those that serve them in the various governmental departments and agencies. By allowing all views on political matters to be voiced, freedom of expression also helps ensure that both citizens and their representatives in government are fully informed and able to reach rational decisions based on that information.

Whenever citizens have continued access to a forum in which to express their views or vent their frustrations, a more *stable social community* is the normal result. [44] This is because the citizenry is free to participate in peaceful protest and demonstration, without having to resort to violent means of getting their message across. Some measure of stability is also obtained when all citizens, regardless of their views, or ethnic or economic backgrounds, are assured access to a public forum. When citizens can participate as equal persons in the political process, they are more willing to accept government decisions that do not necessarily reflect their personal views. In this way, freedom of expression provides a means of ensuring that a necessary balance is maintained between social order and social change.

Free speech also builds *accountability* into the political system. It can operate to hold public officials responsible for their conduct while holding office. Public awareness and criticism of the performance of our elected representatives, or of the particular policies of a government, makes politicians more responsive to the concerns of their constituents. In this regard, freedom of the press is crucial. Today, it is often media coverage and investigative reports that keep citizens informed of the government's performance, and of possible abuses of authority. With this information, appropriate action can be taken. If no response is ***17** forthcoming, the public ultimately remains free to remove those responsible from office at election time.

(Elections are, by their very nature, an exercise in large scale communication between the candidates and those who may elect them). Those politicians who, for whatever reason, fail to meet the expectations of those who put them in office, will face defeat at the next election unless they are able to take corrective action beforehand. In sum, it is through freedom of expression and the press that the electorate is able to hold their representatives accountable.

And finally, by performing each of the above functions, the freedom instils *public confidence* in the political system. Political legitimacy is more likely to be achieved in a society that tolerates divergent views from all of its members, and is responsive to them. This usually promotes confidence in government officials and the institutions they serve, which in turn leads to a more stable society. In promoting self-government, social stability, political accountability, and public confidence, freedom of expression helps ensure that the conditions necessary for a democracy to endure will continuously be met.

(ii) Contextual Analysis

(A) The Electoral Process

(I) Restrictions on Referendum Expenditures

Having outlined the basic principles that the political process rationale for the freedom in the abstract encapsulates, a review can be made of their application by justices of the Supreme Court of Canada in the context of some of the cases raised before it. This necessitates a case-by-case approach. The cases reviewed here deal with governmental regulation of the electoral process. The Court has rendered two cases in near succession on the subject of referendum and election campaigns. The first case, *Libman c. Quebec (Procureur général)*, [45] concerned provisions of the *Quebec Referendum Act*, [46] which regulated campaign organization and expenditures. When a referendum is called, the Act authorized members of the National Assembly to register and organize in support of one of the positions put to the vote. One provisional ***18** committee was thereby formed to represent each referendum option. Each provisional committee became a "national committee" after its members met and adopted by-laws conforming to the requirements of the Act. One of these requirements was that the by-laws must allow groups to either join or affiliate with the committee. Each Committee was allotted a "referendum fund" out of which it could make payments qualifying as "regulated expenses," subject to certain exceptions. The Act restricted contribution amounts to a referendum fund, and their sources. Only a designated representative of a national committee was entitled to incur a "regulated expense," which is defined as covering the cost of any good or service used to promote or oppose a referendum option. The appellant was a member of the National Assembly and president of the Equality party. Before the expected referendum on the Charlottetown Accord was held, he challenged the Act under section 2(b) of the *Charter* on the basis that it prevented him from publicizing his position outside of the National Committees.

The Court found that the political expression of those who would prefer not to align themselves with a national committee was constrained by the impugned provisions. Individuals or groups may wish to campaign on their own so as not to appear to support the political ideology of a party favouring a referendum option or the proposed campaign strategy of a national committee. They might also take exception with the referendum options available or their wording, and advocate a general boycott. The *Charter* infringement arose from the fact that individuals or groups acting independently could only incur "unregulated" expenses.

The Act placed restrictions on political expression for the purpose of enhancing it. It sought to achieve equality between the promotion of the various referendum options to allow for informed voting and public confidence over the fairness of the process. It purported to do this by placing spending limits on the participants. This was to ensure the national committees had more or less an equal opportunity to access media and influence voters. Similarly, if independent spending was not also limited, there was every possibility that the financial support received for the promotion of one of the options will be disproportionate to that received for the others. At least this is how the Court construed the legislative objectives, and without raising any objection against them.

If there is a flaw with this reasoning, it is with the implicit assumption that each referendum option automatically deserves the same level of support. In some ways, the amount of funding received for any given option is a measure of how strongly it is supported generally, which in ***19** turn may be an indication of its worth or merit. The fact that individuals are willing to

expend personal funds to get their viewpoint across speaks to how strong their convictions are. However, there is a downside to this, for there is always the possibility that it is only the options favoured by corporations and affluent members of society that will benefit from unlimited campaign spending. Yet not every referendum issue will necessarily divide members of society according to their financial status. The Government might have considered other approaches to this problem. For example, independents might have been permitted to spend personal funds to a set maximum amount as they see fit. This may have helped limit the disproportionate influence that affluent supporters sometimes wield while achieving some balance between individual freedom and equality of opportunity.

This is the alternative option that the Court pointed to when invalidating the legislation under the minimal impairment requirement of proportionality under section 1 of the *Charter*. In contrast to the comprehensive definition of a "regulated expense," "unregulated expenses" were narrowly circumscribed and treated as exceptions to the general rule. The Act listed 9 situations qualifying as an unregulated expense. [47] The Court found fault with at least 6 of the 9 exceptions, and stated that they are so restrictive that there is little difference between having them and a total ban on expression for independents. Furthermore, there was no allotment of funds for independent campaigns. As a result, even the most rudimentary channels of communication were cut off for independents. They were prevented, for example, from printing flyers, posters and pamphlets - one of the few mediums of communication that less affluent members of society have at their disposal. Largely influenced by a federal Commission report on electoral financing, [48] the Court determined that the Act should have allowed independents to spend a set maximum amount and at the same time prevent them from joining ***20** together and pooling this. The impugned provisions were accordingly struck down.

(II) Publication of Public Opinion Surveys Before Elections

In *Thomson Newspapers Co. v. Canada (Attorney General)*, [49] a provision of the *Canada Elections Act* [50] met the same fate. It prohibited the publication of opinion surveys during the last 3 days of a federal election campaign. The ban was applicable to surveys that identified the political party or candidate that electors are inclined to vote for in an election, or on an election issue. The majority of the Court [51] placed this form of freedom of the press squarely within section 2(b). The only reason for the restriction that was countenanced by the majority was the need to prevent potentially inaccurate polls from being released immediately prior to election day. The validity of such polls cannot be subjected to the same level of scrutiny as earlier ones, and may present false information to electors at a time when they are expected to fulfil their "most important democratic duty" and vote. [52]

Again, the government's legislation did not pass the Court's test of proportionality. Here, the majority displayed a surprisingly high regard for the ability of Canadians to act rationally in view of some of its earlier comments in section 2(b) cases. The Canadian voter was said to be capable of exercising independent and sound judgment over the scientific validity of opinion surveys. Most have some appreciation of the problem the government is concerned with, and can detect seriously inaccurate poll results. Though present the danger that some voters may be influenced by false polling information and cast their votes accordingly was not demonstrated to be occurring at a widespread or significant level. To the majority, the publication ban was both over and under-inclusive. It was excessive in capturing all opinion surveys regardless of their accuracy, and insufficient in not requiring disclosure of the methodology employed by those surveys made public. The majority found that Parliament's objective would be better served by removing the publication ban and permitting only the release of pre-election surveys ***21** that attach methodological information. The provision was therefore struck down as not meeting the section 1 requirements of minimal impairment and proportionality.

The *Libman* and *Thomson* cases demonstrate that the values informing the democratic process theory of free expression may sometimes conflict with each other. In *Libman*, free individual involvement in the referendum process, which is an aspect of self-government, was pitted against notions of equality of participation and public confidence in the results. In *Thomson*, the benefit of informing the electorate through free reporting of election issues was weighed against the possible spread of misinformation by the broadcasting of inaccurate poll results. The resolution reached in either case can be declared a victory for individual liberty over government interference. However, this victory may be temporary, for the Supreme Court did not purport to invalidate the

government's objective in limiting freedom of expression, only its proposed means of achieving it. Furthermore, the dissent [53] in *Thomson* would have decided the reverse and upheld the provision under section 1. Thus, although the Court has yet to rule as such, it may be that the individual will not always triumph over government in a contest between public participation in the political system and regulation of that process.

That the political process theory of free speech will continue to influence the development of jurisprudence under section 2(b) of the *Charter* is beyond doubt. It constitutes the single most powerful rationale for protecting speech generally. It does not, however, provide the sole reason as to why it should be protected. In fact, when considered alone, the theory operates in an elitist fashion by excluding other kinds of speech that are also deserving of protection. There are occasions in which non-political forms of expression can provide a greater public benefit. A more comprehensive basis for defending free expression is found when the "marketplace of ideas" is accessed.

(b) The Pursuit of Knowledge, Truth, and Understanding on All Things

(i) Abstract Theory

Defined in its broadest terms, the second rationale for protecting free speech interests relates to our eternal search for knowledge, truth ***22** and understanding on everything that is a part of human existence. For reasons of convenience, this rationale shall be referred to herein as it is most commonly known: the "market place of ideas" theory. This theory works best when it is applied to situations where what is being communicated is capable of rational assessment. Speech which appeals to the conscious mind of the listener, and which can be rationally evaluated in terms of its worth or veracity, contributes to our understanding of the world around us. And a society that leaves it up to its individual members to debate the veracity of different thoughts or ideas is inevitably a more enlightened one.

John Stuart Mill provides in the celebrated treatise; On Liberty, the single most important contribution to this theory of free speech. [54] For Mill, human judgment of truth is best arrived at when all members of society are free to exchange and contemplate the opinions, ideas, theories, and scientific discoveries of the day. By "truth," Mill is relying on the relative, as opposed to the absolute, sense of the term. Truth is what we perceive as correct or valid, based on the information that we have of alternative views or explanations. Although this system of theory verification does not come with a guarantee that the best idea will always be followed, it has no alternative. Any other method of determining what is "right" is bound to produce greater error, and eventually degenerate into dictatorial rule.

The pursuit of truth rationale first gained acceptance as a principle protected by the First Amendment of the American *Bill of Rights*, when Holmes J. relied on it to form the basis of his dissent in *Abrams v. United States*, [55] in 1919. Drawing an analogy from the free economic market system, Holmes J. argued that speech is protected to provide for the "free trade of ideas," which is the testing ground of all our knowledge. The worth of any given proposition is determined by how it fairs in "the competition of the market." The "marketplace of ideas" theory treats ideas much like they are commodities. They can be bought, sold, modified, damaged, exchanged, thrown away, or re-cycled.

The central thesis of Mill's analysis of free discussion is that censorship is an evil regardless of whether the silenced opinion is true or false. If the silenced opinion is right, members of society are "deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier ***23** impression of truth produced by its collision with error." [56] There are additional reasons why this theory holds state censorship of even false opinions as inherently dangerous. The theory asserts that it is members of the general public, not government, who are in a better position to arrive at an objective and fair conclusion as to the merits of any new idea or theory. The problem with allowing the state to act as arbiter of what is false or harmful is that it may seek to suppress speech that challenges its own authority to govern. Another difficulty that arises from the official suppression of ideas deemed harmful because they are "false," relates to the relative nature of the concept of "truth." History has shown that human judgment in this regard is not infallible, and that what any given society holds as true or valid is liable to change over time. Society is constantly evolving, and what may be regarded

as true today will not necessarily be true tomorrow. Many of the great figures in history, such as Galileo, share the dubious distinction of being right at the wrong time.

Government-based censorship can be counter-productive in other ways as well. It may well have a "chilling-effect" on the exercise of free speech by encouraging self-censorship. Out of an abundance of caution, an individual may chose to remain publicly silent on certain controversial matters rather than risk a civil suit or a criminal prosecution. Furthermore, those who are censored or punished for voicing their beliefs in public may decide to continue their activities "underground," where ***24** there is a greater tendency for such views to thrive in the absence of contrary public opinion. False ideas may only be recognized as such when they are confronted or challenged by accepted opinion. According to the market place of ideas theory, it is the open and frank discussion of false ideas, and not their suppression, which leads to their ultimate demise. [57] Viewed in this light, excessive state censorship can provide an environment in which falsehoods can more easily take root and flourish.

The pursuit of truth rationale of free expression protects much that the political process theory does not. It extends protection beyond political dialogue by encompassing views and ideas irrespective of their particular subject matter. It also provides a powerful rationale for defending false or even harmful views. However, even this rationale suffers from a number of potential shortcomings. As with its economic counterpart, the market place of ideas theory is based on a number of assumptions that have more recently been called into question.

One is that consumers consistently exercise rational judgment, which allows them to choose the best product or idea from among the competing ones. In his critique of this theory, C. Edwin Baker argues that certain psychological processes may interfere with an individual's ability to rationally evaluate different kinds of information. He contends that how one interprets the information presented is influenced by "'subconscious' repressions, phobias, or desires ..., stimulus-response mechanisms and selective attention and retention processes," allowing emotional and even irrational appeals to have a significant impact. [58] He also draws from the sociology of knowledge perspective to suggest that one's view of what is right or true is largely predetermined by the social structure of the environment in which he or she is a part. In this sense, it is questionable whether a conscious and free decision can be reached whenever there is a choice to be made between one or more alternatives. The premise that people are able to make rationale consumer decisions is made more tenuous by the powerful influences that mass media and advertising can hold over its target audience. There may therefore be some basis for the assertion that "[m]arketplace outcomes ... are determined ***25** more by the packaging of the message and the psychological predispositions of the listeners than by any rational process." [59]

Another questionable assumption upon which this theory is based is the notion that all individuals or groups in society have an equal opportunity to access the "market" and "sell" their ideas. It should be noted that the theory was developed in an age when the "soap-box speaker" was a more common phenomenon and "in a society where the major forms of public debate were hand-printed leaflets, hand-set newspapers, and speeches in town meetings and public parks." [60] Modern marketing strategies have changed all this. To get the message across and accepted in today's world, it is normally necessary to employ multi-marketing strategies on a comparatively large scale. This poses difficulties that may prove insurmountable for the ordinary citizen who wishes to "market" his or her ideas. Most individuals lack the financial resources necessary to purchase commercial space to air their views. This problem is compounded by the fact that those who control media access are not necessarily amenable to allowing the presentation of views or information that challenge "conventional wisdom and the established power structure." "Accordingly, those facts, ideas, and perspectives most likely to gain media access and, consequently, large scale public exposure, are those appealing to the self-interest of those individuals and groups who own and manage the media, to the mass audience whose patronage provides the economic and political basis for advertising, and to economic organizations whose commercial payments directly provide funds for the media." [61] It therefore follows that the media carries "great power to suggest and shape articulated thought." [62] By allowing this power to be exercised in favour of the status quo, the market often masks, rather than reflects, the divergence of views that may exist in society.

Retaining the economic market analogy, some level of governmental regulation of the "free trade of ideas" may be desirable. In many ways, it is the private sector, and not the government, which poses the greater threat to free speech interests. Today,

the single most powerful medium of communication is the media. No other medium is capable of reaching as great a number of people as are the newspapers, radio, and television. ***26** Through private ownership, the control that the dominant groups in society exercise over what messages are conveyed through this medium can amount to a form of censorship that is more far-reaching than any imposed by government. This permits the argument that limited governmental regulation that focuses not on the content of expression, but on the power of media owners to monopolize their resources, can enhance the effectiveness of the market place of ideas.

Government participation in the operation of the free market system is not new. For all its merits, the system of free enterprise falls short of its ideal. False or misleading advertising and the growth of monopolies sometimes offset rational consumer choices and improved productivity through free competition. Sometimes defective or even harmful products are made available for public consumption. To counter dangers such as these, governments have found it necessary to intervene in order to protect both the sellers and the buyers. Consumer protection laws, investigations of fraud and anti-competition practices, and product testing are some of the responses made by governments to alleviate shortcomings in the economic sphere. Do these concerns disappear when it is an idea rather than a material product that is made available for public consumption?

The answer, it would seem, is both yes and no. As was evident in *Libman, supra*, and *Thomson, supra*, the Supreme Court of Canada has signalled that government may have cause to intervene in our political process to ensure fairness or accuracy in how information is conveyed to the electorate. At the same time, the Court found that the specific measures adopted by Parliament for this purpose intruded further than necessary upon freedom of expression. These cases illustrate government-imposed limitations on the *process* through which information is conveyed. In contrast, the Court has also addressed two cases dealing with hate propaganda in which restrictions were placed on the *content* of expression. Again, the court has both accepted and rejected government intrusions in this area, thereby indicating that although it may be desirable to restrict certain forms of expression to avoid some harm, not all efforts in this direction can be supported as constitutionally valid. Clearly, government attempts to limit either the medium or content of expression must achieve some measure of balance between free enterprise and public protection.

27** ***(ii) Contextual Analysis

(A) Hate Propaganda

(I) The Wilful Promotion of Hatred

The Supreme Court of Canada has come to different conclusions on the constitutionality of two distinct *Criminal Code* [63] offences that have been employed against the dissemination of hate propaganda. In its first decision; *R. v. Keegstra*, [64] a majority of the Court upheld section 319(2) of the *Code*, which creates a hybrid offence for anyone who "wilfully promotes hatred" against an identifiable group distinguished by colour, race, religion or ethnic origin. The *actus reus* of the offence is the communication of statements promoting hatred. Statements made in private conversation are exempted. Other exceptions appear in the form of defences under section 319(3). These are that the statement communicated is: 1) true, 2) an opinion expressed in good faith on a religious topic, 3) of public benefit, or 4) intended to have the contrary effect of preventing group hatred. The consent of the Attorney General must be obtained before a prosecution for the offence may be instituted.

The Court was divided (4-3) over whether this provision could be upheld under section 1 of the *Charter*. The majority, whose decision was written by Dickson C.J.C., found that it could be justified as a reasonable limitation on freedom of expression. In his section 1 analysis, Dickson C.J.C. attempted to limit the potential scope of the offence by giving it a narrow and restrictive reading. He stated that the requirement in section 319(2) that the statements be made "other than in private conversation" demonstrates respect for individual privacy. It serves to immunize any discussion intended to be private in nature, even if it transpires in a public area, or is somehow made public. [65] On the question of the level of intent required, Dickson C.J.C. relied on a previous interpretation [66] of the word "wilfully" that served to import full *mens rea* for the offence. Thus, the crime is only committed where the accused consciously intended to promote hatred, or where it was foreseen that this was certain or morally certain to result. A restrictive interpretation of the phrase "promotes hatred" was also offered by Dickson C.J.C. In ***28** the

context of section 319(2), to promote hatred is to actively support or instigate vilification and detestation of an identifiable group. [67] He also pointed to the special defences made available to the accused, and suggested that they operate to favour the speaker's interests in borderline cases. [68]

Dickson C.J.C. began his discussion of the theoretical value of the expression prohibited by section 319(2) of the *Code*, by stating that, in his opinion, the significance of this kind of activity is marginal. He first dismissed the argument that the search for truth is furthered by the promotion of hate propaganda:

> Taken to its extreme, this argument would require us to permit the communication of all expression, it being impossible to know with *absolute* certainty which factual statements are true, or which ideas obtain the greatest good. The problem with this extreme position, however, is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated market place of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. [69]

He then proceeded to reject the argument based on self-fulfilment by suggesting that while section 319(2) constrains this psychological process for the individual speaker, this concern is defeated by what his or her message has to say of the corresponding rights of those vilified. The right to identify with and express one's cultural or religious heritage is an aspect of self-fulfilment that hate propagandists would claim for themselves, but deny for others. [70] Dickson C.J.C. adopted a similar line of reasoning for downplaying the application of the political process rationale to hate propaganda. He was willing to concede that hate propaganda can be categorized as political in nature, and that its suppression prevents a few individuals from airing their views in a political arena. At the same time, however, the dissemination of hate propaganda serves to undermine the commitment to an open political process because, ***29** according to Dickson C.J.C., it tends to deny the right of those targeted to also participate freely and equally. [71]

The dissenting judgment was provided by McLachlin J. Her discussion of free expression values attacked many assumptions implicit in the majority's opinion on the matter. With respect to the marketplace of ideas theory, McLachlin J. stated its validity is not negated by the fact that history reveals ideas that are both false and destructive can gain a foothold, at least for the short term.

> While freedom of expression provides no *guarantee* that the truth will *always* prevail, it still can be argued that it assists in promoting the truth in ways which would be impossible without the freedom. One need only look to societies where free expression has been curtailed to see the adverse effects both on truth and on human creativity. It is no coincidence that in societies where freedom of expression is severely restricted truth is often replaced by the coerced propagation of ideas that may have little relevance to the problems which the society actually faces. Nor is it a coincidence that industry, economic development and scientific and artistic creativity may stagnate in such societies. [72]

She argued against limiting this rationale to what can only be verified as “true,” since this would leave unprotected many opinions or ideas that are nonetheless valuable. [73] She accordingly holds more trust in the ability of individuals to rationally assess the merit of varying messages, and less faith in the ability of the state to impose censorship without creating more problems than it may solve, than does the majority.

***30** In a different context, [74] McLachlin J. addressed the suggestion made that hate propaganda is antithetical to the cause of free expression because whatever it gives to its promoter it takes away from the credibility of those targeted, in terms of their ability to communicate effectively. She interpreted this argument as resting on an assumption that with the right of free expression is a concomitant right to be believed. That is, to merely state a position is to automatically derive some support for it. She found no philosophical basis for such a contention under any of the three rationales for protecting the freedom. "Freedom of expression guarantees the right to loose one's ideas on the world; it does not guarantee the right to be listened to or to be believed." [75] Another problem she identified with this argument is that it would lead much valuable expression to be restricted. Unlike the majority, McLachlin J. found that the promotion of hatred is not necessarily incongruous with democratic principles in that, where a contentious political issue is at stake, it is to be expected that attacks will be made against the credibility of the views and judgment of those falling on the other side of the debate. [76] It would seem from this that McLachlin J. is less prepared than the majority to defeat an exercise of free expression on the basis that it tends to undermine the corresponding right of others, and is therefore more in line with traditional liberal theory.

The section 1 analysis provided by McLachlin J. contrasts sharply with that of the majority. She took the contrary position that section 319(2) does not represent a minimal impairment of freedom of expression. This is largely because she found the offence to be defined in much wider terms. For McLachlin J., the word "hatred" in section 319(2) is too broad and subjective to provide a basis for criminalizing speech. She argued that it could be interpreted as capturing a wide range of emotions, beginning with mere "active dislike." [77] That what constitutes "hatred" is left to the subjective inferences of those sitting in judgment of the prohibited conduct, and that inferences unfavourable to the accused "are more likely to be drawn when the speech is unpopular," [78] is a related concern of hers. The problem she identified with the *mens rea* requirement ***31** is that the intention to promote hatred is not necessarily inconsistent with the intention to speak of what is perceived to be true, or to contribute to legitimate public debate. [79] She was also of the opinion that section 319(2) should have been restricted in scope by making the occurrence of "actual harm or incitement to hatred" a component of the offence. [80] Though she allowed that the reach of section 319(2) is somewhat circumscribed by the defences, she questioned the limited scope of the most important defence - "truth," and the onus it places on the accused to establish what was said is, in fact, true. She pointed out that it would appear, for the purpose of this defence, what is "true" is only that which can be verified as such. [81] In her judgment, McLachlin J. seemed to be particularly concerned with the deleterious affects that an overly broad prohibition could have on perfectly legitimate public discussion. One of her strongest reservations regarding the offence is its potential "chilling effect" on the speech of innocent persons. She feared that section 319(2) might be so vague that it will sometimes be difficult to predict whether a treatment of certain subject matters is covered or not. For example, political debate on "immigration, education language rights, foreign ownership and trade may be tempered," as might scientific research showing ethnic or racial group differences. [82] McLachlin J. referred to the provision's own "track record" as providing all the evidence needed to conclude that it is over broad. [83] As she pointed out, pamphlets containing the words "Yankee Go Home," and Salmon Rushdie's novel, *Satanic Verses*, are among those publications that have regrettably fallen, in one way or another, under the purview of the offence.

Upon reaching the final stage of the proportionality test, McLachlin J. applied a cost-benefit analysis of the effects and ends of the legislation. She described the nature of the violation as serious and counter to all three freedom of expression rationales. [84] On the other side of the equation, ***32** McLachlin J. suggested that the offence might do more to promote the spread of group hatred than it does in preventing it. [85] She also stated that it is unclear how the other objectives said to be animating the legislation, namely the preservation of social harmony, individual dignity, multiculturalism, and equality, are actually fostered by it. Balancing the tenuous benefits derived from the legislation with the significant nature of the infringement, McLachlin J. concluded that it could not be redeemed under section 1.

(B) Spreading False News

Not long after its decision in *Keegstra*, the Supreme Court of Canada came to a different conclusion on a related matter - the "spreading of false news." In a 4-3 decision, the Court *in R. v. Zundel* [86] found that the false news law in section 181 of the *Criminal Code* could not be justified as a reasonable limitation on freedom of expression. This decision is significant since it is the only time in which the Court has struck down a criminal offence on the basis of the section 2(b) guarantee. Section 181 of the *Code* made an indictable offence of knowingly publishing a false "statement, tale or news" which "causes or is likely to cause injury or mischief to a public interest." The charges forming the subject matter in the case arose from two pamphlets published by Zundel: one alleging the existence of an international Jewish conspiracy; the other attempting to refute the holocaust of World War II.

This time, it was McLachlin J. who provided the majority's decision. She began her section 2(b) analysis by stating that each of the three general purposes of freedom of expression embrace beliefs regarded by most members of society as wrong or false. [87] McLachlin J. essentially provided two reasons why it cannot be maintained that deliberate lies further none of the freedom of expression principles. The first reason is ***33** that, on the contrary, there are many occasions in which exaggerated or falsified accusations may promote free speech goals. [88] She provided hypothetical examples of where individuals may chose to cite false information to advance their perfectly legitimate position on issues they are strongly committed to. [89] In support of this argument, McLachlin J. relied on past prosecutions for this offence to illustrate the potential section 181 has for "suppressing valuable political criticism or satire." [90] The second reason offered by McLachlin J. as to why it is unsafe to dismiss deliberate lies as furthering none of the free speech values relates to the difficulty in separating falsehoods from truth. A given statement may have more than one meaning, particularly if it is intended as metaphorical or allegorical, and may be interpreted differently by different people. [91] It is for these reasons that she found a categorical dismissal of ***34** deliberate lies at the theoretical level of section 2(b) analysis is not without some difficulty. [92]

According to McLachlin J., section 181 of the Code suffers from "overbreadth," and therefore fails to satisfy the requirements of the proportionality test. It is over broad because it extends beyond what can be verified as false. Here, she attacked the assumption that assertions of fact can somehow be separated from those of opinion. She stated that even if the phrase: "statement, tale or news" does not enter the realm of pure opinion, it does intrude beyond the boundaries of what is strictly factual. In other words, it captures more than false assertions of fact. She also suggested that in the process of determining what is a false assertion of fact for the purposes of section 181, the provision operates to single out views more for their unpopularity than for their lack of truthfulness:

> What is false may, as the case on appeal illustrates, be determined by reference to what is generally ... accepted as true, with the result that the knowledge of falsity required for guilt may be inferred from the impugned expression's divergence from prevailing or officially accepted beliefs. This makes possible conviction for virtually any statement which does not accord with currently accepted "truths," and lends force to the argument that the section could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas. [93]

Though she may not have explicitly stated as much, her discourse on the value of false, or even harmful, kinds of speech owes much to the marketplace of ideas theory.

The minority judgment was delivered by Cory J. In it, he developed the contrary argument that the captured expression "falls on the extreme ***35** periphery" of section 2(b) values, if it is not actually inimical to them. [94] He was of the view that even under traditional liberal theory, where the state exists not to impose its vision of the "good life," but to provide a forum in which its citizens can define this amongst themselves, there can be no objection in restricting persons from knowingly

spreading falsehoods that subvert democratic values. [95] Cory J. then attempted to demonstrate the extent to which these values are undermined by the kind of activity that section 181 prohibits.

When addressing the political process rationale, Cory J. followed the majority's position in *Keegstra* to further advance the argument that "intentional and harmful falsehoods repudiate democratic values by denying respect and dignity to certain members of society, and therefore, to the public interest as a whole." [96] He drew upon other competing values of the *Charter*, namely, the equality and multiculturalism provisions in subsection 15 and 27, respectively, to inform his decision. Statements that distort the truth to perpetuate discrimination against minorities run against democratic pluralism by dividing citizens along gender and ethnic lines. The proper functioning of a democracy becomes skewed when some members of society identify themselves not as free and equal citizens, but as members of a maligned minority group, and define their potential contribution to a political debate accordingly. Furthermore, those viewpoints that are voiced become a devalued commodity when attached to a minority targeted as deserving of distrust and resentment. In this light, Cory J. contended the provision does more to promote, than defeat, the participation of all individuals in the political process. [97] Similarly, ***36** he argued that the prohibition serves to restrict expression that would otherwise frustrate those belonging to the groups targeted on their path towards self-fulfilment. [98] In this contest between individual rights and group interests, it is apparent that Cory J. places a premium on social cohesion.

For Cory J., one of the lessons that history has to offer is that the market-place of ideas model is "inadequate." It is inadequate because its distrust of government regulation of speech means that the voice of the majority, or dominant groups in society, will continue to drown out that of a minority:

> [M]inorities have more often been the objects of speech than its subjects. To protect only the abstract right of minorities to speak without addressing the majoritarian background noise which makes it impossible for them to be heard is to engage in a partial analysis. This position ignores inequality among speakers and the inclination of listeners to believe messages which are already part of the dominant culture. It reflects the position put forth by the dissent but rejected by the majority in *Keegstra* that the right to freedom of expression entails only the freedom to 'loose one's ideas on the world' and not to be respected, 'listened to or believed.' [99]

Cory J. then drew from the majority judgment in *Keegstra* to reiterate the point made that where the expression under consideration "threatens the dignity" of those targeted, and promotes discriminatory practices against them, it is appropriate to maintain its limitation under section 1 of the *Charter*. [100]

Cory J. also relied on the majority decision in *Keegstra*, to argue that the truth on some matters is more or less knowable, and that intentional lies, such as those of the appellant, are the antithesis of truth. [101] Referring to one of Zundel's pamphlet's, Cory J. asserted that "[i]n the name of the integrity of knowledge, the appellant demands the right to throw a monkey-wrench into the mechanisms of knowledge." [102] Cory J. contended that by deliberately manufacturing lies to support his "theories," the accused has made reasoned debate on the issue impossible. [103] In upholding the provision under section 1 of the *Charter*, he was also ***37** confident that, contrary to what was stated by the majority, it was sufficiently focused so as to capture harmful and false statements, and not views that are merely unpopular. [104]

It is submitted that of the most cogent rationale that can be invoked in defence of the wilful promotion of hatred or deliberate lies is the market place of ideas theory of free expression, [105] and that it is McLachlin J. who properly applied it in this context. It would seem self-evident that whatever benefit there is for an individual promoting hateful statements, in terms of the other two rationales, is negated somewhat by the detrimental effect it has on the corresponding interests that those vilified have. It is also suggested, for reasons going beyond the confines of this article, that the final dispositions of the constitutional questions in

Keegstra and *Zundel* were the right ones to make. What is wrong with the analysis provided by Dickson C.J.C. and Cory J. is that they assume ***38** that the more likely a given statement is false, the less reason there is to protect it under the marketplace of ideas. One need only consider the work of its foremost champion - John Stuart Mill, to realize that there is no doctrinal basis for this contention. It is clear from his discourse on freedom of thought and discussion that Mill believed the individual should be at liberty to speak of what may be deemed false by others. [106] There can be no freedom of expression in a society that holds that it is only the truth that may be spoken.

At the risk of misrepresenting what *On Liberty* has to say about the expression in question, it is submitted that statements which promote hatred or which are both factually false and potentially harmful have something to contribute to the cause of social enlightenment. Mill warned that the suppression of opinions, be they true or false, is an injustice not only to their adherents, but to their detractors even more still. The value that false ideas hold is that they lead us to appreciate more the reasons why the contrary proposition is true. What is true is relative not only to a particular period in time, but to what is thought to be false as well. Human understanding is influenced by, if not dependent upon, contradistinction. One's understanding of truth is sharpened by one's understanding of what is false, and *vice versa*. On another level, the presence of views that challenge established dogma forces us to revisit the basis for our convictions so that their meaning is not lost or forgotten. For the truth to remain a "living truth," it must be continuously contested, affirmed and defended. [107] Mill wrote that the "fatal tendency ***39** of mankind to leave off thinking about a thing when it is no longer doubtful, is the cause of half their errors." [108]

It is indeed a sad comment on humanity that some individuals feel the need to spread hatred against ethnic groups, and are even willing to manufacture false information to this end. The suggestion that the holocaust of World War II did not occur is one of the most troubling examples of this kind of speech. Yet there is some benefit to be derived from its free discussion. Its presence allows us to more accurately gage the prevalence of such views and to more fully appreciate the reasons why they are wrong or harmful. A corollary of this is that it may also increase our ability to minimize the threat they pose by bringing them out in the open to face the light of day. The fact that this insidious form of disinformation exists reminds us that we share a responsibility to counter it with what we know to be true.

There are at least three arguments that can be raised against allowing the state to assume this responsibility on our behalf. First, it is preferable in a free society to allow others to accept the truth of a matter when it is freely formed rather than imposed. Second, it is normally difficult to contain the spill-over effects that a legal prohibition on speech can have. Put simply, state censorship tends to encourage further state censorship, and self-censorship. And third, placing individuals on trial for their views may inadvertently prove counterproductive. Due to the presumption of innocence, the prosecution is forced to disprove the correctness of an accused's views, which is to afford them a higher level of credibility than they merit. Public trials may also provide such accused persons with a wider audience than they would otherwise have had, and generate some public sympathy for their cause.

This is not to suggest that there may also be valid, or even more pressing, reasons for criminalizing this form of expression. Again, it bears repeating that what has been said here is limited to the Court's handling of the free expression rationales, and not of the other matters taken into consideration in deciding the constitutional questions. The important point to be made is that even when they constitute a reasonable limitation on the freedom, such offences come at a certain cost to the search for truth and understanding. Failure to recognize this concern ***40** now may serve to unnecessarily weaken the marketplace of ideas rationale, making it easier to justify state regulation of false ideas in the future.

(c) Deference to Individual Autonomy and Self-fulfilment

(i) Abstract Theory

The third commonly understood rationale for free speech shifts the focus of attention from societal to psychological imperatives. Self-fulfilment theory, as it is referred to more often than not, is concerned with the development of human personality and the achievement of self-realization. This theory of free expression is largely accredited to Thomas Emerson, who writes that "[t]he right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual.

It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being." [109]

Self-fulfilment theory views free speech as a dynamic and interactive process through which individuals are led on a path of self-discovery. It may well be that we do not really know who we are until confronted by others. Who we are and what we achieve is largely determined by the reaction of others to our behaviour and thoughts. The ability to freely form and communicate one's beliefs and thoughts with others is an indispensable part of the human experience. By this view, open communication is an inherently good activity, which cannot be restricted without impairing an individual's psychological and social development.

There are some definite advantages to be obtained from the recognition of free expression as promoting individual self-fulfilment or self-realization. First, it allows the freedom to be protected simply as an end in itself. Expression is understood as necessarily being of some value to the individual making it, irrespective of its worth to society in general. The other two instrumental values of freedom of expression tend to limit constitutional protection to speech that serves some additional purpose, such as advancing knowledge, or making government more accountable.

Second, it is this theory that best underscores the degree of interdependency between freedom of expression and human autonomy. One cannot be assured unless some measure of the other also exists. Self- ***41** fulfilment theory therefore directly addresses what others do not — the freedom of the individual to make choices in all aspects of life. After all, it is the individual who must decide, for example, which "truth" to follow, which political candidate to vote for, and which consumer products to purchase. Indeed, the need to respect individual autonomy in a democratic society is so fundamental that it could stand alone as a fourth justification for protecting free speech were it not for the fact that this is the common denominator which unites most of the theories upon which our rights and freedoms are based.

And third, self-fulfilment theory is particularly suited to protecting forms of expression that would fall under the category of entertainment in its widest sense. The theory would seem to recognize that expressing one's emotions, feelings, or sexuality, contributes to his or her personal sense of well-being. It would be difficult to apply the other two theories to this kind of expression. The American constitutional scholar, Lawrence H. Tribe, has criticized the instrumental theories as, "far too focused on intellect and rationality to accommodate the emotive role of free expression — its place in the evolution, definition, and proclamation of individual and group identity." [110] Self-fulfilment theory is therefore able to protect forms of expression that have not been traditionally recognized as such. As Peter Hogg has noted, it "covers much that is not speech at all: art, music and dance, for example." [111] Thus, the theory is not limited to the written or spoken word. It instead embraces all mediums through which beliefs, thoughts, and feelings may be expressed or communicated.

There are, nonetheless, a number of problems that this theory can give rise to. In some ways, the very strength of this theory — its breadth — may also be its greatest drawback. [112] The apparently all-inclusive ***42** nature of a theory based on self-fulfilment makes it difficult to differentiate between cases where the section 2(b) right should be upheld or defeated in the end. The ethereal nature of this theory only complicates matters further. Assessing the extent to which an act may be said to further the personal development of the actor is a highly subjective and uncertain exercise. There may therefore be some temptation to introduce artificial limits on the scope of the theory in order to increase its practical utility in constitutional adjudication.

Another problem with this theory is that it tends to raise more questions than it answers. Does all expression automatically lead to self-development? A conclusion that it does would seem to logically follow from a theory that embraces free speech as an end in itself. However, it may sometimes be difficult to justify certain forms of expression as furthering the personal development of the speaker. For example, how does the promotion of hate propaganda lead to "self-improvement"? It can well be argued that "bigotry, and thus the attendant expression of racism, stifles, rather than furthers, the moral and social growth of the individual who harbours it." [113] The ardent racist usually holds a perversely distorted perspective of certain historical and social facts. As a consequence, the racist will deny him or herself the opportunity of interacting in a positive and informative way with members of certain ethnic groups. The racist, therefore, lives on a self-limiting world of ignorance and social isolation. Permitting committed racists to propagate their self-deceptive views might only lesson the degree to which they may realize

and develop their true human potential. [114] On the other hand, could it not be argued that the best hope for such individuals discovering the error of their views lies in the reaction of others to them when they are freely communicated? Furthermore, is there not a problem in allowing judges to decide such hypothetical questions as to which forms of speech further individual self-fulfilment, and which do not?

43** ***(ii) Contextual Analysis

(A) Commercial Advertising

Some of the earliest section 2(b) challenges to reach the Supreme Court of Canada involve commercial advertising. In *Ford, supra*, restrictions were placed on the ability of Quebec business owners to advertise in any language other than French. In *Irwin Toy, supra*, it was the attempt to advertise toy products to children of a certain age group that was prohibited. Two other cases worth considering as well are *RJR-MacDonald Inc. c. Canada (Procureur général)*, [115] and *Rocket v. Royal College of Dental Surgeons (Ontario)*. [116] As in *Irwin Toy*, the impugned provisions in *RJR-MacDonald* involved the advertising of goods, namely - tobacco products. In *Rocket*, however, the challenge came from members of the dentistry profession seeking greater freedom to advertise their services. Together, these cases form the core of a growing body of jurisprudence on a freedom that was unheard of in Canada less than ten years ago — that of "commercial expression."

Commercial expression inevitably appears in the form of product or business advertising and can be distinguished from other kinds of speech by examining the speaker's motive behind it. The primary purpose of commercial advertising is to reap financial profits. The only marketplace the advertiser seeks to participate in is an economic one. Advertising, especially lifestyle advertising [117], has little to say about the search for knowledge or truth. In fact, it my sometimes have the opposite effect of promoting ignorance and uncritical thought. For the most part, advertising is seductive or manipulative in nature. It speaks to the unconscious mind by appealing to our emotions and insecurities. When it sinks to ***44** the level of being misleading or fraudulent, governments have rightly intervened to protect consumers.

On the other hand, there is something seemingly unfair about not extending this free speech rationale to advertising. It would be ironic to dismiss advertising under a theory of free speech based on market principles. To be sure, some informational advertising regarding the price and quality of a good or service can make a limited contribution to what is currently known about them. But this theory of free expression can be a double-edged sword when drawn to defend the interests of advertisers. Some have argued that it is relatively easier to verify the truth of assertions contained in an advertisement than it is with respect to an idea or opinion. [118] As a result, there may be less concern under marketplace theory when governments introduce restrictions on false or misleading advertising. It is only when the claims in advertising are factually true that they are of some value to consumers.

A defence of commercial advertising is made even more difficult when one turns to the political process theory. Before the Supreme Court of Canada began interpreting section 2(b) of the *Charter*, attempts were made to categorize commercial advertising under the traditional view that free expression promotes democratic government. The argument that had been advanced is that the system of free enterprise is so connected to our democratic way of life, with advertising being so essential to make that system work, that it is both impractical and undesirable to divorce political from economic expression. [119] To accept this line of ***45** reasoning would render the political process rationale so over-inclusive that it would become virtually meaningless. Whatever degree of interdependence there may be between the economic and political systems, commercial advertising is of no great consequence to how our governments are run. [120] To equate the importance of a toothpaste commercial with a debate on capital punishment would only serve to undermine our most powerful reason for protecting free expression. In fact, commercial advertising can be viewed as a more subtle form of social control. It is more likely to encourage conformity than stimulate public discussion or debate. Another problem with the argument is that where a form of advertising addresses a political issue, it might not have been properly characterized as being commercial in nature in the first place. To cite a recent example, a cigarette manufacturer has placed a newspaper advertisement attacking the B.C. government's policy regarding tobacco product labelling. [121] Here, the message is first and foremost a political one. Any hope to eventually profit from it should not detract from its potential contribution to a political debate.

***46** The consensus, among both judges and academics [122] alike, is that the most important benefit obtained from advertising relates to the theory of individual self-fulfilment. Fulfilment for the consumer, not the seller, that is. Selling goods or services may provide the advertiser with the means to realize certain personal goals, but the act of advertising itself does not have this immediate effect. The issues are different, however, when one considers the recipient of the intended message - consumers. It has been recognized that freedom of expression protects the interests of the listener as well as the speaker. [123] For the consumer, advertising has the potential to make informed economic choices possible. Purchasing a product, or obtaining a service, may sometimes be described as trivial, but it is too much a part of our daily lives to be dismissed as unfulfiling. When properly presented, information about products allows consumers to select that which is most suited to their individual preferences. [124] Similarly, where it is a service that is being considered, it is generally helpful to have information about the nature of that service, the qualifications of those providing it, and the cost involved, before acquiring it.

The Supreme Court of Canada laid the ground for applying this theory to commercial advertising in *Ford*. Focusing on the interests of its target audience, the Court proclaimed "commercial expression ... plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy." [125] Again, the Court failed to elaborate further on this sole justification for protecting commercial advertising. It was able to leave this issue by shifting emphasis on a different aspect of the section 2(b) guarantee that was violated, that of language choice. The decision involved provisions of Quebec's infamous French-only sign law, [126] which were struck down by the Court primarily on the basis that ***47** the Canadian and Quebec [127] charters protect the freedom to express oneself in the language of one's choice. [128]

The Court was soon provided with another opportunity to assess the value of expression used for commercial purposes. The challenged law in *Irwin Toy* prohibited advertising directed at children under 13 years of age. Exceptions were allowed for advertisements satisfying certain criteria. Some of these exceptions are designed to ensure that the commercial messages are not misleading in nature. [129] Others address such maters as family values, [130] appropriate products for children, [131] and a child's ability to properly appraise the information presented. [132] A majority of the Court accepted the arguments of the Attorney General of Quebec that the objective of the legislation is to protect children from the "techniques of seduction and manipulation abundant in advertising." [133] The majority also accepted the evidence presented showing that children are less capable than adults of properly evaluating an advertisement's persuasive force, and therefore comprise a vulnerable group ***48** in need of special protection. [134] It concluded that the legislation was justified under section 1 of the *Charter*. The closest the majority came to addressing the theoretical values at stake was with the comment that the "real concern animating the challenge to the legislation is that revenues are in some degree affected. This only implies that advertisers will have to develop new marketing strategies for children's products." [135]

In the Court's first two cases on commercial expression it is difficult to find any serious attempt to link the advertising concerned with the general purposes of the section 2(b) guarantee. It may well be true that the rationale for protecting a right to advertise is weak in most cases, but some explanation should be provided, especially in the initial stages of *Charter* analysis, as to why this is so. Otherwise, the Court risks the danger that only lip-service will be paid to the need to conduct a purposive interpretation of section 2(b). Fortunately, the Court's two subsequent cases in this area hold more promise in this regard.

In *Rocket*, the Court struck down restrictions on the ability of dentists to advertise their services. The restrictions were found under the *Health Disciplines Act*, [136] which prohibited advertising on the basis that it constitutes unprofessional conduct. As in *Irwin Toy*, the regulatory scheme involved imposed a general ban on advertising, and then specified the conditions under which an exception would be allowed. The unanimous judgment of the Court was delivered by McLachlin J. In it, she compared the value the advertising in question holds for dentists and their patients. From the perspective of dentists, being prevented from advertising means potential loss of profits, and nothing more, in terms of the free speech rationales. This indicates that the violation of freedom of expression ***49** is less worthy of protection. At the same time, the advertising of dental services can assist consumers in choosing a suitable dentist, a decision which is of sufficient importance to prevent its curtailment from

being dismissed prematurely under section 2(b). [137] She noted that this combination of the interests will appear in most cases of commercial advertising. McLachlin J. also contrasted the decision in *Irwin Toy* with the present case to show that the exercise of consumer choice is more important in the context of the latter. Yet the two cases are similar in that consumers of dental services are also "highly vulnerable to unregulated advertising." They lack the expertise to critically evaluate the kinds of claims made about the quality of the services provided. [138]

She found that the need to control advertising misleading to the public, and to maintain high professional standards, are legitimate legislative objectives. The means of achieving these goals, however, went further than necessary in restricting the right of dentists to advertise, and consequently, could not be upheld under the latter two components of the section 1 proportionality test. The problem identified with the enumerated exceptions to the otherwise total ban on advertising was that they were under-inclusive. Other exceptions should have been made for such matters as hours of operation and languages spoken - information which enhances consumer choice without compromising the legislative objectives. [139]

RJR-MacDonald [140] represents the Court's most recent and overt examination of section 2(b) values in conjunction with commercial advertising. Yet a hard sell approach would be required to convince some that the majority's decision to remove a ban on tobacco advertising actually stands to benefit consumers. While some of the invalidated provisions of the *Tobacco Products Control Act* [141] severely restricted advertising by the industry, another stood to warn consumers of what the tobacco companies would not. A complete ban on the publication or broadcast of tobacco advertising was imposed by s.4 of the Act. Section 9 placed three comprehensive restrictions on the packaging of tobacco products. The packages were required to contain health warnings, in prescribed form, of the harmful effects of smoking. [142] The nature and ***50** quantity of the product's toxic substances had to be listed. Finally, the manufacturers could only provide packaging information of their own in the form of the product's name, brand name, and trade marks. Under section 8, the appearance of such trade marks was restricted to the product's packaging. In the end, all of the aforementioned and consequential [143] provisions were struck down by the majority, amounting to a wholesale repeal of the Act.

The majority, headed by McLachlin J., [144] found that the provisions constituted an unjustifiable infringement of section 2(b). La Forest J., for the minority, [145] would only agree that with the exception of the proscribed health warnings, the regulations violated section 2(b) of the *Charter*. They parted company on virtually every other point of contention raised. Whereas McLachlin J. described certain forms of tobacco advertising as beneficial and innocuous, La Forest J. found it to be misleading and deceptive. To La Forest J., the fact the advertising concerned is designed to increase profits only decreases its value as a constitutional right. For McLachlin J., the ability to reap profit from certain forms of expression does not automatically divest it of protection under the *Charter*. [146] While La Forest J. furthered the argument that the judiciary should afford Parliament some measure of deference in cases involving complex social policy, McLachlin J. cautioned against over extending this notion. Though McLachlin J. stressed that tobacco advertising ***51** is made in pursuit of a perfectly lawful activity, her colleague opined that Parliament could have exercised its criminal law power to prohibit the manufacture and sale of tobacco products without running afoul of the *Charter*.

The two justices were at opposite ends on whether tobacco advertising benefits consumers. At the high end, McLachlin J. championed the view that since smoking is a legal activity, they are entitled to receive information regarding it. Announcing price, new brands, and brand comparisons in tar levels and attendant health risks: these are examples of advertising cited by McLachlin J. as potentially providing helpful information to smokers while having negligible effect on overall tobacco consumption rates. [147] If this also represents the industry's position on the need to advertise, La Forest J. was not buying it. To paraphrase his position on the freedom at risk, there is little good in the free promotion of a dangerous product for corporate profits. "Making an informed choice about tobacco simply permits consumers to choose between equally dangerous products." [148] One of the arguments put forth by the appellants was that promoting lower tar levels would allow smokers to select less harmful brands. According to La Forest J., there was no evidence to show a health benefit in smoking "lighter" brands. [149] The only "benefit" would be to the advertisers, who would encourage those smokers who are contemplating quitting

to instead switch to brands with lower tar levels. Also undermining the appellants' argument was the fact that product and health information is readily available from the retailer and the tobacco package. [150]

With respect to the broader field of advertising and the appropriate standard of judicial review under section 1 of the *Charter*, McLachlin and La Forest JJ., again, found something to agree and disagree with. Both sanctioned the deferential approach to section 1 justification that was first posited in *Irwin Toy*, but to differing degrees. This approach affords government some leeway in developing legislative solutions for socio-economic problems. When called to account for its legislation under section 1, the majority in *Irwin Toy* stated that government should be afforded a "margin of appreciation" for the sometimes complex and conflicting nature of the information relied on when legislation is drafted. In more concrete terms, this means that government is not ***52** always required to select the least intrusive objectives and legislative means of achieving them. With regard to the tobacco advertising restrictions, La Forest J. argued at different stages of his analysis that the requirements of proportionality should be lowered in the government's favour. Though McLachlin J. recognized the need to pay deference to tough legislative choices, she warned against taking this notion too far, lest the judiciary abandon its role in constitutional adjudication. [151] Her application of the proportionality test in *RJR-MacDonald* suggests that Parliament was held to a full level of account.

Examined from the perspective of self-fulfilment theory, the majority's holding in *RJR-MacDonald* is difficult to defend. The legislative scheme operated to provide consumers with health information not otherwise available at the point of sale. The objection raised by the appellants that the prescribed heath warnings should have identified their author appears as little more than a smoke screen. There are numerous warnings that appear on hazardous consumer products, with respect to either their use or contents, and yet it is unusual to find any indication that they are mandated by government regulation.

The majority's opinion to the contrary, there is little value in allowing tobacco advertising in view of the harmful consequences involved. The majority's position is largely predicated on the assumption that tobacco advertising can impart valuable information to consumers without jeopardizing the government's goal of reducing tobacco consumption. It is difficult to comprehend how this can be true. The only example of "informational advertising" discussed concerned differences in brand tar levels. Yet La Forest J. cast doubt on the assertion that advertising low tar levels is advantageous to consumers. It would seem that the only information of real value was the proscribed health warnings and the listing of toxic substances found in the product. Viewed in this light, the advertising ban may have actually served to provide consumers with the most important information there can be about tobacco products and their consumption. [152]

However, what the Court had to say about the value of commercial advertising in general does fall in line with its previous decisions. This series of cases serves to confirm that the value of commercial expression is to be measured in terms of its ability to make informed consumer purchases possible. Even then, it seems from some of the comments ***53** made by members of the Court that the protection accorded to advertising under section 2(b) is of a qualified nature. This is an entirely appropriate evaluation of the activity concerned. Only when advertising conveys information accurately and truthfully about a product or service can it be of some benefit to the consumer. This automatically eliminates much of what currently exists in the field of advertising. If it is felt that this under-estimates the value of commercial expression, it should be pointed out that challenges raised under section 2(b) against restrictions on advertising have faired better than cases where the source of the restriction on free speech is the criminal law.

(B) Prostitution

In *Reference re subsection 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [153] a majority of the Supreme Court upheld, under section 1 of the *Charter*, a summary conviction offence which forbids any person from communicating or attempting to communicate with another "for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute." [154] To fall within the definition of the offence, the communication must occur in a public place, a place open to public view, or a vehicle located therein. The first thing that can be said about this post *Irwin Toy* decision rendered on section 2(b) of the *Charter* is that it is almost entirely devoid of any discussion of the free speech interests affected. Neither Dickson C.J.C. nor

Wilson J., who wrote the majority and minority judgments respectively, [155] bothered to identify the free speech interest at risk. All that Wilson J. offered was the offence:

> prohibits persons from engaging in expression that has an economic purpose. But economic choices are, ... for the citizen to make (provided that they are legally open to him or her) and, whether the citizen is negotiating for the purchase of a Van Gogh or a sexual encounter, section 2(b) of the *Charter* protects that person's freedom to communicate with his or her vendor. [156]

Dickson C.J.C. agreed that the expression is made for economic gain, but stated: "[i]t can hardly be said that communications regarding an ***54** economic transaction of sex for money lie at, or even near, the core of the guarantee ...." [157] This summary dismissal of the speech at risk is a disservice to the cause of a purposive approach to *Charter* interpretation.

What was so readily apparent but left unsaid was that communication between consenting adults for the purpose of engaging in prostitution is an aspect of autonomy and self-fulfilment. This is not self-fulfilment in the sense of becoming a better person or realizing a personal goal, but rather, self-fulfilment in the sense of providing for the necessities of life. For those individuals who find themselves left with no alternative but to engage in street prostitution, their ability to practice their trade can be a matter of day to day survival. At least in this respect the Court's catagorization of the prohibited conduct as primarily economic in nature is appropriate due to the close relationship between commercial speech and self-fulfilment theory. Yet communication for the purpose differs from other forms of commercial speech in that the autonomy interest is more pronounced for the service provider than the consumer, and the exercise of the section 2(b) right is more vital to that interest in the case of prostitutes. This is a concern that even the dissenting judgment overlooked.

That this kind of speech has a substantial liberty component is difficult to deny. The Court was in fact asked to decide whether the right to "life, liberty, and security of the person" in section 7 of the *Charter* was also infringed in the case. The argument raised by the appellants' counsel was that by preventing street prostitutes from exercising their chosen profession to provide for the necessities of life, an economic aspect of their *liberty* and *security* interests had been violated. Though only Wilson J. concluded, for different reasons, that section 7 had been infringed, [158] all of the justices hearing the case acknowledged that prostitution ***55** in itself is not made illegal in Canada. [159] It would appear that the trick for prostitutes is to find a legal means of practicing their trade.

The infringement was upheld despite the absence of a legitimate criminal law objective in prosecuting the offence. To the legislative objective, both Dickson C.J.C. and Wilson J. attributed public nuisance concerns. Noise, the disruption of traffic, and public exposure to the activity were the problems said to be animating the legislation. It is difficult to comprehend how such an objective can be supported as consonant with the aims of criminal justice. Yet not even Wilson J. proposed to invalidate the objective under section 1. Instead, she argued that the legislation goes beyond the objective, thereby failing the requirement of proportionality. [160] In a separate majority judgment, Lamer J., as he then was, would have characterized the legislative purpose in broader terms. Drug trafficking, violence, pimping, and recruitment into the profession are the vices that he argued the legislation seeks to address. According to Lamer J., prostitution is a form of slavery that degrades women and exploits their disadvantaged position in society. The offence is designed to limit public exposure to this degrading activity. Though it would have the offence serve a criminal law purpose, Dickson C.J.C. correctly rejected this hypothesis. A legislative scheme that prohibits the public solicitation of prostitution while leaving the act of prostitution legal, cannot presume to aspire to the goals proposed by Lamer J., however commendable they may be.

In the end, the Court was left with a criminal offence addressing public nuisance concerns. This is hardly the stuff that criminal laws are made of. These matters would have been more appropriately dealt with through regulation at the municipal level. In this connection, the Court's reluctance to second-guess the purpose of the enactment can be explained. The offence was only introduced by Parliament after the Court struck down a municipal by-law prohibiting solicitation for sex as a matter in relation

to the federal criminal law power. [161] However, the ***56** Court should have accepted responsibility for the dilemma it created and either revisited the basis for its earlier decision, or at least expressly restricted its analysis of legislative objective to take into account the unique difficulties presented by its previous ruling. [162] Otherwise, the understanding that a law saved under section 1 will have a substantial and pressing reason for a *Charter* infringement may not always follow.

It might be contended, as Lamer J. did, that one of the reasons why the offence is acceptable is that it does not prohibit the same conduct occurring in a private place. [163] This argument seems disingenuous when one considers that in the same case the court also upheld the companion offence of keeping a common bawdy-house. [164] The effect of upholding this offence was to close off the only legal avenue left to prostitutes to ply their trade. Even Dickson C.J.C. acknowledged the legislative scheme follows a circuitous route to this end. [165] Until viable alternatives become available to them, some prostitutes will continue to put themselves at risk and practice their trade in the streets, with or without legal restrictions, because they perceive it to be in their best interests to do so.

The conclusion reached in *Prostitution Reference* is difficult to reconcile with some of the principles articulated by the same Court both before and after the decision. In *Irwin Toy*, the Court upheld restrictions on advertising in the name of protecting children as a vulnerable group. In *Rocket*, a less than complete freedom to advertise dental services was struck down. In *RJR-MacDonald*, the Court came to the defence of tobacco companies and their interest in marketing a dangerous substance for public consumption. Yet in *Prostitution Reference*, one of the most marginalized and vulnerable groups in society - street prostitutes - were subject to a complete ban on practicing their trade. For all its discourse on the need to protect vulnerable groups, and to prevent total bans on a form of expression, the Supreme Court failed to apply these principles in a case where more compelling reasons for protecting the autonomy or self-fulfilment needs of the speaker are rare.

*57 (C) Obscenity

R. v. Butler, [166] regarding obscenity, can be distinguished from other Supreme Court of Canada rulings on *Criminal Code* offences infringing section 2(b) in that the decision to uphold the restriction was a unanimous one. Section 163 catches the sale or distribution of obscene material. By virtue of subsection 8, any publication that has "the undue exploitation of sex" as its dominant characteristic, or sex coupled with "crime, horror, cruelty and violence," is deemed to be obscene. Subsection 5 stipulates that any motive the accused may have had in committing either offence is irrelevant. At the time, a public benefit defence was provided in subsections 3 and 4, while subsection 6 ruled out the defence of mistake of fact with respect to the offence falling under subsection 1. [167] That is, an accused who was unaware of the "nature or presence" of the obscene material was nevertheless liable.

The case arose from charges laid under subsections 163(1)(a) and 2(a) of the *Code* against the owner and an employee of an adult video store in Winnipeg. The charges related to sex videos and magazines, and various sexual devices or aids, which were seized from the store by police on two separate occasions. Wright J., of the Manitoba Court of Queen's Bench, [168] reviewed the seized material and concluded that section 2(b) of the *Charter* was infringed, and that the violation was justified under section 1 with respect to some of the counts in the indictments, but not justified with regard to the remaining counts. [169]

***58** The Court of Appeal [170] disagreed with the trial judge's approach to the constitutional question, and a majority reversed his decision. Huband J.A., for the majority, held that there had been no violation of the freedom of expression guarantee. [171] Twaddle J.A., dissenting in part, argued that section 163(8), in effect, creates two distinct offences serving different purposes. The first is concerned with publications constituting an "undue exploitation of sex," and is designed to preserve moral standards. The other captures publications that also involve "crime, horror, cruelty and violence," and is aimed at the avoidance of harm. Twaddle J.A. contended that while it is constitutionally permissible to enact criminal prohibitions that restrict expression for the purpose of avoiding harm, [172] such is not the case where the legislative purpose is to punish immoral ***59** conduct, in itself. [173] He accordingly would have upheld the former offence under section 1, and severed the other as unconstitutional. The other dissenting judge, Helper J.A., found section 163 to constitute an unreasonable infringement of freedom of expression. [174]

At the Supreme Court level, two separate but concurring judgments were delivered in the case. The principle judgment was written by Sopinka J. [175] Gonthier J., who wrote the other decision, was joined by L'Heureux-Dubé J. As with the prostitution and hate propaganda decisions, it is necessary to consider the differing interpretations on the scope of the offence to fully appreciate the views offered on the extent of the violation on freedom of expression. Both decisions in *Butler* are predicated on a 3-part categorization of pornography based on the degrees of potential harm involved:

> (1) explicit sex with violence,
>
> (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and
>
> (3) explicit sex without violence that is neither degrading nor dehumanizing. [176]

***60** Sopinka J. was of the view that although section 163(8) generally covers materials falling under the first category, it will rarely reach those found at the third level. As to the second level, material falling under it will be "undue" where it presents a substantial risk of harm. Furthermore, where sexually explicit material might constitute the "undue exploitation of sex," Sopinka J. stated that the "internal necessities" test should continue to be applied to determine whether the material is nevertheless redeemable. This test asks whether the undue exploitation of sex the main object of the work, or subservient to a higher literary or artistic purpose. In borderline cases, the test is to be applied in favour of free speech interests. [177]

Sopinka J. then proceeded to examine the proportionality of the infringement pursuant to section 1 of the *Charter*. He prefaced his analysis by stating that the proper application of section 1 should not suppress what may be referred to as "good pornography." He was confident that the objective of the offence was the avoidance of harm to society, "and not to inhibit the celebration of human sexuality." [178] For Sopinka J., the fact that the targeted expression is generally produced to make a profit means that it occupies a less privileged position under section 2(b) of the *Charter*. Expression made for an economic purpose does not strike at the heart of section 2(b) values, making its restriction easier to justify under section 1. [179] Yet, when addressing the matter of minimal impairment, he argued that with the internal necessities test, works of "scientific, artistic or literary merit" are not in danger of offending section 163, even if financial profit is derived from them. The "artistic defence" is to be applied generously so that materials made in pursuit of individual fulfilment may claim the benefit of the Charter's protection. [180] At the third stage of the proportionality test, Sopinka J. commented that sexually explicit material that is degrading, dehumanizing, or violent in nature "appeals only to the most base aspect of individual fulfilment, and is primarily economically motivated." [181] He decided that section 163 was reasonably justified under section 1.

Though Gonthier J. reached the same conclusion, he did so on the basis of an even wider interpretation of the scope of the obscenity offence. Referring to the categorization of pornography according to the ***61** perceived levels of harm involved, Gonthier J. argued that materials falling within the third category, while generally the least harmful, may nevertheless qualify as obscene under section 163(8), particularly if they are presented to the public indiscriminately. Thus, although the content of the message may not be objectionable as such, the manner in which it is presented to others can be. Gonthier J. used the example of "an explicit portrayal of 'plain' sexual intercourse" in a book and on a billboard sign to suggest that while the former may

give rise to little concern, the latter may constitute the undue exploitation of sex due to its harmfulness. That is, "the medium, type or the use" of the material may change its effects "from innocuous to socially harmful." [182]

Not surprisingly, Gonthier J. only relied on the values connected to free expression to defeat, rather than defend, the protection accorded to the seized material under section 2(b). In mentioning only the marketplace of ideas theory, he seemed to develop the argument that pornography presents a "distorted" message that its consumers are incapable of interpreting in non-harmful ways:

> This distorted image of human sexuality often comprises violence, cruelty, infliction of pain, humiliation, among other elements of the pornographic imagery. Not only are these materials often evidence of the commission of reprehensible actions in their making, but their representation conjures the possibility of behavioural influences. In a market-place of ideas, ... pornographic imagery is there for the taking, and it finds without any doubt many takers. Attitudinal changes in these takers, because of exposure to pornographic materials, may lead to abuse and harm. [183]

Though Gonthier J. was concerned that "these materials do not reflect the richness of human sexuality, but rather turn it into pure animality," his real concern may be that this "richness" is not to be experienced outside of the privacy of the home: "Obscene materials ... convey a distorted image of human sexuality, by making public and open elements of the human nature which are usually hidden behind a veil of modesty and privacy." [184] With this statement, Gonthier J. seemed to suggest that the real basis for regulating the depiction of human sexuality be on grounds of public decency or morality rather than out of a concern of its harmful effects. In fact, he later argued that there can be a legitimate ***62** moral basis for prohibiting this type of material, [185] though he is careful to tie in the element of harm to this suggestion. [186]

The analysis provided by Gonthier J. on the value of the freedom at risk in the case can be criticized for placing notions of morality above the need to respect individual autonomy. He essentially argued that the reason why pornography should not enter the marketplace of ideas is because it is "false" and "harmful." It is false because it makes available for public consumption that which should only be experienced in private. The fact that individuals who choose to rent adult sex videos, or purchase sexual aids, generally do so for private consumption is irrelevant here. Rather, it is the "distorting" effect that arises whenever human sexuality is depicted by such materials that matters. This is because its consumers are incapable of dealing with the "distorted" message it presents so as not to cause harm to themselves or others. Thus, it is acceptable for the legislators and the courts to remove these "defective products" from the marketplace of ideas. What is lacking in this analysis is any attempt to consider the extent to which the availability of such materials may further individual autonomy and personal fulfilment. He ignores what benefit there may be in allowing individuals to decide for themselves what is right or of value to them in regard to representations of sexuality.

There is some irony in the fact that the obscenity offence is itself offensive by today's standards. As constituted and interpreted by the judiciary at the time the case reached the Court, the offence was an affront to individual autonomy and a threat to artistic endeavour. [187] It ***63** was overly vague and antiquated. The offence had been "on the books" in Canada for a hundred years, [188] and did not even bother with a definition of "obscenity" until 1958. [189] This definition, which has remained unchanged since then, equates obscenity with the "undue exploitation of sex," or sex plus "crime, horror, cruelty [or] violence." This terminology has more to do with the advent of detective crime comics and fear of moral corruption, then with today's concern over the treatment of women and children as sexual objects. This is made explicit by the heading, under which section 163 falls, which reads: "Offences Tending to Corrupt Morals."

To help quantify the "undueness" of a publication, courts have invented a "community standards of tolerance" test, [190] whereby the court acts as sole arbiter of what is obscene based on its perception of society's norms and values. Material with sexual content becomes legally "obscene" when most members of society would not be prepared to allow others to be exposed to it.

Too many criticisms have been raised against this approach to address them here. Suffice it to say that this standard did little to reduce the scope of the offence is made apparent by the number of additional tests which have been adopted. The "community

***64** tolerance standard was modified by the "internal necessities" defence, [191] which was in turn followed by the "degradation or dehumanization" test. [192] This latter test holds that even in the absence of violence or cruelty, material that degrades or dehumanizes its subjects would exceed community levels of acceptance. Despite this effort to provide an intelligible standard for assessing offensive material, no attempt was made to harmonize these tests in to a cohesive whole. This led to confusion over the status of each test, and its relationship to the others. It was not even known whether the various tests complement or compete with one another, and in which respects.

Sopinka J. acknowledged that "this hiatus in the jurisprudence" made the offence susceptible to a declaration of invalidity under the constitutional doctrine of vagueness. [193] His solution was to formulate the three categories of pornography referred to above. There are a number of problems with this definition. To begin with, it bears little resemblance to the wording of section 163(8). It provides that an element of "degradation or dehumanization" can constitute obscenity, even in the absence of violence. Arguably, this phrase is even more vague, value-laden and subjective than those it appears to replace - the "undue exploitation of sex" and "crime, horror, cruelty and violence" definitions. While recognizing that "there is a range of opinion as to what is degrading or dehumanizing" in this context, Sopinka J. declined to provide one of his own, suggesting instead this is a matter to be decided upon application of the community standards test. [194] It is both astonishing and confusing to find this reliance on the original test to interpret a definition developed to remedy some of its very defects. Another flaw with his classification scheme is that it introduces an entirely new factor in the equation as to what constitutes obscenity. In all three categories of pornography, it is the "explicit" depiction of sex that is made the common denominator. Yet the term "explicit" is not defined at any point in the judgment. Nor is any explanation offered as to why explicit forms of pornography are singled out, or alternatively, why the offence should be limited to only the explicit depiction of sexual activity. Despite the Court's attempt to provide a more narrow interpretation of the scope of the offence, uncertainty still remains on when the exploitation of sex becomes "undue."

***65** Things are also amiss in the Court's application of section 1 of the *Charter*. At nearly every stage of the section 1 analysis, it has compromized its previous standard of judicial review of *Charter* infringements imposed by the criminal law. The first difficulty the Court encountered in justifying the infringement pertains to the legislative history of the offence. To pass constitutional muster, the legislative measure must be "rationally connected" to an objective that is "pressing and substantial." Previous decisions of the Court established that the objective of a challenged law is that which was intended at the time of its enactment. [195] The Court rejected the American doctrine of shifting purpose, which allows an impugned measure to be assigned a valid contemporary purpose where possible. This created a dilemma for the Court in *Butler*, since the obscenity offence originally defined obscene materials only on the basis of their tendency "to corrupt morals." In 1949, this definition was dropped, and was not replaced with the current wording found in subsection 8 for another ten years. In *Butler*, Sopinka J. rejected the possibility that a breach of the *Charter* can be defended on the basis of morality alone. If it is to withstand constitutional scrutiny, the legislative measure must serve either a different or additional purpose. According to Sopinka J., subsection 8 has introduced an additional element in the definition of the offence - that of "harm to society." This amendment changes the character of the offence such that it now focuses primarily on the "harm to society" that such materials pose when others are exposed to them, which constitutes a valid legislative objective. As to the Court's prohibition against adopting shifting legislative purposes, Sopinka J. offered that our understanding of the harm caused by obscene materials has evolved since 1959. By applying the community standards test, the judiciary has built "a permissible shift in emphasis" into the offence, which allows "harm" to be defined by more contemporary attitudes

Assuming that there is an element of harm inherent in subsection 8 which the offence was intended to prevent, and that there is no contradiction in the rejection of the doctrine of "shifting legislative purpose" and the adoption of "permissible shifts in emphasis," there remains a serious problem with the notion of harm relied on by Sopinka J. It would seem from the inference that, by 1959, the offence was intended to protect society from harm, a court will always have a basis for upholding the objective of an impugned penal measure. The supposed belief that harm is present to defend the legislation is too vague to ground a valid

***66** legislative objective. It will almost always be possible to theorize that any given offence is aimed at the avoidance of some harm. Though Sopinka J. attempted to define the concept of "harm" at work in the context of obscenity, his description

remains far removed from what could reasonably have been intended in 1959. [196] Furthermore, his comment that there will always be an element of harm behind a moral concern leaves open the possibility these factors can simply be reversed to save an otherwise repugnant legislative objective.

The Court's invocation of *Irwin Toy, supra*, to justify a less rigorous application of the proportionality test in *Butler* is also problematic. The approach Sopinka J. followed to establish a "rational connection" between the legislation and an objective of preventing harm to society is one point of contention. Confronted with conflicting opinion and scientific evidence on the effects caused by exposure to obscenity, Sopinka J. stated that proof of actual harm is not required. It is sufficient "to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs." [197] When addressing minimal impairment, Sopinka J. cited a passage in *Irwin Toy* to the effect that Parliament is not required to draft the least intrusive legislative measures imaginable in relation to the objective sought. He construed past attempts to replace or amend the obscenity offence as designed to make the definition of the offence more specific. The lesson he drew from their failure to be realized is that:

> the only practicable alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the ***67** knowledge and understanding of the phenomenon to which the legislation is directed .... [T]he standard of "undue exploitation" is therefore appropriate. The intractable nature of the problem and the impossibility of precisely defining a notion which is inherently elusive makes the possibility of a more explicit provision remote. In this light, it is appropriate to question whether, and at what cost, greater legislative precision can be demanded. [198]

This comment could be put to better use in explaining why the offence should be declared unconstitutional. It is no excuse to suggest that the legislation does as well as could be expected in defining an obscure phenomenon. If the subject matter of an offence does not permit a sufficient degree of legislative precision, the proper conclusion to draw is that it is not amenable to regulation, or that less ambitious means must be found to address it. The *ratio decidendi* in *Irwin Toy* regarding judicial deference should be taken in the context in which it was intended - the regulation of socio-economic affairs. In fact, when calling for a lower standard for judicial review under section 1 of the *Charter* in certain situations, the majority in *Irwin Toy* specifically excluded criminal prohibitions from consideration. It had good reason for doing so. The stigma and consequences attached to a criminal conviction demand the most exacting application of the proportionality test. If the Court lowers the section 1 threshold in the realm of the criminal law then, for all intents and purposes, it has lowered it in every area of regulated activity.

The Court also ignored the context in which the offence appears in the *Criminal Code*. As indicated by the heading under which it falls, [199] section 163 is plagued with anachronisms and defects of substance. Subsections 1(a) and 7 deal exclusively with the prohibition of crime comics, while subsection 2(c) and (d) forbid the sale or advertisement of a method of causing abortion or miscarriage, or of curing venereal diseases or lack of sexual virility. The prohibition in subsection 2(b) takes a moral stance against exhibiting a "disgusting object or an indecent show" in public and may be void for vagueness. Subsection 5 renders the accused's motives irrelevant to any of the charges under section 163. At the time of the *Butler* decision, a reverse onus was present in subsection 3 and 4, which required the accused to raise a limited defence of public benefit, while subsection 6 operated to make the substantive offence of publishing or distributing obscene matter one of absolute liability by removing the defence of mistake of fact. [200] While ***68** admitting that such defects "raise substantial Charter issues," Sopinka J. stated from the onset that his analysis of the constitutionality of the offence would be limited to subsection 8. [201] Presumably, many of the remaining defects can be cured later by applying the remedy of severance. The preferable approach, however, would have been to recognize that the culmination of these defects shows that the legislation is fatally flawed and should be struck down in its entirety. At the very least, the court should have invalidated the definition of obscenity by taking into account the deplorable context in which it appears.

Perhaps the most troubling aspect of the decision is that it usurps the role of government. To define obscenity based on an interpretation of previous judicial interpretations, and to come up with a new three prong test having more in common with a passage in a Committee report [202] than the wording of section 163(8), is to legislate from the bench. It may well be appropriate for a contemporary offence of obscenity to focus on explicit portrayals of sex that are violent in nature, or arguably, which also degrade or dehumanize those depicted. This is subject to the provisos that there is a sufficient basis to establish a causal nexus between exposure to such forms of pornography and harm to others, and that greater specificity can be found to define the offence. However, this is for Parliament to determine. Past failures to enact a new obscenity law should not be used by the Court as an excuse for judicial activism, but as a basis for inferring that this is essentially a ***69** political matter. It is for elected representatives to find inventive solutions for controversial issues.

Instead of striking down the offence in the name of individual autonomy and self-fulfilment, the court went to great lengths to limit these values, thereby calling into question its role in judicial review. In justifying its decision, the Court had no difficulty in employing such values as "degrading," "dehumanizing," "harm" and "equality." Yet it failed to account for competing free speech values in its analysis. The end result was that an unnecessarily broad law was saved under section 1 of the *Charter* even though the extent of the violation of freedom of expression was far from minimal. That the ruling was unanimous signifies that the pendulum in constitutional adjudication has swung away from the need to preserve traditional liberal values, and towards the promotion of social equality and harmonization.

(D) Child Pornography

In *R. v. Sharpe*, [203] a case involving child pornography, the Supreme Court of Canada demonstrated once again its readiness to supersede the responsibility of Parliament to redraft defective legislation. To be sure, the production, possession, and distribution of child pornography are deeply troubling occurrences which invite penal sanctions. The existence of such material is predicated upon the sexual exploitation of children for the personal gratification of paedophiles. Given their age and stage of cognitive development, children are highly susceptible to the seduction or coercion that normally leads to their participation in recordings of their sexual activities with themselves, with other children, or with adults. The exploitive nature of the relationship between the child victim and the pornographer can only impair the child's psychological development and sexual maturation. The perceived harms do not end here, however. There is a real fear that the presence of such material creates an increasingly greater demand for it, and breeds a larger and more dangerous type of sexual predator.

Yet, if the contrary rulings of the lower courts [204] in the case stand for something, it is that there is some merit to the argument that Parliament over reacted in its legislative response to public pressure to introduce ***70** legislative controls. In fact, the Supreme Court of Canada made findings similar to that of the lower courts in the case. Where it differed was largely with respect to the appropriate remedy to apply. Whereas the majority of the Court of Appeal took the courageous step of referring the problematic matter back to Parliament, despite the extensive media coverage and public outcry that this was certain to generate, the Supreme Court of Canada conveniently avoided this scenario by taking the unusual step of "reading in" specific amendments to the law. While the Court can be faulted for preferring this more timid approach to rights protection, there are some positive aspects of the Court decision with respect to free speech theory. Though the final outcome of the Supreme Court decision might indicate otherwise, it is evident the majority position was sensitive to the need to respect individual privacy and self-fulfilment theory when counterbalancing the opposing values at stake.

There are three hybrid offences falling under the child pornography provision of the *Criminal Code*. Subsection 163.1(4) prohibits the mere possession of child pornography, with a conviction attracting a maximum term of imprisonment of 5 years. The other two offences are concerned with the production and distribution of such material. By the time the case reached the Supreme Court of Canada, it was only the ***71** possession offence that was challenged under the *Charter*. Compared with the test of obscenity in section 163(8), the Code definition of "child pornography" is explicit in denoting:

> (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
>
> (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
>
> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or
>
> (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act. [205]

The *Code* allows for the defences of artistic merit and the public good, and materials having an educational, scientific or medical purpose are also held to be immune from conviction. Yet subsection 7 operates to remove the motives of the accused from consideration.

The offence presented by 163.1(4) is unprecedented in Canadian criminal law. It prohibits the possession, and nothing more, of material that is expressive in nature. Other provisions under the *Code* that restrict free expression, such as the hate propaganda and obscenity offences, are restricted to their dissemination in public. The possession of child pornography, on the other hand, encroaches on the private realm of individual liberty. It includes material created or gathered by an individual acting alone. Paintings, drawings, diary entries, and material accessed on a personal computer are captured. It matters not that the material may be intended for private use. Because of this, the possession offence engages aspects of the section 2(b) guarantee which are often overlooked, the corresponding freedom of thought, belief and opinion. In holding out the threat of imprisonment for creating private works which are solely the product of one's own imagination, the offence raises the spectre of state sponsored thought control. That the law will often be enforced by police officers entering private dwellings pursuant to a search warrant adds to the extent of the intrusion on individual liberty. Other provisions of the *Charter*, namely the right to liberty and security of the person under section 7, and the privacy interest underlying the right against unreasonable search and seizure in section 8, are also ***72** invoked by the law's application. In reaching its decision in *Sharpe*, the majority of the Supreme Court of Canada found violations of section 2(b) and 7, and would have had little choice but to strike down the law had it not wrote exclusions into its otherwise overly broad reach.

The majority, [206] headed by McLachlin C.J., found that the *Charter* values of liberty, privacy, and self-fulfilment were threatened by the law. As to the countervailing government objective in enacting the offence, McLachlin C.J. pointed to the need protect children from harm. She found that there is a reasonable apprehension that children are put at risk of harm by the possession of child pornography in several ways. First, it distorts the cognitive processes of those exposed to it, which is reflected in attitudinal changes and lowered inhibitions against child molestation. Second, it feeds or reinforces fantasies for paedophiles, increasing their tendency to commit sexual offences against children. Third, such material is often employed to seduce children into either participating in its creation, or into engaging in sexual acts with paedophiles. Fourth, it aims to reduce

a market that produces material through the abuse of children. An additional side-benefit of the law, according to McLachlin C.J., is that it aids in the investigation and prosecution of those involved in the production and distribution of child pornography.

In terms of the requirements of proportionality, McLachlin C.J. came to the conclusion that the offence withstood the test of rational connection, faltered somewhat at the minimal impairment threshold, and fell short of the requirements of overall proportionality at the third and final stage of section 1 analysis. Nevertheless, in counterbalancing the individual and collective values at stake, she was prepared to uphold the offence on the basis that certain defences or exceptions were to apply. Both defences were adopted after taking into account the self-fulfilment theory of free speech and the activities of older children who may, or may not, be married. The first of these is that individuals who act alone in creating works of the imagination for their personal use should not be subject to prosecution. Such private musings are of a highly personal nature and may well advance personal development or self-actualization. This is particularly so where the author is a youth in search of self-awareness and his or her sexual identity. The creative process involved is the means by which one's thoughts can be transformed into a tangible record of them. These records may in turn be used for private contemplation ***73** or reflection. The other qualification to the law's scope is that visual recordings made for personal use, and which are in the possession of their creator or the individual depicted, are also exempted, providing that they involve lawful sexual activity. For example, a young couple might chose to record their sexual activity with each other through video or photographs, as a means of exploring their sexual experiences and tastes. As McLachlin C.J. recognized, such activity can foster "healthy sexual relationships and self-actualization." [207] In both cases, the promotion of self-fulfilment will be high, the danger of harm to children low, or non-existent.

The analysis of self-fulfilment theory offered by McLachlin C.J. in *Sharpe* does much to alleviate some of the major concerns over the potential scope of the offence. While the more appropriate course for the Court to take would have been to strike down the law for Parliament to redraft, the majority's handling of the free speech concerns can be viewed as an accomplishment when contrasted with that of the remaining members. In her decision on behalf of the minority, [208] L'Heureux-Dube challenged the conclusions reached by McLachlin C.J, and even argued against the writing of the two important exceptions into the law. She contended that in the context of child pornography, self-fulfilment is only in operation at "its most base and prurient level." [209] Her decision upholding the offence instead emphasizes the harms presented by the possession of child pornography, and the societal values promoted by its criminalization. In her assessment, the possession of such material presents an inherent harm to all members of society, by objectifying the children it depicts in a degrading and dehumanizing manner:

> It hinders children's own self-fulfilment and autonomous development by eroticising their inferior social, economic and sexual status. It reinforces the message that their victimization is acceptable. In our view, that message denies children their autonomy and dignity. [210]

In preying upon this vulnerable group, and reinforcing its already inferior social status, the subject matter of the offence serves to violate the rights of the child to equality under section 15 of the *Charter*, and to physical and psychological security under section 7.

The introduction of self-fulfilment theory in Canadian constitutional law has received a mixed reception by members of the Supreme Court ***74** of Canada. The Court was quick to embrace the theory in *Irwin Toy*, yet slow to apply it outside of cases involving commercial expression. The theoretical rationale was ignored in *Prostitution Reference*, considered in *Butler*, and applied in *Sharpe*. Yet even in the most recent case of *Sharpe*, the theory was treated with near distain by the minority, despite the fact it was dealing with one of the most intrusive criminal law restraints ever placed on individual expression.

5. CONCLUSION

An inquiry into the values that underlie section 2(b) of the *Charter* takes on a heightened importance whenever a deprivation of one's physical liberty may be imposed. Offences that hold individuals liable to imprisonment for what they say constitute

one of the most intrusive measures on individual liberty, and should only be upheld in circumstances that are clearly warranted. However, in the three areas of substantive criminal law in which the Supreme Court of Canada has dealt with section 2(b) claims; individual [211] and group defamation, prostitution, and obscenity, these challenges have failed, with the exception of the *Zundel* appeal. A theme that runs through many of its decisions is that the activity concerned is far removed from the core of what section 2(b) is intended to protect. This is so despite its stated commitment in *Irwin Toy* to protect "all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream." [212] Unfortunately, what its actual decisions tend to reveal is that the contrary is true. Where a controversial or unpopular form of expression is raised, the Court seems inclined to deny it full constitutional protection. Moreover, its reasons for doing so reflect a greater concern over social cohesion and harmony, than in allowing divergent views to be expressed.

In neither its first major decision (Prostitution Reference), affecting freedom of expression, nor its more recent one (*Butler*), has the Court attempted to raise any serious discussion of the theoretical values promoted. This may be attributed, in part, to the rather formal procedure it has set out in *Irwin Toy* for evaluating section 2(b) *Charter* claims. By ***75** adhering to this rigid procedure, the Court has been able to avoid providing a full or in-depth discussion of what value there may be in permitting expression of the type sought to be protected. This is because the analytical procedure envisioned in *Irwin Toy* has largely relegated the relevancy of this kind of discussion to the more technical matter of applying the proportionality test under section 1 of the *Charter*.

What is perhaps even more disturbing with respect to this series of judgments from the Court is that it reveals a general lack of commitment to the very rationales it endorsed in *Ford* for protecting activity falling under the freedom of expression guarantee. More often than not, these "justifications" are employed to defeat, rather than defend, the section 2(b) rights of individuals. In the hate propaganda and obscenity cases, the argument that the expression furthers certain political goals, and contributes to the personal growth of the speaker, is countered by a reference to the corresponding rights of others that may be involved indirectly. It is suggested that the expression in question does not deserve protection as an instrument of individual self-fulfilment and of participation in the political process because it would tend to undermine the same interests that other groups affected have. Though this is an entirely fair assessment to make in the context of statements promoting hatred, it should be noted that the problem with the offences of spreading false news and obscenity is that their scope was less than certain. With respect to the marketplace of ideas theory, the majority in *Keegstra*, and the minority in *Zundel*, attempted to limit its scope so as to exclude false or harmful views. This evidences either a fundamental misconception of one of the basic constructs of the theory, or a complete lack of faith in its operation.

There appears to be a high degree of scepticism, among some members of the Court, with respect to certain assumptions upon which the rationales are based. This seems to be especially so in connection to the notion of rationality in human decision-making. [213] By focusing on the fallibility of human judgment, the Court was able to justify restrictions on the right of personal autonomy and the corresponding freedom to say and hear what one chooses. In *Butler*, the court appeared confident that it has singled out material that causes those exposed to it to commit ***76** some harm either to themselves or others. Similarly, the majority in *Keegstra* and the minority in *Zundel* placed more trust in government control of speech than with the ability of members of society to properly interpret it. Yet the Court has not been consistent on this critical point. It's more recent decision on section 2(b), *Thomson, supra*, is premised on the belief that individuals are well informed and highly rational, at least at election time. Whether this signifies a new conception of human agency and reason, or confusion over its scope, remains to be seen. Faith in human rationality lies at the heart of freedom from government intrusion. To reject it completely would place the theoretical foundation for protecting freedom of expression in a state of collapse. [214] This is not to suggest that individuals always act rationality. Rather, they have the capacity to draw rational conclusions, and, in a free society, all of the preconditions necessary for reason to ultimately triumph over ignorance are normally in place. Judicial pronouncements on the validity of government imposed restrictions on free speech should focus on whether they enhance, or detract from, this process.

If the "fundamental" freedom enshrined in section 2(b) is to be duly recognized as such by members of our judiciary, it may be necessary for the Supreme Court of Canada to reconsider its assessment of some of the theoretical benefits obtained from its exercise. The broad scope accorded to the section 2(b) guarantee in *Irwin Toy* means little if the Court's understanding of

its theoretical basis is self-defeating in nature. If the freedom to raise controversial issues in public does not lie at the heart of the provision, it is difficult to conceive of what does. It is important in a democratic society to protect the exercise of this freedom, even where it is employed to questionable or repugnant ends, unless demonstrable harm to others is reasonably certain to result. A healthy democracy is one that allows its members to make choices for themselves, even though it means that often the wrong choice will be followed. A free society does not presume a perfect social order. Social injustices can, and do arise, when individuals are granted a measure of autonomy over their lives. The reason why the personal liberty to make wrong decisions is tolerated lies in the conviction that any alternative to this is likely to lead to more deleterious consequences not only for the individual concerned, but for society in general. The Court has already addressed how the individual exercise of free expression can be antithetical to its perceived purposes. What it may now need to consider is the more important question as to whether prohibiting conduct on this ***77** basis may also be counterproductive to the goals of a free and democratic society.

Footnotes

a1 B.A. 1st Class Honours (Criminology), Simon Fraser University, B.C.; LL.B., University of Alberta. Member of the British Columbia and Manitoba Bar Associations.

1 In *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, (sub nom. *Hunter v. Southam Inc.*), 14 C.C.C. (3d) 97, (sub nom. *Hunter v. Southam Inc.*) [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, (sub nom. *Hunter v. Southam Inc.*) 55 A.R. 291, 1984 CarswellAlta 121, 1984 CarswellAlta 415 (S.C.C.), at 106 [C.C.C.], Dickson J. stated on behalf of a unanimous Court that the *Canadian Charter of Rights and Freedoms, 1982*, (Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. II [hereinafter *Charter*]), is a "purposive document." This means that the delineation of any of its provisions is to be made with reference to the purpose or interests that the guarantee in question is understood to embody. This approach to *Charter* interpretation was affirmed in; *R. v. Big M Drug Mart Ltd.*, 18 C.C.C. (3d) 385, [1985] 1 S.C.R. 295, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.), at 423-4 [C.C.C.]; *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, 23 C.C.C. (3d) 289, [1985] 2 S.C.R. 486, 1985 CarswellBC 398, 1985 CarswellBC 816 (S.C.C.), at 299 [C.C.C.].

2 [1938] 2 D.L.R. 81, [1938] S.C.R. 100, 1938 CarswellAlta 88 (S.C.C.), affirmed 1938 CarswellNat 2 (Alberta P.C.) [hereinafter *Alberta Legislation*].

3 As described by Cannon J., its "pith and substance" was to control press coverage to prevent "the public from being misled or deceived as to any policy or activity of the Social Credit Government and by reducing any opposition to silence or bring upon it ridicule and public contempt." (*Ibid.*, at 118).

4 *Ibid.*, at 107.

5 *Ibid.*, at 119.

6 Duff C.J.C., *ibid.*, at 107.

7 Now *Constitutional Act, 1867* (U.K.), 30 & 31 Vict. c. 3.

8 (1949), [1950] 1 D.L.R. 657, 1949 CarswellQue 18 (S.C.C.), reversed (1950), [1951] S.C.R. 265, 1950 CarswellQue 11 (S.C.C.) [hereinafter *Boucher*].

9 *Ibid.*, at 682. (Emphasis added).

10 [1953] 4 D.L.R. 641, [1953] 2 S.C.R. 299, 1953 CarswellQue 41 (S.C.C.).

11 Rand J. pointed to the preamble of the *B.N.A. Act*, and stated that the government in Canada rests "ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under licence, its basic condition is destroyed: the Government, as licensor, becomes disjoined from the citizenry." (*Ibid.*, at 671). He then proceeded to cite passages of the judgments rendered by Duff C.J.C. and Cannon J. in *Alberta Legislation, supra*, n. 2, and concluded that in the present case, "a more objectionable interference, short of complete suppression, with that dissemination which is the 'breath of life' of the political institutions of this country than

that made possible by the by-law can scarcely be imagined." (*Ibid.*, at 673). However, Rand J. did hint of a broader purpose served by free speech when he earlier stated that "freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order." (*Ibid.*, at 670).

12 7 D.L.R. (2d) 337, [1957] S.C.R. 285, 1957 CarswellQue 39 (S.C.C.) [hereinafter *Switzman*].

13 R.S.Q. 1941, c. 52.

14 Rand J. again made reference to the preamble of the *B.N.A. Act*, and continued; "Whatever the deficiencies in its workings, Canadian Government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted." (*Supra*, n. 12 at 358).

15 To Abbott J., "[t]he right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours." (*Ibid.*, at 369). He pointed to the *Canada Election Act*, R.S.C. 1952, c. 23, and the fact that certain provision of the *B.N.A. Act* require that Parliament meets at least once every year, and is re-elected at least every 5 years, as examples of statutory measures designed to protect and enhance this right: "Implicit in all such legislation is the right of candidates for Parliament or for a legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members." (*Ibid.*, at 371).

16 *Supra*, n. 1.

17 33 D.L.R. (4th) 174, [1986] 2 S.C.R. 573, 1986 CarswellBC 411, 1986 CarswellBC 764 (S.C.C.) at 183-187 [D.L.R.] [hereinafter *Dolphin Delivery* cited to [D.L.R.]]. The failure of the Court to "clearly enunciate any underlying theory of freedom of expression under the Charter" at that time did not go unnoticed by at least one commentator — Brian Etherington, "Picketing in Labour Disputes: Retail, Wholesale and Dept. Store Union, Local 580 v. Dolphin Delivery Ltd." (1987) 66 Can. Bar Rev. 818 at 825.

18 *Ibid.*, at 184.

19 54 D.L.R. (4th) 577, (sub nom. *Ford v. Quebec (Attorney General)*) [1988] 2 S.C.R. 712, 1988 CarswellQue 155 (S.C.C.) [hereinafter *Ford* cited to [D.L.R.]].

20 T.J. Emerson, "Toward a General Theory of the First Amendment" (1963) 72 Yale L.J. 878. A condensed version of this treatise in found in T.J. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970) at 6-9.

21 R. Sharpe, "Commercial Expression and the Charter" (1987) 37 U.T.L.J. 229.

22 58 D.L.R. (4th) 577, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 1989 CarswellQue 115F (S.C.C.) at 612 [D.L.R.] [hereinafter *Irwin Toy* cited to [D.L.R.]].

23 The Court's discourse on this subject in *Irwin Toy, ibid.*, has been described as "incomplete." In; M.D. Lepofsky, "The Supreme Court's Approach to Freedom of Expression — *Irwin Toy v. Quebec (Attorney General)* — And the Illusion of Section 2(b) Liberalism" (1993) 3 *N.J.C.L.* 37, at 73-4, and; M.D. Lepofsky, "Towards a Purposive Approach to Freedom of Expression and Its Limitation," in, F.E. McArdle, ed., *The Cambridge Lectures, 1989* (Montréal: Éditions Yvon Blais Inc., 1990), at 6-14, Lepofsky outlines (at 74) some additional 10 rationales which he contends "are not simply subsumed by those which are explicitly mentioned in [*Irwin Toy*]."

24 See; A.W. MacKay, "Freedom of Expression: Is It All Just Talk?" (1989) 68 Can. Bar Rev. 713, who argues for a shift in judicial focus from the liberal theories of free speech that serve middle-class interests to one which better protects those who are often marginalized in society (at 764). Also see; R. Moon, "The Scope of Freedom of Expression" (1985) 23 Osgoode Hall L. J. 331, and; M. Crawford, "Regimes of Tolerance:* A Communitarian Approach to Freedom of Expression and its Limits" (1990) 48 U.T.Fac.L.Rev. 1, who propose theories that focus on the communicative aspect of the freedom, and its role in the community.

25 L. Browstone, "The Charter, The Media, Sex Discrimination and Equality: A Volatile Combination?" (1989) 14 Queen's L. J. 153; K. Mahoney, "Obscenity and Public Policy: Conflicting Values — Conflicting Statutes" (1985-86) 50 Sask. L. Rev. 75.

26 See, for example, H. Glasbeek, "Comment: Entrenchment of Freedom of Speech for the Press — Fettering of Freedom of Speech of the People," in P. Anisman and A. Linden, eds., *The Media, The Courts and The Charter* (Toronto: Carswell, 1986).

27 A. Wayne MacKay, "Freedom of Thought, Belief, Opinion and Expression Including Freedom of the Press and Other Media of Communications and Freedom of Peaceful Assembly: Whose Interests Are Protected?" in, Gérald-A. Beaudoin, ed., *Your Clients and the Charter — Liberty and Equality: Proceedings of the October 1987 Colloquium of the Canadian Bar Association in Montréal* (Cowansville: Les Éditions Yvon Blais Inc., 1987) at 140.

28 *Supra*, n. 1.

29 Dickson C.J.C., Lamer and Wilson JJ. formed the majority.

30 "Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream .... We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee." (S*upra*, n. 22 at 606-7).

31 [1986] 1 S.C.R. 103, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.).

32 *Ford, supra*, n. 19, at 618.

33 *Ford, ibid.*, at 617-8; *Edmonton Journal v. Alberta (Attorney General)*, 64 D.L.R. (4th) 577, [1989] 2 S.C.R. 1326, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) at 581-4 [D.L.R.] (*per* Wilson J.); *R. v. Keegstra*, 61 C.C.C. (3d) 1, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 114 A.R. 81, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) at 23, 46-8 [C.C.C.].

34 McIntyre J. made no attempt to categorize the speech involved as "political" or "economic" in nature, though he was prepared to recognize peaceful secondary picketing as protected under section 2(b). Etherington argues that this form of picketing can be viewed as "a form of political speech"; "The private ordering of the relations of production is of central political significance in a free enterprise system and communication of information concerning this ordering of relations and the allocation of resources within those relations can be regarded as inherently political speech. The decision of picketing workers to communicate information concerning their disputes with employers over productive relations and the decision of listeners (be they consumers or other workers) to honour a picket line may represent the most overtly political activity undertaken by those actors in their lifetimes." (*Supra*, n. 17 at 825-6, footnote omitted).

35 See note 15.

36 *Supra*, n. 17 at 183.

37 Cory J. stated; "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized." (*Supra*, n. 33 at 607). In *Edmonton Journal*, subsection 30(1) and (2) of the *Judicature Act*, R.S.A. 1980, c. J-1, prohibiting the publication of information arising from matrimonial court proceedings, and pre-trial civil proceedings, respectively, were found to constitute an unreasonable infringement of s. 2(b).

38 77 D.L.R. (4th) 385, (sub nom. *Committee for the Commonwealth of Canada v. Canada*) [1991] 1 S.C.R. 139, 1991 CarswellNat 827 (S.C.C.), reconsideration refused (May 8, 1991), Doc. 20334 (S.C.C.) at 407 [D.L.R.].

39 These goals of free expression are based, in part, on those identified by Lepofsky, *supra*, n. 23 at 7-10.

40 The foremost defence of this theory in American constitutional law was made by A. Meiklejohn in; *Political Freedom: The Constitutional Powers of the People* (New York: Oxford University Press, 1965).

41 Abraham Lincoln, The Gettysburg Address, 1863.

42 *Supra*, n. 7.

43 *Supra*, n. 12, at 358.

44 Emerson treats the "balance between stability and change" value of free speech as a separate category, *supra*, n. 20 at 884-5. In *Ford, supra*, n. 19 at 617, the Supreme Court of Canada remarked that this value "would appear to be closely related if not overlapping" with the political speech rationale. The Court preferred to treat these two values as falling under the same category of speech; that of democratic self-government.

45 151 D.L.R. (4th) 385, [1997] 3 S.C.R. 569, 1997 CarswellQue 851, 1997 CarswellQue 852 (S.C.C.) [hereinafter *Libman*].

46 R.S.Q., c. C-64.1, Appendix 2, ss. 402-404, 406, para. 3, 413, 414, 416, and 417.

47 The exceptions in s. 404 pertain to the cost of; personal transportation (ss. 5), meals and lodging while traveling (ss. 4), holding a meeting not exceeding $600.00 (ss. 9), normal office expenses of an authorized party (ss. 7), interest on a loan used for regulated expenses (ss.8), publishing an objective explanation of the Act's provisions, (ss. 6), producing, promoting, and distributing a book planned to be for sale regardless of the referendum call (ss. 2), broadcasting a radio or television program without payment or reward (ss. 3), and publishing articles without payment of money or reward (ss. 1).

48 Canada, Royal Commission on Electoral Reform and Party Financing. *Reforming Electoral Democracy: Final Report*, vol. 1, (Ottawa: Minister of Supply and Services Canada, 1991).

49 159 D.L.R. (4th) 385, 38 O.R. (3d) 735 (headnote only), [1998] 1 S.C.R. 877, 1998 CarswellOnt 1981, 1998 CarswellOnt 1982 (S.C.C.) [hereinafter *Thomson*].

50 R.S.C. 1985, c. E-2, s. 322.1.

51 Bastarache J., with Cory, McLachlin, Iacobucci and Major JJ. concurring.

52 Bastarache J., *Thomson, supra*, n. 49 at 454.

53 Gonthier J., with Lamer C.J.C. and L'Heureux-Dubé J. concurring, formed the dissent.

54 D. Spitz, ed., (New York: W.W. Norton & Co., 1975).

55 250 U.S. 616 (U.S. N.Y., 1919).

56 *Supra*, n. 54, at 18. S. Brown, in; "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes? Regina v. Zundel" (1987-88) 11 Dalhousie L.J. 471 at 474-75, said it this way: "If freedom of expression protected only those seeking and speaking social truth and never those seeking and speaking social falsehoods than [sic] the social significance of truth would eventually be lost and its social vulnerability become unappreciated. ... Truth, *per se*, has no intrinsic *social* value. It acquires this only when it can shape the public mind — when its social message and social lessons are fully appreciated. The *greater* threat to social truth is not social falsehood, but that it becomes *insignificant* and *irrelevant*. Social truth must be regularly challenged — its message kept alive — if it is to remain current and meaningful. The *process* of vigorous clash and interplay of social truth with social falsehood rejuvenates the message of truth. Silence, not falsehood, allows the message to die. In a world legally sanitized of any evil words there can be no true sense either of the significance or the ultimate vulnerability of good words. Without any political room for expressive juxtaposition of social falsehood with social truth, truth loses its contemporary social significance, atrophies and ultimately leaves a dangerous vacuum where social evil, unappreciated because unheard, can in times of social crises more easily take its place."

57 K. Dubick, "Freedom to Hate: Do the Criminal Code Proscriptions Against Hate Propaganda Infringe the *Charter*," (1990) 54 Sask. L.R. 149 at 195.

58 "Scope of the First Amendment Freedom of Speech" (1977-78) 25 U.C.L.A.L. Rev. 964 at 976.

59 S. Ingber, "The Marketplace of Ideas: A Legitimizing Myth" [1984] Duke L.J. 1 at 35-6, (footnote omitted).

60 *Ibid.*, at 36, (footnote omitted).

61 *Ibid.*, at 39, (footnotes omitted).

62 *Ibid.*, at 38, (footnote omitted).

63 R.S., c. C-34.

64 *Supra*, n. 33.

65 *Ibid.*, at 56.

66 *R. v. Buzzanga* (1979), 101 D.L.R. (3d) 488, 25 O.R. (2d) 705 (Ont. C.A.).

67 *R. v. Keegstra*, n. 33 at 59 [C.C.C.].

68 *Ibid.*, at 61.

69 *Ibid.*, at 48-9.

70 *Ibid.*, at 49.

71 *Ibid.*, at 50. "As a caveat," Dickson C.J.C. stated that "it must be emphasized that the protection of extreme statements, even where they attack those principles underlying the freedom of expression, is not completely divorced from the aims of section 2(b) of the Charter. As noted already, suppressing the expression covered by section 319(2) does to some extent weaken these principles. It can also be argued that it is partly through a clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive. ... In this regard, judicial pronouncements strongly advocating the importance of free expression values might be seen as helping to expose prejudice statements as valueless even while striking down legislative restrictions that proscribe such expression. Additionally, condoning a democracy's collective decision to protect itself from certain types of expression may lead to a slippery slope on which encroachments on expression central to section 2(b) values are permitted. To guard against such a result, the protection of communications virulently unsupportive of free expression values may be necessary in order to ensure that expression more compatible with these values is never unjustifiably limited." (*Ibid.*, at 51).

72 *Ibid.*, at 79.

73 *Ibid.*

74 McLachlin J. raised these points in relation to whether the promotion of hate propaganda should not receive constitutional protection because it amounts to a form of violence, or a threat of violence.

75 *R. v. Keegstra*, n. 33, at 99 [C.C.C.].

76 *Ibid.*

77 *Ibid.*, at 117.

78 *Ibid.*, at 117-8.

79 *Ibid.*

80 *Ibid.*, at 118.

81 *Ibid.*, at 119. Contrary to the majority, McLachlin J. found that the defence of truth in s. 319(3)(a) amounted to an unreasonable limitation on the section 11(d) *Charter* right of presumption of innocence because of the evidential burden it places upon the accused.

82 *Ibid.*, at 120-121. On the issue of education language rights, the accused in *R. v. Buzzanga, supra*, n. 66, had their trial conviction under s. 319(2) overturned, after they had distributed a satirical hand bill as a means of protesting an alleged act of discrimination against the education rights of francophone children in their community.

83 *Ibid.*, at 120.

84 *Ibid.*, at 123.

85 *Ibid.*, at 124. McLachlin J. pointed out (*ibid.*, at 115-6), that prosecutions for this type of offence generally attract considerable media coverage which has the effect of exposing the accused's views to an even wider audience. This problem may be compounded by the nature of the criminal trial process itself. With the individual on one side, and the state represented on the other, there is a danger that the accused will be perceived as a martyr for the heavy handed way in which his views have been treated. This in turn might invite public sympathy for his cause, especially among those already mistrustful of government.

86 95 D.L.R. (4th) 202, [1992] 2 S.C.R. 731, 1992 CarswellOnt 109, 1992 CarswellOnt 995 (S.C.C.).

87 *Ibid.*, at 260 [D.L.R.].

88 *Ibid.*, at 262 [D.L.R.].

89 "A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs ... eg., 'cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salmon Rusdie's *Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the prophet." (*Ibid.*, at 262 [D.L.R.], per McLachlin J.) In his dissent, Cory J. responded that her first two examples "of expression not only fail to raise the possibility of injury to a public interest but, indeed, they would have an over-all beneficial or neutral effect on society. In contrast, an accused would only be convicted under section 181 if there were no reasonable doubt regarding a very serious injury to the public interest." (*Ibid.*, at 250 [D.L.R.]).

90 *Ibid.*, at 262 [D.L.R.]. The other reported cases are; *R. v. Hoaglin* (1907), 12 C.C.C. 226 (Alta. T.D.); *R. v. Carrier*, 104 C.C.C. 75, 1951 CarswellQue 17 (Que. K.B.); and *R. v. Kirby* (1970), 1 C.C.C. (2d) 286 (Que. C.A.) [hereinafter *Kirby*]. Hoaglin, an Alberta Storekeeper, was convicted for posting signs in his store windows stating: "Americans not wanted in Canada." The Court held that by discouraging needed immigration into Canada, the "false" statement ran against the "public interest." Although initially charging Carrier with conspiracy to publish a seditious libel similar to that which formed the subject-matter of the charge in *Boucher, supra*, n. 8, the Quebec Attorney-General later sought a conviction on the same facts for spreading false news. Carrier was eventually successful on the ground of *autrefois acquit*. In *Kirby*, the trial conviction of an underground newspaper publisher was overturned since the printing of an untrue story, that the mayor of Montreal had been shot by a "dope-crazed hippie," did not cause "injury or mischief to a public interest."

91 *Supra*, n. 86 at 263. In applying this consideration in the context of the *Zundel* case, McLachlin J. stated that; "[e]ven a publication as crude as that at issue ... illustrates the difficulty of determining its meaning. On the respondent's view, the assertion that there was no Nazi policy of the extermination of Jews in World War II communicates only one meaning — that there was no policy, a meaning which, as my colleagues rightly point out, may be extremely hurtful to those who suffered or lost loved ones under it. Yet, other meanings may be derived from the expressive activity; e.g., that the public should not be quick to adopt 'accepted' versions of history, truth, etc., or that one should rigorously analyze common characterizations of past events. Even more esoterically, what is being

communicated by the very fact that persons such as the appellant Mr. Zundel are able to publish and distribute materials, regardless of their deception, is that there is value inherent in the unimpeded communication or assertion of 'facts' or 'opinions'." (*Ibid.*)

92 *Ibid.*, at 261-2 [D.L.R.].

93 *Ibid.*, at 272 [D.L.R.].

94 *Ibid.*, at 241, 252 [D.L.R.]. (This was essentially the same argument offered by the Ontario Court of Appeal in *R. v. Zundel*, 35 D.L.R. (4th) 338, 58 O.R. (2d) 129, 1987 CarswellOnt 83 (Ont. C.A.), leave to appeal refused 61 O.R. (2d) 588n, 56 C.R. (3d) xxviii, [1987] 1 S.C.R. xii (S.C.C.), at 364-5 [D.L.R.]). In contrast, McLachlin J. argued that expression caught by section 181 may well relate to the "core" values protected by the section 2(b) guarantee. This is because, unlike the provision challenged in *Keegstra*, s. 181 of the *Code* is not "confined to hate propaganda," and "hence restricted only [to] speech of low or negative value." Instead, it catches a "broad spectrum of speech, much of which may be argued to have value." (*Keegstra, ibid.*, at 276).

95 *Zundel, ibid.*, at 239-40.

96 *Ibid.*, at 242.

97 *Ibid.*, at 232-3. The same argument was employed by Quigley J. to uphold the offence of wilful promotion of hatred in *R. v. Keegstra*, 19 C.C.C. (3d) 254, 87 A.R. 200, 1984 CarswellAlta 428 (Alta.Q.B.), reversed 60 Alta. L.R. (2d) 1, 87 A.R. 177, 1988 CarswellAlta 94 (Alta. C.A.), additional reasons at 114 A.R. 288, 79 Alta. L.R. (2d) 97, 1991 CarswellAlta 41 (Alta. C.A.), reversed [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 114 A.R. 81, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) at 268 [C.C.C.].

98 *Ibid.*, at 242 [C.C.C.].

99 *Ibid.*, at 240 [C.C.C.].

100 *Ibid.*, at 241 [C.C.C.].

101 *Ibid.*, at 241-2 [C.C.C.].

102 *Ibid.*, at 249 [C.C.C.].

103 *Ibid.*, at 250 [C.C.C.].

104 *Ibid.*, at 249 [C.C.C.]. "We must reiterate that the focus of section 181 is not on the opinions of the appellant. While they might be caught under section 319, the hate propaganda provision, his acquittal on one charge at trial relating to 'The West, War and Islam!' and the withdrawal of a subsequent charge against him for expressing *these same opinions* ... make it clear that this section is not and has not been used against those who express unpopular, counter-intuitive or socially undesirable points of view. What is being prohibited is an attempt to win converts to this point of view and to inflict harm against disadvantaged members of society by the most unscrupulous manipulation." (Per Cory J., *ibid.*, at 249). "[I]t is important to note that, as was done in this case, the trial judge must instruct the jury that the accused is not to be judged on the unpopularity of his or her beliefs." "To be acquitted under section 181, there need only be a reasonable doubt with regard to the wilful publication of the statement presented as truth, or the falsity of the statements, or to the knowledge of the falsity or with regard to the likelihood of injury to the public interest. ... Indeed, where the speech at issue lacks a factual base or is so vague that it makes no clear allegation capable of verification or falsification, it will not be caught by this section." (Per Cory J., *ibid.*, at 244).

105 It was this theory that was invoked by the Alberta Court of Appeal in; *R. v. Keegstra, supra*, n. 97, where it held that the offence of willful promotion of hatred was an unreasonable limitation on freedom of expression. Though the Court expressed doubt that deliberate lies of the kind prohibited by the false news law are protected by the marketplace of ideas theory, it was certain that it at least extends to "imprudent speech," which is what it found the offence Keegstra was charged with to make a crime of. By "imprudent speech," the Court was referring to situations where "the speaker is innocent of knowledge of the falsehood but is blameworthy in that he has not taken reasonable steps to discover if what he says is true or not." (*Ibid.*, at 164 [C.C.C.]). The Court was right to point out that "it is not just correct and careful comment that is protected" by the theory. (*Ibid.*).

106 Mill also argued that there can never be absolute certainty that any given opinion is factually false, and will remain so for all time. To make such a designation on behalf of others is an "assumption of infallibility." The false news law appeared to avoid this issue by making it an essential component of the offence that the statements were made with knowledge of their falsity. However, where the accused put this issue in dispute, as Zundel did, it was unavoidable for the trier of fact to make the determination as to whether the "statement, tale or news" is false. This problem is different with respect to the offence Keegstra was charged with, since it does not even purport to be limited to false statements of fact. All that matters is that the statement made "promotes hatred." Though the accused may raise such defences as truth or public benefit, there is little to prevent expressions of opinion from capture. It therefore seems presumptuous of Dickson C.J.C. to dismiss statements promoting hatred from the marketplace of ideas on the basis that they are untrue.

107 As already indicated, Brown provides an exposition of this process in relation to the offence Zundel was charged with, to make the point that the goal of obtaining the truth should not be confused with the means by which it is arrived at. (See note 56). Whereas the Ontario Court of Appeal in *Zundel, supra*, n. 94, stated that "[s]preading falsehoods knowingly is the antithesis of seeking truth through the free exchange of ideas" (at 364), Brown views it as indispensable to the effective operation of this process.

108 *On Liberty, supra*, n. 54 at 42.

109 "Toward a General Theory of the First Amendment," *supra*, n. 20 at 879.

110 *American Constitutional Law*, 2nd ed., (New York: The Foundation Press, Inc., 1988) at 787.

111 *Constitutional Law of Canada*; 4th ed., (Toronto: Carswell, 1996) at 784.

112 According to D. Schneiderman, in "Freedom of Expression and the *Charter*. Being Large and Liberal," in *Freedom of Expression and the Charter*, D. Schneiderman, ed., Carswell; 1991, xxiii, at xxvii, "[t]his rationale probably protects too much expression and collapses into an argument for liberty generally and not expression particularly." (Footnotes omitted). In *Keegstra, supra*, n. 33, McLachlin J. commented that "[o]n its own, this justification for free expression is arguably too broad and amorphous to found constitutional principle." She noted, however, that "[t]hose who assert that freedom of expression is worth protecting for its intrinsic value to the self-realization of both speaker and listener tend to combine this rationale with others ...." In this way, "an emphasis on the intrinsic value of freedom of expression provides a useful supplement to the more utilitarian rationales, justifying, for example, forms of artistic expression which some might otherwise be attempted to exclude." (At 80).

113 R. Delgado, "Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling" (1982) 17 Harv. C.R. C.L.R. Rev. 133 at 176.

114 Dubick, *supra*, n. 57 at 161.

115 (*sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)*) 82 D.L.R. (4th) 449 (sub nom. *Imperial Tobacco Ltd. c. Canada (Procureur général)*) [1991] R.J.Q. 2260 (Que. S.C.), reversed (sub nom. *Canada (Procureur général) c. RJR-MacDonald Inc.*) [1993] R.J.Q. 375, 1993 CarswellQue 176 (Que. C.A.), reversed (sub nom. *RJR-MacDonald Inc. c. Canada (Attorney General)*) [1995] 3 S.C.R. 199, 1995 CarswellQue 119 (S.C.C.) [hereinafter *RJR-MacDonald* cited to [D.L.R.]].

116 71 D.L.R. (4th) 68, [1990] 2 S.C.R. 232, 73 O.R. (2d) 128 (note), 1990 CarswellOnt 1014 (S.C.C.) [hereinafter *Rocket* cited to [D.L.R.]].

117 An examination of lifestyle advertising in relation to the purposes of free speech is provided by R. Moon, in; "Lifestyle Advertising and Classical Freedom of Expression Doctrine" (1991) 36 McGill L. J. 76.

118 Sharpe, *supra*, n. 21 at 235-6, Hogg, *supra*, n. 111 at 970.

119 Henry J., a proponent of this view, explains that communication regarding goods and services in a free market society stands on equal ground with political speech. Both forms of speech contribute to the proper functioning of a democratic society. To operate effectively, our market system is dependent upon the ability of producers and sellers to inform consumers of available products and services. When the information presented to them is reliable and complete, consumers are in a position to make purchases based on the "best combination of price, quality and volume." This in turn ensures that the economy remains healthy, which, in the long run,

affects our standard of living and life-style options. “The general public are thus directly concerned with performance of the market economy and their governments are of necessity drawn into a continuing concern with the state of the economy and the need to develop and maintain an economic or industrial policy. The performance of the economy thus becomes a political issue.” (Dissenting in; *Klein v. Law Society of Upper Canada*, 16 D.L.R. (4th) 489, 50 O.R. (2d) 118, 1985 CarswellOnt 1066 (Ont. Div. Ct.) at 505-6 [D.L.R.] [hereinafter *Klein* cited to [D.L.R.]. On this, Cory J.A. for the majority agreed in; *Rocket v. Royal College of Dental Surgeons (Ontario)*, 49 D.L.R. (4th) 641, 64 O.R. (2d) 353, 1988 CarswellOnt 993 (Ont. C.A.), affirmed [1990] 2 S.C.R. 232, 73 O.R. (2d) 128 (note), 1990 CarswellOnt 1014 (S.C.C.) at 671 [D.L.R.]).

120 “Commercial speech contributes nothing to democratic government because it says nothing about how people are governed or how they should govern themselves. It does not relate to government policies or matters of public concern essential to a democratic process.” (Callaghan J., for the majority, in *Klein, ibid.*, at 539. Callaghan J. had earlier stated that “[c]ommercial speech flows from the realm of economic activity; political speech from that of politics and government. In a democratic society the economic realm must be subordinate to the political realm. The people may determine through their elected representatives ... how to regulate their economic affairs and through that, their economic speech. In doing so, their only concern need be with the process which generates the regulation. For so long as the regulation is the result of the democratic process and so long as the well-springs of that process are kept pure, through the protections afforded it by a Constitution, then there can be no valid complaint by the regulated.” *Klein, ibid.*, at 531-2. These assumptions have in turn been challenged by S. Braun in; “Should Commercial Speech Be Accorded Prima Facie Constitutional Recognition Under the Canadian Charter of Rights and Freedoms?” (1986) 18 Ottawa L.Rev. 37).

121 The Province (BC), Nov. 1, 1998, p. A17. The ad was placed by RJR-MacDonald Inc.

122 See, for example; Sharpe, *supra*, n. 21 at 236-7; D.A. Strauss, “Constitutional Protection for Commercial Expression: Some Lessons from the American Experience,” (1991) 17 Can.Bus.L.J. 45 at 51-2.

123 *Ford, supra*, n. 19 at 618; *Edmonton Journal, supra*, n. 33 at 610.

124 Though it may be true that advertising does more to shape our wants and preferences than it does in responding to them, a robust theory of individual self-fulfilment or autonomy leaves it up to the consumer to decide whether to “buy” the commercial message. See Sharpe, *supra*, n. 21 at 237.

125 *Supra*, n. 19 at 618.

126 *Charter of the French Language*, R.S.Q., c. C-11. S. 58 provides that only the French language can appear on public signs, posters, and commercial advertising, while s. 69 applies this rule to a firm's name.

127 *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12.

128 “Although the expression in this case has a commercial element, it should be noted that the focus here is on choice of language and on a law which prohibits the use of a language. We are not asked in this case to deal with the distinct issue of the permissible scope of regulation of advertising (for example, to protect consumers) where different governmental interests come into play, particularly when assessing the reasonableness of limits on such commercial expression ....”(*Ford, supra*, n. 19 at 619).

129 Pursuant to s. 91 of the Regulation representing the application of the *Consumer Protection Act*, R.R.Q. 1981, c. P-40.1, r.1, an advertisement must not; “(a) exaggerate the nature, characteristics, performance or duration of goods or services; (b) minimize the degree of skill, strength or dexterity or the age necessary to use goods or services; (c) use a superlative to describe the characteristics of goods or services or a diminutive to indicate its cost; ... (o) suggest that owning or using a product will develop in a child a physical, social or psychological advantage over other children of his age, or that being without the product will have the opposite effect; (p) advertise goods in a manner misleading a child into thinking that, for the regular price of those goods, he can obtain goods other than those advertised.”

130 Subsection 91(f) of the regulations, *ibid.*, states that an ad may not “portray reprehensible social or family lifestyles.”

131 Companies are prohibited from advertising “goods or services that, because of their nature, quality or ordinary use, should not be used by children.”(Subsection 91(g) of the regulations, *ibid.*).

132 For example, an ad must not "portray goods or services in a way that suggests an improper or dangerous use thereof." (Subsection 91(k) of the regulations, *ibid.*).

133 *Irwin Toy, supra*, n. 22, at 620.

134 *Ibid.*, at 632.

135 *Ibid.*, at 630. Even the dissenting judgment of McIntyre J., with Beetz concurring, offered little by way of explanation; "I do not suggest that the limitations ... are so earth shaking or that if sustained they will cause irremediable damage. I do so, however, that these limitations represent a small abandonment of a principle of vital importance in a free and democratic society and, therefore, even if it could be shown that some child or children have been adversely affected by advertising of the kind prohibited, I would still be of the opinion that the restriction should not be sustained." (At, at 636).

136 R.S.O. 1980, c.196. R.R.O. 1980, Reg. 447 (*Health Disciplines Act*), s. 37, paras. 39, 40. In *Rocket, supra*, n. 116, these provisions were invoked to discipline two dentists for their advertising campaign in newspapers and magazines. The ads contained photographs of the two; described their business success at providing dental services through their shopping mall outlets: and ended with the statement that when traveling on business, they stay at a Holiday Inn hotel.

137 *Rocket, ibid.*, at 79.

138 *Ibid.*, at 79-80.

139 *Ibid.*, at 81.

140 *Supra*, n. 115.

141 *Tobacco Products Control Act*, S.C. 1988, c. 20.

142 The *Tobacco Products Control Regulations*, SOR/89-21, section 11(1)(a), and s. 15(1)(a), amended SOR/93-389, s. 4(1)(a) (July 21, 1993), required that each of the following statements must be displayed on at least 3 per cent of the total number of packages produced under a brand name: "Cigarettes are addictive," "Tobacco smoke can harm your children," "Cigarettes cause fatal lung disease," "Cigarettes cause cancer," "Cigarettes cause strokes and heart disease," "Smoking during pregnancy can harm your baby," "Smoking can kill you," and "Tobacco smoke causes fatal lung disease in non-smokers."

143 Sections 5 and 6 were struck down as being unseverable from those infringing the *Charter*. Section 5 regulated the advertisement and display of tobacco products by retailers and vending machines, while s. 6 limited tobacco manufacturers' use of their brand names when promoting cultural or sporting events.

144 Sopinka and Major JJ. concurring. They were joined by Iacobucci J., with Lamer J. concurring, in a separate judgment. While generally endorsing the reasons of McLachlin J., Iacobucci J. departed somewhat from her s. 1 analysis and proposed remedy for the infringements.

145 L'Heureux-Dubé, Gonthier and Cory JJ. concurring.

146 Using the example of the sale of books and newspapers, McLachlin J. correctly points out that profit motive and low free speech value are not necessarily correlated. (*RJR-MacDonald, supra*, n. 115 at 103). (Compare this with her previous comment in *Rocket, supra*, n. 116).

147 *RJR-MacDonald, ibid.*, at 99 and 102.

148 La Forest J., *ibid.*, at 80.

149 *Ibid.*, at 80-81.

150 *Ibid.*, at 81.

151 *Ibid.*, at 92.

152 K. Dubick, "Commercial Expression: A Second-Class Freedom?" (1996) 60 Sask. L.R. 91, at 121.

153 56 C.C.C. (3d) 65, [1990] 1 S.C.R. 1123, 68 Man. R. (2d) 1, 1990 CarswellMan 206, 1990 CarswellMan 378 (S.C.C.) [hereinafter *Prostitution Reference* cited to [C.C.C.]].

154 *Criminal Code, supra*, n. 63, s. 213 (1)(c).

155 La Forest and Sopinka JJ. concurred with Dickson C.J.C., while L'Heureux-Dubé J. joined Wilson J.

156 *Supra*, n. 153, at 128 [C.C.C.].

157 *Ibid.*, at 73-4. Lower courts were even less impressed with the right claimed, and were not prepared to protect it under any rationale of free speech. In the same case, Huband J.A. expressed his dismay that the works of Milton and Mill "were being invoked to protect the business of whores and pimps." (*Prostitution Reference*, at 38 C.C.C. (3d) 408 (Man.) at 413). In *R. v. Smith*, 44 C.C.C. (3d) 385, 1988 CarswellOnt 845 (Ont. H.C.), Watt J. argued that "the expression here at issue would appear to have no intrinsic social or moral value which would merit constitutional protection. ... It is very difficult to apprehend in words such as 'it's 40 for a blow or 50 for a lay' any social or moral value, however ephemeral." (At 454 [C.C.C.]).

158 Wilson J. was apparently of the same view as Dickson C.J.C., who stated that it is unnecessary to consider whether s. 7 liberty protects economic interests because "the strongest argument that can be made regarding an infringement of liberty derives from the fact that the legislation contemplates the possibility of imprisonment." (*Supra*, n. 153 at 77). However, Lamer J., in a separate judgment, did address this issue directly in holding that section 7 does not guarantee an economic right to practice one's chosen profession.

159 Dubick, *supra*, n. 152, at 128-9.

160 Here, Wilson J. argued that it should have been a precondition of a conviction for the offence that some public nuisance was actually caused by the communicative act.

161 *R. v. Westendorp*, 144 D.L.R. (3d) 259, [1983] 1 S.C.R. 43, 23 Alta. L.R. (2d) 289, 41 A.R. 306, 1983 CarswellAlta 1, 1983 CarswellAlta 316 (S.C.C.) [hereinafter *Westendorp*].

162 Though Dickson C.J.C. raised the *Westendorp* decision, in *Prostitution Reference, supra*, n. 153, at 76, he did not directly relate this to the problem of defining legislative objective in Prostitution Reference.

163 *Ibid.*, at 121-2.

164 *Criminal Code, supra*, n. 63, s. 210.

165 *Supra*, n. 153, at 78.

166 89 D.L.R. (4th) 449, [1992] 1 S.C.R. 452, 78 Man. R. (2d) 1, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.), reconsideration refused [1993] 2 W.W.R. lxi (S.C.C.).

167 Subsection 6 has since been repealed (1993, c. 46, s. 1). The reverse onus in subsection 3 and 4 has also been removed, thereby making it a substantive element of the offence that the obscene matter was not of public benefit.

168 *R. v. Butler*, 50 C.C.C. (3d) 97, 60 Man. R. (2d) 82, 1989 CarswellMan 181 (Man. Q.B.), affirmed 73 Man. R. (2d) 197, 1990 CarswellMan 228 (Man. C.A.), reversed [1992] 1 S.C.R. 452, 78 Man. R. (2d) 1, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.), reconsideration refused [1993] 2 W.W.R. lxi (S.C.C.).

169 Those video tapes which Wright J. found to be "legitimately proscribed according to the requirements of section 1 of the Charter," contained "scenes involving violence or cruelty intermingled with sexual activity" or depict "lack of consent to sexual conduct, or otherwise can be fairly said to dehumanize men or women in a sexual context." (*Ibid.*, at 123 [C.C.C.]). Similarly, those materials that

were not legitimately proscribed reflected "consensual activity by adult individuals not involving force, duress or cruelty." (*Ibid.*, at 124-125 [C.C.C.]). In extending protection to this kind of material, Wright J. did not really address the free speech values promoted by it, although he did state; "Every limit on the circulation of obscene expression involves the arbitrary removal of an individual's opportunity to make his or her own choice. Free choice is part of the bedrock of a democratic society. Temptation is necessary to allow people to choose — to choose to be right-minded, or moral or not. Without temptation, can free choice fully exist?" (*Ibid.*, at 123 [C.C.C.]).

170 *R. v. Butler*, 60 C.C.C. (3d) 219, 73 Man. R. (2d) 197, 1990 CarswellMan 228 (Man. C.A.), reversed [1992] 1 S.C.R. 452, 78 Man. R. (2d) 1, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.), reconsideration refused [1993] 2 W.W.R. lxi (S.C.C.).

171 Huband J.A. was of the opinion that the "obscene material does not appear to have that 'social or moral value which would merit constitutional protection'." (*Ibid.*, at 229 [C.C.C.]). "There is nothing of the quest for truth in the materials .... They add nothing to the democratic process. They are the antithesis of individual self-fulfillment and human flourishing. Instead, men and women are debased and degraded by being portrayed as constantly on an animalistic pursuit." (*Ibid.*, at 231 [C.C.C.]). He further argued that the material in question did not constitute expression in terms of "'thoughts, opinions, beliefs"' (*Ibid.*, at 229 [C.C.C.]). "What is depicted ... is simply a series of unconnected sexual adventures which, for the most part, were unencumbered by any dialogue other than moans, sighs and groans. What we see and hear are the expression of loins and glands rather than hearts and minds." (*Ibid.*, at 229 [C.C.C.]). "Sexual stimulation is not protected by section 2(b) of the Charter. Intellectual rather than sensual arousal is what the Charter was intended to protect." (*Ibid.*, at 230 [C.C.C.]).

172 For Twaddle J.A., "harm" in this context refers to "sexually related material which dehumanizes people." "Such books and movies do violence to the human spirit, creating images which become part of those who see them." (*Ibid.*, at 247 [C.C.C.]).

173 Here, Twaddle J.A. questions "what right a free society has to dictate to individuals what books should be read, or movies seen, solely on the basis of society's view of what is moral." (*Ibid.*, at 246 [C.C.C.]). Earlier in his judgment, Twaddle J.A. took exception to the view that the seized material did not convey meaning and that section 2(b) of the *Charter* did not protect expression of a sexual nature when he stated: "The subject-matter of the material under review, be it in the form of a video movie, a magazine or a gadget, is sexual activity. Such activity is part of the human experience. The impulse to engage in it, in some form or other, is (to use the words of Professor H.A.L. Hart of Oxford University) 'a recurrent and insistent part of daily life'. The depiction of such activity has the potential of titillating some and of informing others. How can images which have such effect be meaningless?" (*Ibid.*, at 237 [C.C.C.]).

174 Helper J.A., like Twaddle J.A., found the material to constitute "expression," and to have some value: "Whether one interprets the materials in this appeal as portraying human physical interaction or a way of life, as educating the uninitiated or presenting a variety of human sexual experiences or as mere entertainment, there is meaning. An idea is being conveyed. Sometimes even a story is being told as poor a story as it may be." (*Ibid.*, at 256 [C.C.C.]).

175 Lamer C.J.C., La Forest, Cory, McLachlin, Stevenson and Iacobucci J.J. concurring.

176 *R. v. Butler, supra*, n. 166, at 470 [D.L.R.] (per Sopinka J.). "Violence in this context includes both actual physical violence and threats of physical violence." (*Ibid.*, [D.L.R.] per Sopinka J.).

177 *Ibid.*, at 471 [D.L.R.] (per Sopinka J.).

178 *Ibid.*, at 481 [D.L.R.].

179 *Ibid.*, at 482 [D.L.R.].

180 *Ibid.*, at 485 [D.L.R.].

181 *Ibid.*, at 488 [D.L.R.].

182 *Ibid.*, at 494 [D.L.R.].

183 *Ibid.*, at 491 [D.L.R.].

184 *Ibid.*, at 490 [D.L.R.].

185 Gonthier J. stated that he "cannot conceive that the state could not legitimately act on the basis of morality"; though "[n]ot all moral claims will be sufficient to warrant an override of Charter rights." (*Ibid.*, at 497 [D.L.R.]). "First of all, the moral claims must be grounded. They must involve concrete problems such as life, harm, well-being, to name a few, and not merely differences of opinion or of taste." "Secondly, a consensus must exist among the population on these claims. They must attract the support of more than a simple majority of people." (*Ibid.*, at 498 [D.L.R.]).

186 In relation to obscenity, Gonthier J. stated that "[t]he avoidance of harm caused to society through attitudinal changes certainly qualifies as a 'fundamental conception of morality.' After all, one of the chief aspirations of morality is the avoidance of harm. It is well grounded, since the harm takes the form of violations of the principles of human equality and dignity. Obscene materials debase sexuality. They lead to the humiliation of women, and sometimes to violence against them." (*Ibid.*, at 498 [D.L.R.]).

187 The subject matter in many of the reported cases demonstrates how close the courts have come to censoring perfectly legitimate forms of expression. In *Brodie v. R.*, 32 D.L.R. (2d) 507, [1962] S.C.R. 681, 1962 CarswellQue 1 (S.C.C.), the novel "Lady Chatterley's Lover," by D.H. Lawrence, was found to be obscene by 4 of the 9 justices deciding the issue. Another book, "Fanny Hill," was deemed not to be obscene by a 3-2 majority (*R. v. C. Coles Co.* (1964), [1965] 1 O.R. 557 (Ont. C.A.)). In another 3-2 decision, the movie: "Last Tango In Paris," with Marlon Brando, was not found to be obscene (*R. v. Odeon Morton Theatres Ltd.*, 16 C.C.C. (2d) 185, 1974 CarswellMan 32 (Man. C.A.)). A sex education book designed for children, and entitled "Show Me," was prosecuted without success in *R. v. MacMillan Co.*(1977), 13 O.R. (2d) 630 (Ont. Co. Ct.). An accused's trial conviction regarding the showing of the motion picture: "Dracula Sucks" was upheld by the Alberta Court of Appeal. The Supreme Court of Canada allowed the appeal and ordered a new trial (*Towne Cinema Theatres Ltd. v. R.*, 18 D.L.R. (4th) 1, [1985] 1 S.C.R. 494, 37 Alta. L.R. (2d) 289, 61 A.R. 35, 1985 CarswellAlta 70 (S.C.C.)). If it is thought that such abuses of the offence are a thing of the past, the factual context of the Court of Appeal decision in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, 54 B.C.L.R. (3d) 306, 1998 CarswellBC 1416 (B.C. C.A.), leave to appeal allowed (1999), 59 C.R.R. (2d) 188 (note) (S.C.C.), reversed [2000] 2 S.C.R. 1120, 2000 CarswellBC 2442, 2000 CarswellBC 2452 (S.C.C.), may prove enlightening.

188 The offence first appeared in the *Criminal Code*, 1892, c. 29, s. 179.

189 *Criminal Code*, S.C. 1953-54, c. 51, s. 150(8).

190 This test was exported by Australia and New Zealand in *R. v. Close*, [1948] V.L.R. 445, and imported into Canada in *Brodie v. R., supra*, n. 187.

191 *Brodie, ibid.*

192 This test was embraced in *Towne Cinema Theatres Ltd., supra*, n. 187.

193 *Butler, supra*, n. 166 at 469-70 [D.L.R.].

194 *Ibid.*, at 470 [D.L.R.].

195 *R. v. Big M Drug Mart Ltd., supra*, n. 1.

196 Sopinka J. goes further than describing the harm involved as an increased tendency that women and children will be subjected to physical abuse. He appears to suggest that it is sufficient the material in question offends fundamental social values, such as the *Charter* right to equality between the sexes. Referring to the judgment of Anderson J.A., in *R. v. Red Hot Video Ltd.*, 18 C.C.C. (3d) 1, 1985 CarswellBC 439 (B.C. C.A.), leave to appeal refused (1985), 46 C.R. (3d) xxv (S.C.C.), Sopinka J. commented that "if true equality between male and female persons is to be achieved, we cannot ignore the *threat to equality* resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on 'the individual's sense of self-worth and acceptance'." (*Butler, supra*, n. 166, at 479 [D.L.R.], emphasis added). Under the third requirement of the proportionality test, he described the legislative objective as promoting "respect for all members of society, and non-violence and equality in their relations with each other." (At 488 [D.L.R.]).

197 *Ibid.*, at 483 [D.L.R.].

198 *Ibid.*, at 485-6 [D.L.R.].

199 The heading reads: “Offences Tending to Corrupt Morals.”

200 See note 167.

201 *R. v. Butler, supra*, n. 166, at 461 [D.L.R.].

202 In *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (1985) (Fraser Report), pornographic materials are defined as generally falling under one of two categories; the sexually explicit, and the sexually explicit combined with violence or degradation (Vol. 1, at 51, 59). In terms of the application of criminal sanctions, the committee recommended that the obscenity offence be repealed and replaced by a three-tier system of regulation. The most severe criminal sanctions would be reserved for material falling under the first tier, which would involve either the infliction of actual physical harm on anyone depicted, or the depiction of children. The portrayal of sexually violent behaviour is to be prohibited under the second tier. The least onerous sanctions would apply to material of the third tier, which involves the visual portrayal of sexual activity not already falling under the other two tiers. This material would only attract criminal sanctions when displayed in public without warning. A defence of educational, scientific or artistic merit would be available with respect to material under the first and second tier. (Vol. 3, at 12-15). Sopinka J. referred to this report in connection with his 3 part classification scheme for pornography (*Ibid.*, at 470 [D.L.R.]).

203 [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, 2001 CarswellBC 82, 2001 CarswellBC 83 (S.C.C.).

204 In *R. v. Sharpe*, 169 D.L.R. (4th) 536, 1999 CarswellBC 39 (B.C. S.C.), affirmed 1999 CarswellBC 1491 (B.C. C.A.), reversed [2001] 1 S.C.R. 45, 2001 CarswellBC 82, 2001 CarswellBC 83 (S.C.C.), the offence of possession of child pornography in section 163.1(4) of the *Criminal Code* was declared an unjustifiable violation of freedom of expression, while the definition of pornography in section 163.1(1)(b), as applied to the companion offence of possession for the purpose of distribution under section 163.1(3), withstood the same challenge. As for the possession offence, Shaw J. found any purpose served by it to be tenuous and offset by its profound intrusion on individual privacy and expression. This decision was upheld on appeal in *R. v. Sharpe*, 175 D.L.R. (4th) 1, 1999 CarswellBC 1491 (B.C. C.A.), reversed [2001] 1 S.C.R. 45, 2001 CarswellBC 82, 2001 CarswellBC 83 (S.C.C.). Southin J.A. took the position that any offence prohibiting the mere possession of expressive materials “bears the hallmark of tyranny” (*ibid.*, at 175 D.L.R. (4th) 1 at 51), and automatically constitutes an unjustifiable violation of s. 2(b) of the *Charter*. She stated in the alternative that the offence fails for reasons of overbreadth and the lack of the “most compelling evidence of necessity” for its enactment. (*Ibid.*, at 175 D.L.R. (4th) 1 at 56-7). With respect to the problem of overbreadth, Rowles J.A. was in agreement. She declared the offence unconstitutional due to its extension into areas of private activity where no harm to children would be occasioned. Only McEachern C.J.B.C. would have upheld the offence. He attached greater weight to the apprehended risk of harm to children than to the risk that a few individuals will be in possession of such materials for purely private and innocent reasons. (*Ibid.*, 175 D.L.R. (4th) 1 at 102).

205 Section 163.1(1).

206 The majority was comprised of McLachlin C.J., Iacobucci, Major, Binnie, Arbour and LeBel J.J.

207 *Supra*, n. 203 at para. 109 [S.C.J.].

208 Gonthier and Bastarache J.J. joined with L'Heureux-Dubé J.

209 *Supra*, n. 203, at para. 212 [S.C.J. No. 3].

210 *Ibid*, at para. 185.

211 In *R. v. Lucas*, 157 D.L.R. (4th) 423, 163 Sask. R. 161, [1998] 1 S.C.R. 439, 1998 CarswellSask 93, 1998 CarswellSask 94 (S.C.C.), the Court interpreted s. 298, 299, and 300 of the *Criminal Code, supra*, n. 63, pertaining to defamatory libel of an individual, as constituting a reasonable limitation on section 2(b) of the *Charter*.

212 *Supra*, n. 22 at 606 [D.L.R.]. See note 30.

213 This theme is explored in more detail by R. Moon, in "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication" (1995) 45 U. Toronto L.J. 419. Also see his earlier article: "Drawing Lines in a Culture of Prejudice: *R. v. Keegstra* and the Restriction of Hate Propaganda" (1992) 26 U.B.C.L. Rev. 99.

214 Moon, "Drawing Lines in a Culture of Prejudice", *ibid.*, at 101.

13 NJCL 1

TAB 2

The Constitutional Protection of

FREEDOM OF EXPRESSION

RICHARD MOON

THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION

Richard Moon

In this book, Richard Moon puts forward an account of freedom of expression that emphasizes its social character. Such freedom does not simply protect an individual's liberty from state interference; it also protects the individual's right to communicate with others. Communication is an activity that is deeply social in character, and that involves socially created languages and the use of community resources such as parks, streets, and broadcast stations. Moon argues that recognition of the social dynamic of communication is critical to understanding the potential value and harm of language and to addressing questions about the scope and limits on individual rights to freedom of expression.

Moon examines the tension between the demands for freedom of expression and the structure of constitutional adjudication in the Canadian context. The book discusses many of the standard freedom of expression issues, such as the regulation of advertising, election spending ceilings, the restriction of hate promotion and pornography, state-compelled expression, freedom of the press, access to state and private property, and state support for expression. It examines several important Supreme Court of Canada decisions, including *Irwin Toy*, *Dolphin Delivery*, *RJR Macdonald*, *Keegstra*, and *Butler*.

RICHARD MOON is Professor, Faculty of Law, University of Windsor.

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The Constitutional Protection of Freedom of Expression

RICHARD MOON

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To Sibyl, Ellen, and Hope.
Words cannot do justice.

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Contents

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Acknowledgments

Many of the ideas expressed in this book can be traced back to articles published over the last fifteen years. Most obviously, Chapter 2 bears a strong resemblance to 'The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication,' *University of Toronto Law Journal* 45 (1995), 419, and Chapter 4 is a revised version of '*R. v. Butler*: The Limits of the Supreme Court's Feminist Re-Interpretation of s.163' *Ottawa Law Journal* 25 (1993), 361. I am grateful to both journals for permitting me to reprint parts of these articles.

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THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION

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Introduction

To some readers the first words of this book's rather bland sounding title, 'the constitutional protection,' might seem superfluous. In much of the writing about freedom of expression, particularly that from the United States, no distinction is drawn between freedom of expression as a moral or political ideal and as a constitutional right. To write about freedom of expression is to write about its constitutional protection.

Yet, as the book's title is meant to suggest, it matters whether we are talking about freedom of expression as political claim or constitutional right. In very general terms, this book is about the tension between the demands of freedom of expression and the structure of constitutional adjudication. The chapters that follow consider the ways in which the concept of freedom of expression is compressed within the parameters of constitutional adjudication and the ways in which the boundaries of constitutional adjudication are stretched (and the competence of courts is strained) by the courts' efforts to give significant meaning to the freedom.

The book considers many of the standard freedom of expression issues, such as the regulation of advertising, hate promotion and pornography, election spending ceilings, access to state and private property, state support for expression, and compelled expression. It does not, however, offer ready-made answers to these issues. Indeed, I believe it shows why there are no simple and clear answers to most of them.

Freedom of expression does not simply protect individual liberty from state interference. Rather, it protects the individual's freedom to communicate with others. The right of the individual is to participate in an activity that is deeply social in character, that involves socially created

languages and the use of community resources such as parks, streets, and broadcast stations. Yet the structure of constitutional adjudication, reinforced by an individual rights culture, tends to suppress the social or relational character of freedom of expression and its distributive demands (concern about the individual's effective opportunity to communicate with others).

Recognition of the social character of freedom of expression is critical to understanding both the value and potential harm of expression and to addressing questions about the freedom's scope and limits. Freedom of expression is valuable because human agency and identity emerge in discourse. We become individuals capable of thought and judgment and we develop as rational and feeling persons when we join in conversation with others. The social emergence of human thought, feeling, and identity can be expressed in the language of truth or individual autonomy or democratic self-government. Each of the tra-ditional accounts of the value of freedom of expression (democratic-, truth-, and self-realization-based accounts) represents a particular perspective on, or dimension of, the constitution of human agency in community life. At the same time, the variety of these accounts reflects the diverse role that expression plays in the life of individual and community – that different relationships and different forms of communication contribute to the realization of human agency and the formation of individual identity. While the social character of human agency is seldom mentioned in the traditional accounts of the value of freedom of expression, it is the unstated premise of each. Each account is incomplete without some recognition that individual agency is realized in social interaction; this dimension has simply been pushed below the surface by the weight of the dominant individualist understanding of rights and agency.

Recognition that individual agency and identity emerge in communicative interaction is crucial to understanding not only the value of expression but also its potential for harm. Our dependence on expression means that words can sometimes be hurtful. Our identity is shaped by what we say and by what others say to us and about us. Expression can cause fear, it can harass, and it can undermine self-esteem. Expression can also be deceptive or manipulative. Human reflection and judgment are dependent on socially created languages, which give shape to thought and feeling. While language enables us to formulate and communicate our ideas and to understand the ideas of others, it is not a transparent vehicle, an instrument that lies within our perfect control.

But if expression is never fully transparent, neither is it entirely opaque, a 'cause' that simply impacts upon its audience. Some instances of expression encourage reflection and insight even about some of our most basic assumptions, while others by-pass or discourage reflection. This distinction, however, is a relative one. There is no clear line between manipulative and rational expression. How we label a particular act of expression, as rational or manipulative, will depend on its form but also on its social/economic circumstances, including the distribution of communicative power.

The Canadian freedom of expression decisions are characterized by a tension between the general faith in individual freedom and rationality that underlies established theory and doctrine and a recognition that different forms of expression or different social and economic circumstances may discourage or constrain judgment. Freedom of expression doctrine is built on an understanding of the individual as free and rational and on an understanding of expression as the transparent communication of opinion and information, which takes place either face-to-face or in books, newspapers, and other generally accessible media. This understanding of agency and expression has left the courts unable to account for the harm (or to justify the restriction) of expression and ill-prepared to respond to either the rise of visually based commercial advertising as the paradigm of public expression or to the concentration of communicative power. If individuals are free and rational, capable of determining what they will believe and what values they will hold, and if expression is simply transparent, how could freedom of expression ever be harmful? Expression would have no tangible effects; it would simply provide ideas and information that an individual listener might decide to accept or reject.

Traditional freedom of expression doctrine has always permitted the restriction of manipulative expression (or expression that incites). Expression may be viewed as manipulative when it takes a form or occurs in conditions that limit the audience's ability to rationally assess the claims being made and the implications of acting on those claims. A commitment to freedom of expression means that individuals should be free to express their views and to hear and assess the views of others. The conventional assumption is that a restriction is not justified simply because we think that the restricted expression 'causes' harm or that the audience's reason cannot be trusted. To be consistent with the constitutional commitment to free expression a limitation must rest, at least in part, on the presence of exceptional conditions or circum-

stances that undermine the audience's ability to freely or rationally assess the views expressed.

The difficulty, however, is that these conditions or circumstances may be difficult to isolate. Because there is no condition of pure human reason and perfect independence it is impossible to identify clear deviations from the proper and ordinary conditions of free choice and rational judgment. The line between rational and manipulative expression becomes even more difficult to draw once we recognize that some of the factors that may impair autonomy and reason are systemic – for example, the domination of public discourse by the advertising form or the private ownership of key parts of the public sphere. Because the courts are unable (and the legislature is unwilling) to address these systemic problems directly (by opening public discourse up to a wider range of voices and views) they are treated by the courts as part of the context within which freedom of expression operates, as factors that affect individual reason and autonomy.

The Canadian courts have tried to by-pass these difficult issues by adopting a behavioural approach to the justification of limits on expression. The courts have often upheld limits on freedom of expression without explaining why the freedom's defining faith in the free and rational judgment of the individual does not apply in the particular circumstance. Instead, they have simply asked whether the expression 'causes' harm. When expression takes place in a context in which individual judgment seems distorted or constrained, it is simpler for a court to label and treat the expression as a form of action that 'impacts' upon the individual than to try to isolate the exceptional character or circumstances of the expression. In addition, because 'cause' is difficult to prove the courts have either fallen back on 'common sense' or deferred to legislative judgment to 'complete' the causal link between expression and harm.

However, if the courts support the restriction of potentially harmful expression without explaining why the judgment of the audience is not to be trusted in the particular circumstance, and without acknowledging the costs of removing certain matters from the scope of public discourse, the right to free expression will have ceased to play any obvious role in their decision making. Freedom of expression has little substance if our trust in the 'autonomous' judgment of the individual is the exception – a condition that must be established. It has no substance if it is 'protected' only when we agree with the message or consider the message to be harmless. The nearly impossible task for the

courts is to define a reasonably clear space for freedom of expression that does not depend (simply) on our agreement with the message communicated or our judgment that no harm will be caused if the message is accepted. The task is difficult not just because reason is imperfect and autonomy is relative but because freedom of expression operates against a background of communicative inequality that seems to lie outside the domain of constitutional review.

This points to the other tension apparent in the Canadian freedom of expression decisions: the tension between the conventional understanding of freedom of expression as a right of the individual to be free from state interference and the recognition that freedom of expression has implications for the distribution of communicative resources.

Traditional accounts of freedom of expression emphasize the importance of protecting the individual's personal sphere from interference by the state. When the state interferes with the individual's freedom to express him/herself, a court must decide whether the state has good and strong reasons for its action. However, if expression is a valuable activity, the courts should not be concerned solely with direct state censorship. They should also be sensitive to the real opportunities that individuals have to express themselves and to participate in public discourse – opportunities that depend upon the distribution of communicative resources.

Yet any attempt to read the constitutional right to free expression as requiring the expansion of communicative opportunities for some members of the community runs up against both the conventional understanding of the freedom as a 'negative' right against state interference and the structural constraints on the courts' capacity to engage in a significant or coherent redistribution of communicative power. This tension between the distributive demands of freedom of expression and the structure of constitutional adjudication is apparent in the courts' attempts to define a right of communicative access to government property. While this right rests on concerns about communicative opportunity, it is narrowly defined and awkwardly framed in the constitutional language of state interference with individual liberty.

Chapter One

Truth, Democracy, and Autonomy

1. Introduction: Common Ground

There are many arguments for protecting freedom of expression, but all seem to focus on one or a combination of three values: truth, democracy, and individual autonomy. Freedom of expression must be protected because it contributes to the public's recognition of truth or to the growth of public knowledge; or because it is necessary to the operation of a democratic form of government; or because it is important to individual self-realization, or because it is an important aspect of individual autonomy. Some arguments emphasize one value over the others. In these single-value accounts the other values are seen as either derived from the primary value or as independent but of marginal significance only.[1] However, most accounts assume that a commitment to freedom of expression, which extends protection to political, artistic, scientific, and intimate expression, must rest on the contribution that freedom of expression makes to all three values.[2] Freedom of expression, like other important rights, is supported by a number of overlapping justifications.

In this chapter, I will argue that the different accounts of the value of freedom of expression rest on common ground. While emphasizing different values or concerns, these accounts rest on a common recognition that human agency emerges in communicative interaction. We become individuals capable of thought and judgment, we flourish as rational and feeling persons, when we join in conversation with others and participate in the life of the community. The social emergence of human agency and individual identity can be expressed in the language of truth/knowledge, individual self-realization/autonomy, or democratic

self-government. Each account of freedom of expression represents a particular perspective on, or dimension of, the constitution of human agency in community life.

This recognition of the social character of freedom of expression does not represent a general or novel account of the freedom's value under which all other accounts can be located. The wide variety of accounts offered to justify the constitutional protection of freedom of expression suggests the rich and varied role that expression plays in the life of individual and community. Different relationships and different kinds of discourse are critical to the realization of human agency and the formation of individual identity. Any account of the value of freedom of expression must recognize the complexity of human agency and the diverse forms of human engagement in community.

While the social character of human agency is seldom mentioned in the different accounts of the freedom's value, it is the unstated premise of each. Each account is incomplete without some recognition that individual agency is realized in social interaction. This dimension of the freedom has simply been pushed below the surface by the weight of the dominant individualist understanding of rights and agency. As a consequence, most accounts of freedom of expression consist of little more than abstract statements that give little shape to our intuitions about the value of expression and provide very little guidance in the resolution of particular disputes concerning the scope and limits of the freedom.[3] My hope is that making explicit the social character of freedom of expression will enable better understanding of the value and potential harm of expression and better judgment about the scope and limits of the freedom.

2. Truth and Knowledge

The most familiar version of the truth-based argument for freedom of expression is that of J.S. Mill, who thought that the general public would be more likely to recognize truth if they were permitted to hear all available views, even those thought by many or most to be false.[4] In *On Liberty,* Mill (1982 [1859]) argued that censorship inhibits the progress of human knowledge because no censor is infallible. Even when it acts in good faith (which is certainly not always the case), the state will make mistakes and sometimes suppress truth rather than falsehood (Mill 1982, 77). The risk that censorship will inhibit the search for truth is significant, according to Mill, because public debate is not

simply a competition between true and false ideas. Even the apparently false idea often contains at least a grain of truth, which will be suppressed if the idea is censored (Mill 1982, 108). In Mill's view, the progress of public knowledge occurs through the synthesis of competing ideas.

Mill dismissed the argument that fallible state censors might still be in a better position than the general public to distinguish truth from falsehood. In his view, individual judgment isolated from the process of open debate is unreliable. We can only have confidence in our judgments about what is true when there is free and open expression of competing views, when determinations of truth and falsity are left to the general public.[5] Mill's fallibility argument rests on a faith in public reason.[6] It assumes that the public, when permitted to engage in free and open debate, is capable over the long run of distinguishing truth from falsehood.

For Mill, even if the state censor happens to judge correctly and suppresses only false views, something is still lost. The expression of false views has value because the 'collision' of truth with error gives us a 'clearer perception and livelier impression of truth' (Mill 1982, 76). We will gain a better understanding of the truth if we must address competing views and decide why we believe a particular view to be true or false. Our truthful opinions will be stronger and less vulnerable to superficial attack if they are based on reasoned judgment (Ten 1980, 126).

Mill is generally understood as having made an instrumental argument for freedom of expression.[7] Freedom of expression is valuable because it advances the goal of truth. Members of the community are more likely to recognize what is true and what is false, at least over the long run, if freedom of expression is protected. Yet, as many have suggested, this empirical claim is contestable. We have plenty of reasons to be sceptical about the reliability of public reason when exercised in particular social/economic contexts (Meiklejohn 1975, 19; Baker 1989, 6). In addition, even if, as a general rule, truth is more likely to emerge when there is debate rather than dogma, there is certainly a case to be made that some false or objectionable views could be excluded from public discussion (although perhaps not from expert debate) without any noticeable decrease in publicly recognized truth. This case has greater strength once we recall how often members of the public base their 'opinions' on the authority of experts rather than on an independent evaluation of the evidence or arguments. Instead of being subject to a general or presumptive ban, restrictions on expression could be considered on a case-by-case basis to determine whether

their benefits to public knowledge outweigh their costs (Smith 1987, 695). If dialogue leads to truth, as Mill argued, then eventually, on some questions at least, the truth may be realized, at which point opposing views may simply be mischievous or misleading.[8] Provided we are not in the grip of a profound scepticism, we might decide to hold on to the truth we have achieved by suppressing false ideas. The difficulty, admittedly, would be knowing when that moment of practical certainty had been reached.

Along these lines, Chief Justice Dickson for the majority of the Supreme Court of Canada in *Keegstra* (1990, 762) said:

> Taken to its extreme, this argument [for truth] would require us to permit the communication of all expression, it being impossible to know with absolute certainty which factual statements are true, or which ideas obtain the greatest good. The problem with this extreme position, however, is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas.

Dickson C.J. suggested that the hateful views of James Keegstra could be denied constitutional protection because they were so 'obviously' false.[9] Yet obviously false views are unlikely to be seen as a concern and to attract censorship. If the views are obviously false, few will be persuaded by them. Indeed, if many people are convinced, the views cannot be so 'obviously' false and the risks of censorship may be significant. The problem with the views of James Keegstra and others is that they are not obviously false to some members of the community. The issue is whether and when the governing authorities should be permitted to suppress views that *they* recognize as obviously false. Perhaps the ground for censoring the false views of Keegstra and others is not the obviousness of their falsity but rather their appeal to the irrational (a matter of the form and social context of expression) or some combination of the irrationality of the appeal and the seriousness of the harm that might follow acceptance of these views by some members of the community.[10]

If Mill's concern was simply that true opinions gain general acceptance (so that society is in a better position to act in ways that increase the welfare of its members), then it would not matter how these ideas

were spread. As long as true opinions achieve general currency in the community it should not matter whether this occurs through persuasion or through indoctrination. The only argument against manipulation or indoctrination is that, in contrast to rational persuasion, they are inefficient tools in the spread of truth.

Mill, however, had other concerns. His argument is not simply that freedom of expression is valuable as an instrument to the realization of public knowledge or the public recognition of truth. It involves much more than an empirical claim that truth will emerge from free and open discussion. Beneath the instrumental and empirical form of Mill's argument, and its concern for the achievement of the social good of public knowledge, is a belief that participation in public discourse is necessary to the development of the individual as a rational agent and a commitment to a way of life that involves reasoned judgment and the effort to discover truth through discussion with others (Ten 1980, 124).

For Mill it mattered not only that we, as a community, hold true opinions but also that we, as individual community members, hold these opinions in a particular way. He was concerned that the individual think and act 'as a rational being,' one who understands the grounds for his or her opinions (Mill 1982, 97).[11] He wanted the individual to participate in the truth, in the sense of being able to distinguish truth from falsehood and knowing the grounds for her/his opinion. More generally, Mill valued the 'cultivation of intellect and judgement' and believed that this would occur through the individual's participation in public discussion and the collective effort to discover the truth (Mill 1982, 97).[12]

Seen in this way, Mill's argument cannot really be described as instrumental rather than intrinsic or as concerned with the collective rather than with the individual.[13] Truth is valued as something recognized or realized by human agents, by individual members of the community exercising their reasoned judgment. The life of truth (or knowledge) is in human reflection and judgment. But reflection and judgment are not simply private processes. Truth is achieved through collective deliberation, through the sharing of ideas and information among community members. Public discussion is valuable to the community, which comes to have greater knowledge, and to individuals, who come to know truth as community members, to develop as rational agents capable of recognizing true opinions, and to live in a community where the pursuit of truth/knowledge is valued.

In the United States, the metaphor of 'the marketplace of ideas' is sometimes used to express the kind of truth-based argument made by Mill: that truth will emerge from a free and open exchange of ideas.[14] Sometimes, however, this metaphor is meant to express an argument that is more sceptical about truth claims. Justice Holmes argued that 'the ultimate good desired is better reached by the free trade in ideas ... that the best test of truth is the power of the thought to get itself accepted in the competition of the market' (*Abrams* 1919, 630). In Holmes's account 'truth' may be simply that which emerges from the marketplace of ideas, the outcome of unrestricted discussion among members of the community.

This sceptical form of argument has been criticized on several grounds. If we are deeply sceptical about the possibility of truth or knowledge, why should we attach the label of truth, indeed why should we attach any value, to whatever conclusions may emerge from free and open discussion? If the product ('truth') has value, this value must be based on the process of its production. Freedom of expression is valuable not because it produces truth but because it is the right or fair way to decide social questions or to achieve public consensus. This is very different from the conventional truth-based argument, in which the value of free expression depends on its production of truth, independently or objectively determined. In its sceptical form the marketplace of ideas argument resembles the democratic account of freedom of expression, with its focus on the process of deliberation and consensus building.

For at least two reasons the idea of democratic deliberation has advantages over the marketplace of ideas metaphor. First, the 'marketplace' image (and its laissez-faire connotations) discourages consideration of the appropriate conditions for achieving social consensus. Most importantly, it does not address the question of the background distribution of wealth and communicative power. The distribution of communicative power should be a central issue in an account concerned with the process of community consensus building. We do not enter the public market as equals: greater voice is given to those with greater economic power. The marketplace metaphor, however, encourages us to think of the existing distribution of communicative power as a fixed background to the free exchange of information and ideas among citizens. It assumes that the public sphere should operate in the same way as the market for goods: controlled by those with resources.

The other difficulty with the metaphor is that the exchange of ideas and information is not analogous to the exchange of goods and services (Shiffrin 1990, 91). Public discourse is not simply about the provision of information and ideas that enable individuals to advance their desires and preferences. Participation in public discourse is vital to the formation of preferences and choices. Human desires, preferences, and purposes are not presocial, formed independently of debate and discussion, but are instead given form in public discourse.

3. Democracy

The argument that freedom of expression is necessary to the operation of democratic government is appealing for a number of reasons. First, it accounts for the central role that political expression seems to play in our understanding of the scope of freedom of expression. Second, it offers a way to justify the constitutional entrenchment of freedom of expression as a limitation on the actions of a democratically elected government. If we accept that freedom of expression is a basic condition of democracy, then the tension between judicial review and democracy seems to dissolve. According to this view, freedom of expression is a necessary constraint on the majority's will and is appropriately enforced by a judiciary insulated from political pressure.

The democratic argument is an American creation, intended to give content and legitimacy to the constitutionally entrenched right to free speech. Its most important proponent, Alexander Meiklejohn, argued that '[t]he principle of freedom of speech springs from the necessities of the program of self-government' (Meiklejohn 1965, 27).[15] This principle is not 'a Law of Nature or of Reason in the abstract'; it is instead 'a deduction from the basic American agreement that public issues shall be decided by universal suffrage' (Meiklejohn 1965, 27).[16] The adoption of a democratic form of government carries with it an obligation to protect freedom of expression. The exercise of self-government requires the free and open flow of ideas and information concerning public issues. If men and women are prevented from hearing 'information or opinion or doubt or disbelief or criticism' relevant to a public issue under consideration, their efforts to advance the common good will be ill-considered and ill-balanced: '[T]he thinking process of the community' will be distorted (Meiklejohn 1965, 27) and the government's democratic authority will be lost.

In Meiklejohn's account, the purpose of the First Amendment is to ensure the 'voting of wise decisions' and this means that voters must be made 'as wise as possible' (Meiklejohn 1965, 26). The responsibility for deciding public issues lies with the citizens, who must, therefore, be given the opportunity to consider these issues. The focus of Meiklejohn's account is thus on 'the minds of the hearers' rather than 'the words of the speaker.' What matters 'is not that everyone shall speak, but that everything worth saying shall be said' (Meiklejohn 1965, 26). As well, in this account, the First Amendment protects only speech that bears, 'directly or indirectly,' upon issues with which voters have to deal. Speech that does not contribute to the consideration of public issues is not protected. 'Private speech' (and 'private interest in speech') has no claim to First Amendment protection (Meiklejohn 1965, 79). However, the protection of 'public' or political speech 'admits of no exceptions' (Meiklejohn 1965, 20).[17] Within its proper scope the freedom is absolute.

For Meiklejohn, the principle of 'self-government' provides a generally accepted and constitutionally recognized premise from which the protection of 'political' discussion follows. Yet what self-government involves or requires is the subject of considerable debate. Certainly the category of speech necessary to the operation of representative government is anything but clear and uncontroversial.

While political expression lies at the core of our understanding of freedom of expression, other forms of expression – notably artistic, scientific, and even intimate expression – also figure in our intuitions about the freedom's scope. It may be that political expression occupies this central role not because it is somehow more valuable than other kinds of expression, but simply because it has been the most vulnerable to state censorship. Many accounts of the value and constitutional protection of freedom of expression focus on the partiality of the government's decision to censor political expression alleged to be untruthful or harmful.[18] These accounts recognize that governments may not judge well the value or harm of political expression and may sometimes be tempted to suppress criticism of their policies. Regardless of whether political expression is more valuable than other forms of expression, there are particular reasons for ensuring independent (judicial) scrutiny of legislative decisions to censor it.

Most advocates of the democratic account of freedom of expression accept that intimate and artistic expression deserve some protection and have sought to fit these other forms of expression into the demo-

cratic account. One approach has been simply to supplement the account with a recognition that freedom of expression contributes to other values, such as truth and self-realization. Cass Sunstein, for example, argues that while political speech lies at the core of freedom of expression, which is principally concerned with democratic deliberation, other forms of expression, such as works of art, lie at its margins, protected because they contribute to values such as individual autonomy (Sunstein 1993, 123). For Sunstein, the centrality of democratic values and the consequent focus on political expression is a matter of constitutional interpretation rather than moral or rights theory. It stems from the structure, history, and text of the First Amendment, which establishes the right to free speech as a constitutional limit on state action.

Meiklejohn adopts a different strategy for extending protection to speech that is not directly concerned with political issues. In his original statement of the democratic account, Meiklejohn had argued that the First Amendment only protected speech that related directly or indirectly to issues that voters had to decide, to matters of public interest. Many criticized his account for failing to protect works of literature, science, and philosophy. In his later writings, however, Meiklejohn argues that such criticism was unfair and that his democratic account of the First Amendment extended protection to these different forms of expression because they contributed to the wisdom and sensitivity of voters. According to Meiklejohn, '[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express' (Meiklejohn 1975, 11). Voters derive this 'knowledge ... [and] sensitivity to human values' from many forms of expression, including philosophy and the sciences as well as literature and the arts (Meiklejohn 1975, 12).[19]

The most obvious problem with Meiklejohn's broad understanding of the category of political speech (speech that contributes to democratic deliberation) is that his already difficult claim that the freedom is absolute in its protection of political expression now seems stretched beyond breaking point. If freedom of speech is this broad, it must often come into conflict with other important interests and must sometimes give way to them. Meiklejohn avoids this conclusion and maintains the claim of absolute protection by denying the label of political speech to any communication that is deceptive, manipulative, or personally offensive, even though its content may be political.[20] While we may be prepared to accept Meiklejohn's claim that these forms of speech do not contribute to political deliberation, and in particular to the listener's

ability to make wise political judgments, there is no easily defined or clearly bounded category of manipulative, deceptive, disruptive, or offensive speech. The determination that speech is manipulative or disruptive and so falls outside the scope of the First Amendment involves a difficult contextual assessment of factors that contribute to, or detract from, the audience's ability to exercise independent judgment. Furthermore, while deliberative democracy may require some restriction of disruptive or offensive expression, the exclusion of these forms of expression may also be seen as limiting the individual's opportunity to contribute to political discourse and to hear strongly held views.[21] Meiklejohn's category of 'political speech' may be protected absolutely and not balanced against competing interests. However, something very like balancing may enter at the stage of defining the scope of the protected category.

Meiklejohn's broad view of the scope of political speech highlights the difficulty that democratic theorists have in keeping the focus of their account on the operation of democratic government. First, if the concern of democratic theorists is with self-government, and with the equal right of citizens to participate in the decisions that affect their lives and the life of their community, this concern could easily extend to other sites of social interaction and power, such as the workplace, the school, or the marketplace, which are of central importance in the life of the individual.[22] While the workplace, for example, may not be organized on the same principles as the governing process (i.e., on the basis of free and equal participation by members), it should, perhaps, be more open, with employees having the right to discuss working conditions, product quality, or management organization.[23] The workplace is an 'important site for the forging of personal bonds' between individuals from diverse backgrounds and 'it affords a space in which individuals cultivate some of the values, habits and traits that carry over to their role as citizens' (Estlund 1997, 727). The focus in the democratic account of freedom of expression on political speech and the workings of representative government stems not so much from the logic of self-government as from the constitutional status of the right and concerns about the legitimacy of judicial review. A constraint on the power of democratically elected institutions of government may seem tolerable only if it can be viewed as a limited but necessary condition of the exercise of legitimate authority by these institutions.

Second, the democratic account's focus sometimes seems to shift from the workings of representative government to the development of wise and public-spirited citizens. While formally concerned with the

governing process, the democratic account of freedom of expression sometimes appears to have a deeper concern with the realization of the individual as a 'rational and value-sensitive' agent. Meiklejohn argued that the wisdom and value sensitivity of citizens (and the protection of artistic, scientific, philosophical, and intimate expression) are necessary to democracy. Yet his argument could easily be turned around so that democracy is valued because it is necessary to the development and realization of the individual (Schauer 1982, 41). Do we care about individual wisdom simply because it contributes to democracy? Should we not regard the development of the individual as a more fundamental value that is simply dressed in the language of self-government? However, simply shifting the focus from political process to individual judgment misses something important about the relationship between individual and community.

If democracy involved nothing more than the registration and aggregation of the political preferences of individual members of the community, all that would be required for its operation would be regular elections, interim polling, and communication from competing candidates to the electorate concerning policy alternatives. However, the conception of democracy that underlies the democratic account involves much more than this. Democracy, understood as collective self-determination, requires that 'public action be founded upon a public opinion formed through open and interactive processes of rational deliberation' (Post 1995, 312).[24] Freedom of expression is not just an instrument for advancing the goal of democratic or representative government. In a democracy the responsibility of citizens for the governance of their community is actualized in public discussion and deliberation.[25] The members of a self-governing community seek common understandings and work towards shared goals through the exchange of views. Through participation in public discourse, the individual becomes a citizen capable of understanding, and identifying with, the concerns and opinions of others and oriented towards the public interest, in the sense that she is concerned with the common good and not simply with the satisfaction of personal preferences.[26]

If this is what the democratic argument is about then two of its advantages have disappeared: the definition of a narrow, but absolutely protected, category of protected activity and the justification of judicial review in a democracy. It is impossible to limit the scope of freedom of expression to the discussion of contemporary political issues, something that Meiklejohn came to recognize. It is also clear that the rich

and complicated understanding of democracy that underlies this account of the freedom cannot provide a simple or neutral justification for judicial review under the constitution.

4. Autonomy and Self-Realization

There are a variety of arguments for freedom of expression that focus on the interests or well-being of the individual. The most familiar version of this type of argument is that it is a violation of the individual's autonomy, or a failure to show proper respect for the individual, to prevent her from hearing the ideas of others because she might make poor judgments (Scanlon 1977, 162).[27] Human beings are characterized by their ability to reason and judge and should be trusted to assess the messages of others fairly or accurately. A parallel to this 'listener'-focused argument is offered by Ronald Dworkin, who argues that the state fails to show equal concern and respect for the individual 'speaker' when it censors his or her ideas on the grounds that they are wrong or foolish (Dworkin 1985, 386).[28] Other arguments stress the importance of expression to individual self-realization (Weinrib 1990; Baker 1989).[29] The individual realizes his capacities for thought and judgment by expressing his ideas or by listening to and, reflecting upon, the ideas of others.

Sometimes it is argued that expression deserves special protection, beyond that accorded to other human acts, not because it is distinctly valuable but because it is ordinarily a harmless activity (Baker 1989, 56; Haiman 1993, 85).[30] According to this view, the protection of expression follows from our commitment to the harm principle. Individuals should have the liberty to do as they please subject only to the limitation that their actions must not cause harm to others (Mill 1982, 68).[31] While the manner of an individual's expression may sometimes cause harm, as with a loud noise or a disruptive demonstration, the message communicated has only a mental impact and is therefore harmless.

Yet this seems wrong. Individuals express themselves in order to affect attitudes and events in the world. The message, and not just the manner of expression, can sometimes cause harm to others. The message may be hurtful or offensive; it may involve the spread of false ideas; or it may encourage harmful activity by others. Expression 'causes' harm when someone is persuaded by a false idea or persuaded to act in a violent way towards another. It may be true that these harms occur only because the listener consciously accepts the message. But why should

this make a difference? If we think that a commitment to freedom of expression means that these harms must be endured or disregarded, we must explain why it is important that individuals be allowed to make judgments for themselves or why expression is so valuable that it should be protected despite the harm it 'causes.'

Generally speaking, those who advance autonomy-based arguments do not claim that freedom of expression is simply an aspect of a more general principle of liberty of action. They assume that the freedom protects a subset of voluntary action, which corresponds more or less with the activity of communication, and that there are distinctive reasons for protecting this type of action. Yet the language of individual respect or autonomy offers few clues as to why communication should have this special status. Why is it disrespectful to silence a speaker when we think that his or her views are wrong, but not disrespectful to criticize those views? Why is it wrong to prevent a listener from hearing certain views, even when we are afraid that he or she might judge unwisely, but not wrong, not a violation of individual autonomy, to prevent the listener from acting on those views? An account of the value of freedom of expression must involve more than a general claim that the restriction of expression is disrespectful to the individual or invades the individual's autonomy. It must provide some explanation of the positive value of the activity of expression (Moon 1985, 342).[32]

Kent Greenawalt suggests that the special connection between expression and autonomy rests on the fact that communication 'is so closely tied to our thoughts and feelings' (Greenawalt 1989, 28). Because of this tie, 'suppression of communication is a more serious impingement on our personalities than other restraints on liberty' (Greenawalt 1989, 38).[33] Yet are not all voluntary acts expressive of the individual and closely tied to his or her thoughts and feelings? The difference is that expression is closely or personally linked to the individual because it is through expression, through conversation with others, that an individual gives shape to his or her ideas and feelings. Expression is not simply an emotional outlet or a vehicle for relaying an individual's existing ideas to another person. An individual's thoughts and feelings, and more generally her identity, are constituted in her expressive activities.

Autonomy- (or self-realization-) based accounts have difficulty explaining the particular value of expression, because they assume that rights, such as freedom of expression, are aspects of the autonomy that the individual retains when he or she enters the social world and that

should be insulated from the demands of collective welfare. Within an individualist framework it is impossible to account for the particular value of expression – of communication *between* individuals. Self-expression accounts seem to assume that ideas or meanings originate with the individual, who may decide to relay his or her particular ideas to others. However, the value we attach to freedom of expression makes sense only if we recognize that the creation of meaning (the articulation of ideas and feelings) is a social process, something that takes place between individuals and within a community.

If we can lift the concepts of autonomy and self-realization out of the individualist frame, so that they are no longer simply about freedom from external interference or freedom from others, then they may provide some explanation of the value of freedom of expression (Moon 1985, 345–6). If by autonomy we mean a capacity to think, judge, and give direction to one's life and the ability to participate in collective governance, then freedom of expression may have an important role to play in the realization of autonomy. Similarly, if by self-realization we mean the emergence of the individual as a conscious and feeling person, freedom of expression may be important to self-realization. In both cases, however, the value of freedom of expression rests on the social character of human identity, reason, and judgment. Freedom of expression is central to self-realization and autonomy because individual identity, thought, and feeling emerge in the social realm.

5. Communication and Agency

Whether the emphasis is on democracy, autonomy, or self-expression, each of the established accounts of the value of freedom of expression rests on a recognition that human autonomy/agency is deeply social in its creation and expression. Each recognizes that human judgment, reason, feeling, and identity are realized in communicative interaction with friends, family, co-workers, and other members of the community (Moon 1991, 94).

Speech, or language use, is a social activity 'through which individuals establish and renew relations with one another' (Thompson 1995, 12). In expressing him/herself to others, a speaker employs a language that is created and shaped in discourse. In an important sense language pre-exists the individual user. It is produced intersubjectively and held by the community of speakers. Significantly, language is not a transparent medium, a simple instrument for conveying an individual's ideas

and feelings. Speaking involves more than the selection of words that correspond to the communicator's ideas. Using language an individual is able to articulate his ideas and feelings. His ideas and feelings are partly constituted by the language of their expression.[34]

We can never fully dominate the language with which we express ourselves, but nor are we fully dominated by language (Taylor 1985, 232).[35] Mikhail Bakhtin observes that while '[t]he words of language belong to nobody ... the use of words in live speech communication is always individual and contextual in nature' (Bakhtin 1986, 88). In expressing him/herself to others, an individual employs a socially created language that belongs to the larger community of language users. Nevertheless, 'we hear those words only in particular individual utterances, we read them in particular individual works' which must be seen as individual and expressive (Bakhtin 1986, 88).[36] Individuals adapt the symbolic forms of language to their needs in particular communicative contexts and in so doing recreate, extend, alter, and reshape the language (C. Taylor 1995, 97).[37] Recognition that language use is active and creative – that it is 'purposive action[] carried out in [a] structured social context[]' (Thompson 1995, 12) – underlies our view of the individual as a conscious agent, who is capable of reflection and judgment and is not simply the product of social structures.[38]

Language enables us to give form to our feelings and ideas and to 'bring them to fuller and clearer consciousness' (Taylor 1985, 257). An individual's ideas only take shape, only properly exist, when expressed in language, when given symbolic form. When we speak we bring to explicit awareness, to consciousness, that which before we had only an implicit sense (Taylor 1985, 256).[39] In this way our capacity for reflection and our knowledge of self and the world emerge in the public articulation/interpretation of experience. As Clifford Geertz observes, we become individuals, agents capable of particular and intentional action, 'under the guidance of cultural patterns, historically created systems of meaning in terms of which we give form, order, point and direction to our lives' (Geertz 1973, 76).[40]

In giving symbolic form to her ideas and feelings an individual manifests these not simply to him/herself but to others as well. To express something is to enter into dialogue – into a communicative relationship – with other members of the community. When an individual expresses something, not only does she formulate it and put it 'in articulate focus,' she also places it in a public space and joins with others in a common act of focusing on a particular matter (Taylor

1985, 260). The individual reflects upon her ideas and feelings by giving them symbolic form and putting them before herself and others as part of an ongoing discourse. She understands her articulated ideas and feelings in light of the reactions and responses of others.

When an individual speaks, he speaks to someone, whether to a specific person or to a general audience. What he says and how he says it will depend on whom he is addressing and why he is addressing them, on whether, for example, he is engaging in political debate or intimate expression. The speaker seeks from his audience what Bakhtin calls 'an active responsive understanding' which may include agreement, sympathy, elaboration, preparation for action, and disagreement (Bakhtin 1986, 94). Not only is the speaker's expression oriented to an audience and intended to elicit a response, his expression is itself a response, 'a link in the chain of communication' (Bakhtin 1986, 91). The speaker responds to prior acts of expression, drawing on conventional forms of expression and reacting to previously stated views. Every statement an individual makes 'is filled with echoes and reverberations' of the statements of others, which he or she reworks and re-accentuates (Bakhtin 1986, 89).

Effective communication can occur only because the speaker and listener 'share certain conventions for expressing different meanings' (Bruner 1990, 63). As George Steiner notes, 'If a substantial part of all utterances were not public or, more precisely, could not be treated as if they were, chaos and autism would follow' (Steiner 1975, 205). At the same time, however, a particular utterance will be interpreted in light of the listener's distinctive experience – in light of assumptions and expectations that are not necessarily shared by others and that stem from a particular life history.[41]

The creation of meaning is a shared process, something that takes place between speaker and listener.[42] A speaker does not simply convey a meaning that is passively received by an audience. Understanding is an active, creative process in which listeners take hold of, and work over, the symbolic material they receive (Thompson 1995, 39), locating and evaluating this material within their own knowledge or memory (Thompson 1995, 42).[43] Listeners use these symbolic forms 'as a vehicle for reflection and self-reflection, as a basis for thinking about themselves, about others and about the world to which they belong' (Thompson 1995, 42).[44] The views of the listener are reshaped in the process of understanding and reacting to the speaker's words. As Bakhtin observes, the individual's thought 'is born and shaped in the process of

articulation and the process of interaction and struggle with others' thought' (Bakhtin 1986, 92).

This intersubjective understanding of agency and identity underlies the claims that freedom of expression contributes to the recognition of truth, the advancement of democracy, and the realization of self. Freedom of expression is valuable because in communicating with others an individual gives shape to his or her ideas and aspirations, becomes capable of reflection and evaluation, and gains greater understanding of her/himself and the world. It is through communicative interaction that an individual develops and emerges as an autonomous agent in the positive sense of being able to consciously direct his or her life and to participate in the direction of his or her community. Through communication an individual creates different kinds of relationships with others and participates in different collective activities, such as self-government and the pursuit of knowledge.

6. The Established Dichotomies: Intrinsic/Instrumental and Listener/Speaker

The established accounts of the value of freedom of expression are described as either instrumental or intrinsic[45] (or as result-oriented or process-oriented (Shiner 1995, 192), or as concerned with the realization of a social goal or with protection of an individual right).[46] Some accounts see freedom of expression as valuable in itself. The freedom is intrinsically valuable because it permits free and rational beings to express their ideas and feelings. Or it must be protected out of respect for the freedom and rationality of individuals. Other accounts see freedom of expression as important because it contributes to a valued state of affairs: freedom of expression is instrumental to the realization of social goods such as public knowledge or democratic government.

Intrinsic accounts assume that freedom of expression, like other rights, is an aspect of the individual's fundamental liberty or autonomy that should be insulated from the demands of collective welfare. Yet any account that regards freedom of expression as a liberty (as a right of the individual to be free from external interference) seems unable to explain the other-regarding or community-oriented character of the protected activity of expression – of individuals speaking and listening to others.

Instrumental accounts of freedom of expression recognize that the freedom protects an other-regarding or social activity and so must be

concerned with something more than respect for individual autonomy, something more than individual 'venting' or the exercise of individual reason. They assume that the freedom must be concerned with social goals that are in some way separate from, or beyond, the individual and his or her communicative actions, goals such as truth and democracy. Yet if freedom of expression is an instrumental right, its fundamental character seems less obvious. Its value is contingent on its contribution to the goals of truth and democracy. And there is no shortage of arguments that freedom of expression does not (always) advance these goals.[47]

The value (and potential harm) of expression will remain unclear as long as discussion about freedom of expression is locked into the intrinsic/instrumental dichotomy, in which the freedom is concerned with either the good of the community or the right of the individual. The value of freedom of expression rests on the social nature of individuals and the constitutive character of public discourse. This understanding of the freedom, however, has been inhibited by the individualism that dominates contemporary thinking about rights – its assumptions about the presocial individual and the instrumental value of community life. Once we recognize that individual agency and identity emerge in the social relationship of communication, the traditional split between intrinsic and instrumental accounts (or social and individual accounts) of the value of freedom of expression dissolves (Moon 1995, 470). Expression connects the individual (as speaker or listener) with others and in so doing contributes to her capacity for understanding and judgment, to her engagement in community life, and to her participation in a shared culture and collective governance.

The arguments described as instrumental focus on the contribution of speech to the collective goals of truth and democracy. However, we value truth not as an abstract social achievement but rather as something that is consciously realized by members of the community, individually and collectively, in the process of public discussion. Similarly, freedom of expression is not simply a tool or instrument that contributes to democratic government. We value freedom of expression not simply because it provides individuals with useful political information but more fundamentally because it is the way in which citizens participate in collective self-governance. There is no way to separate the goal from the process or the individual good from the public good.

Attaching the label 'intrinsic' to autonomy or self-realization accounts of the freedom of expression seems also to misdescribe the value at stake. Communication is a joint or public process, in which individual

participants realize their human capacities and their individual identities. The individual does not simply gain satisfaction from expressing his pre-existing views on things: an individual's views, and more broadly his judgment and identity, take shape in the communicative process.

Freedom of expression theories are also categorized as either 'listener' or 'speaker' centred (Schauer 1982, 104). Listener-centred theories emphasize the right of the listener to hear and judge expression for herself. The listener's right is protected as a matter of respect for her autonomy as a rational agent or for its contribution to social goals such as the development of truth or the advancement of democratic government. Speaker-centred theories emphasize the value of self-expression. The individual's freedom to express himself is a part of his basic human autonomy or is critical to his ability to direct the development of his own personality. Each of these accounts recognizes the connection between speaking and listening, yet each values one or the other of these activities or, if it values them both, it values them as distinct or independent interests. Freedom of expression is valuable because it advances an important individual interest of the listener (or a more general social interest) and/or an important individual interest of the speaker.

The focus of these accounts on the different interests of the speaker and the listener misses the central dynamic of the freedom, the communicative relationship, in which the interests of speaker and listener are tied (Moon 1985, 352; Moon 1995, 426).[48] The activities of speaking and listening are part of a process and a relationship. This relationship is valuable because individual agency emerges and flourishes in the joint activity of creating meaning.

7. The Scope of Freedom of Expression

In each of the established accounts of the value of freedom of expression, the freedom is seen as protecting acts of communication, in which an individual 'speaker' conveys a message to a 'listener' (*Irwin Toy* 1989, 968; Schauer 1982, 98). This is not a conclusion of theory, but rather an assumption that drives the theoretical arguments. The object of most freedom of expression theory is to explain the special protection of communication and to give a clearer or more precise definition to the scope of this protected activity.

Even though the established accounts define expression in similar terms, each tends to define the core and the margins of the freedom

differently. The emphasis on a particular value, such as truth or democracy, or on a particular dimension of the communicative process, will affect the definition of the scope of freedom of expression and the 'balancing' of expression interests against competing values or interests.

Truth-based (or knowledge-based) accounts of the freedom tend to focus on factual claims, which appeal to the audience's autonomous reason and can be described as either true or false. In an account that emphasizes the discovery of truth, the 'word,' and more particularly the printed word, is the paradigm of expression.[49] Words enable individuals to make statements, the truth of which can be debated and judged. They effectively convey ideas and information and support reflection and reasoned judgment on the part of both the 'speaker' and the 'listener.' The printed word, in particular, has the power to reach large audiences, to articulate complex ideas, and to present arguments in a clear, rational, and dispassionate way.[50] While truth-based accounts of freedom of expression sometimes extend protection to more emotive forms of expression, or to art forms such as music, dance, or painting, the inclusion of these forms requires an enlargement of the idea of truth beyond the factual knowledge that individuals and communities use to advance their goals.

The obvious focus of democracy-based accounts of freedom of expression is on communication about the political issues of the day, even if the democratic account is sometimes extended to include protection of scientific and philosophic works. Like truth-based accounts, democracy-based accounts tend to emphasize propositional speech. If the individual is to participate in collective self-government, she must be free to express her views on public issues and to hear the views of others. It is, however, sometimes argued that emotive expression that relates to political issues may be just as important to democratic decision making as calm and rational discussion of the issues. Emotive expression is important because it lets fellow citizens know the depth of the speaker's feelings about a particular issue. I suspect, however, that the increasing emphasis on emotive expression reflects a partial shift in our understanding of democratic participation from informed deliberation and active contribution to public discussion to the manifestation or registration of feelings in polls and elections.

Accounts of the value of freedom of speech that emphasize individual self-realization or autonomy attach significance to both rational and emotive forms (or more correctly dimensions) of expression.[51] Communication is not simply the conveyance of information and ideas, it is

also a way of expressing/articulating one's deeply held feelings. As the U.S. Supreme Court recognized in *Cohen* 1971, all acts of expression have both a propositional and an expressive dimension – both rational and emotive force:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. (*Cohen* 1971, 26)

When self-realization is the guiding value, the paradigm of expression is the spoken word or works of art or other symbolic acts either public or intimate.[52] While the printed word permits the careful articulation and consideration of ideas, oral speech *seems* to involve a more 'direct' and 'immediate' expression of the individual's ideas and feelings. The spoken word is performance-oriented, 'embedded in the human life world, connected with action and struggle' (Ong 1982, 101). Oral communication is more likely to be spontaneous, impulsive, and emotional because it is more closely connected with the immediate context.

In each of the established accounts of the value of freedom of expression, regardless of its particular emphasis, expression is assumed to involve the conveyance of a message to an audience – an engagement of speaker and listener.[53] An act of expression or communication is characterized by the agent's intention to articulate and convey to an audience an idea or feeling. When communicating, the speaker wants the audience to recognize that his or her act is meaningful – that the act is intended to convey to them a message (Moon 1985, 351; Green 1994, 138).[54] The communicative act will be successful only if the audience recognizes the speaker's intention and is able to understand the meaning of the act. As discussed earlier, this characterization of expression or communication as an intentional act does not mean that the act's meaning is simply a matter of the agent's intentions.[55]

An individual may communicate using established symbolic forms, such as spoken or written language, which the audience recognizes as meaningful and intended to convey a message. Or he may use other

symbolic forms that have a generally recognized meaning, such as flag burning or certain gestures.[56] The individual may also use less conventionalized forms of expression, such as parking a car, an example used by the Supreme Court of Canada in *Irwin Toy* (1989). While the communicative function of parking may not be very obvious to others, as long as the individual intends by his or her act to convey a message to an audience then that act should be regarded as expression. According to the Supreme Court of Canada, expression can take 'an infinite variety of forms,' including the written and spoken word, the arts and physical gestures (*Irwin Toy* 1989, 607).

There is a way in which everything we do can be seen as expressive of the self, and as telling others something about us. However, the question in every case is whether the actor intends to convey a message to others, and more specifically, whether she intends that others view her act as meaningful.[57] Nevertheless, there is no bright line separating acts intended by the actor to convey a message from other voluntary human acts.

On this view, the creation of a work of art is an act of expression, perhaps even the paradigm case of expression. Even if art is, as Frederick Schauer says, 'a mode of self-expression, or if there is taken to be a necessary gap between what is intended and what is perceived by the observer' (Schauer 1982, 110),[58] art involves the use of conventional forms and is intended by its creator to be viewed as meaningful. Art gives form to human feelings and concerns by making them visible (or audible) and brings them into the public realm for shared contemplation. According to Richard Wollheim, '[t]he value of art ... does not exist exclusively, or even primarily for the artist. It is shared equally between the artist and his [or her] audience' (Wollheim 1980, 86).[59] A work of art materializes 'a way of experiencing' and brings 'a particular cast of mind out into the world of objects, where men [and women] can look at it' (Geertz 1983, 99).[60] It is meant to be viewed as a human creation and as 'the object of an ever-increasing or deepening attention' (Wollheim 1980, 123).

While it is true that we experience art and do not simply interpret it, art is not just human feeling projected onto objects in the world; artistic expression works through signs and depends on a practice or institution. To view something as a work of art is to see it as human expression formulated in and shaped by a particular medium (Gombrich 1963, 11; Wollheim 1980, 124).[61] In calling something a work of art we underline its artificial character. Indeed, according to some contemporary views,

the significance of art is that it leads us to recognize the artificial character of communicative codes and the conventional nature of perception and understanding.

If freedom of expression protects communicative relationships, and the joint activity of creating/interpreting meaning, there must be both a 'speaker' and an audience to whom the speaker wishes to communicate a message. Even acts of 'speaking to oneself' bear some resemblance to conventional dialogue. (While such acts may or may not be seen as falling within the scope of freedom of expression they are unlikely to be the subject of state restriction.)[62] A speaker who speaks only to her/himself, when writing a diary for example, employs a language. Although the diarist may not intend to communicate with others, he uses a socially created language to give shape and clarity to his thoughts. The diarist may even be seen as speaking to a future self, recording his ideas and feelings so that they are available to be read and considered at a later time.

It also follows from this view of freedom of expression that the 'speaker' must intend to appeal to his or her audience in a conscious or non-manipulative way.[63] Expression may be confrontational, uncivil, and even insulting and still engage its audience.[64] However, the exclusion by the American courts of 'fighting words' from the protection of the First Amendment is a recognition that at a certain point expression is so uncivil or threatening that it cannot be seen as communicative engagement. More obviously, the relationship of expression is undermined by manipulative expression, in which a speaker seeks to affect audience thought and action while by-passing conscious recognition. Even those accounts of freedom of expression that downplay the relational character of expression find a way to exclude or marginalize manipulative or deceptive expression. They classify (without explanation) deceptive or manipulative expression either as 'action' or 'conduct,' which is denied constitutional recognition, or as 'low value' expression, which is given less weight when balanced against competing interests.[65]

8. Value and Harm

Individualist approaches to freedom of expression have difficulty accounting for both the value and harm of expression. If expression is simply a transparent process in which the individual conveys pre-existing (prelinguistic) ideas and feelings to an audience, then it is unclear why it is different from, and more important than, other human ac-

tions. Why should we view freedom of expression as a distinct right rather than simply an aspect of a more general liberty of action?

Expression is valuable because individual identity/agency emerge in communicative interaction; because our ideas and feelings and our understanding of self and the world develop through communication with others.

At the same time, this dependence on expression means that words can sometimes be hurtful or manipulative (Moon 1995, 445–6). While expression sometimes seems to increase knowledge and stimulate reflection, even about our most basic assumptions, at other times it seems to discourage critical thinking, to leave us in 'the deadening grip of disengaged reason' (Taylor 1989a, 377), to deceive and to manipulate. As described in the next chapter, the impact of a particular act of expression will depend not only on its design or form but also on its social and material circumstances.

Chapter Two

The Constitutional Adjudication of Freedom of Expression

1. Introduction: The Canadian Courts' Approach

The Canadian Charter of Rights and Freedoms establishes a two-step process for the adjudication of rights claims. The first step is concerned with whether a Charter right has been breached by a state act. The court must define the protected interest or activity and determine whether it has been interfered with by the state. At this stage, the burden of proof lies with the party claiming a breach of rights. The second step in the adjudicative process is concerned with the justification of limits on Charter rights. Section 1 of the Charter states that the protected rights and freedoms may be limited provided the limits are 'prescribed by law,' 'reasonable,' and 'demonstrably justified in a free and democratic society.' The limitation decision is described by the courts as a balancing of competing interests or values. At this stage, the onus of proof lies with the party seeking to uphold the limitation, usually the state.

The two-step model is built on an understanding of freedom of expression as a right of the individual to be free from external interference. Freedom of expression, however, does not protect liberty/freedom in general. Instead, it protects the individual's freedom to communicate with others, to participate in an activity that is deeply social in character. As well, if participation in the social activity of expression is valuable to the individual and the community, the right to freedom of expression should be concerned not just with preventing state (and other external) interference with the individual's expression but also with ensuring that the individual has real opportunities to communicate with others. The structure of constitutional adjudication,

however, tends to suppress the freedom's distributive demands (concern about effective opportunities for expression) and its relational character (recognition/protection of the relationship of communication). This suppression of the social and material character of freedom of expression makes it difficult for the courts to explain the freedom's value and harm and to determine its proper scope and limits.

The Scope of Freedom of Expression

In its elaboration of freedom of expression under section 2(b) of the Charter, the Supreme Court of Canada has made some grand statements about the freedom's value. The court has said that freedom of expression is 'an essential feature of Canadian parliamentary democracy' (*Dolphin Delivery* 1986, 584); that 'a democracy cannot exist without' it (*Edmonton Journal* 1989, 1336); that it is 'one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society' (*Dolphin Delivery* 1986, 583); that it is 'the means by which the individual expresses his or her personal identity and sense of individuality' (*Ford* 1988, 749); that it is an important way of 'seeking and attaining truth' (*Irwin Toy* 1989, 976); and, more generally, that its 'vital importance ... cannot be over-emphasized' (*Edmonton Journal* 1989, 1336). While these statements are general and undeveloped, they are understood by the court to add up to a substantial justification for the constitutional protection of freedom of expression.

The generous tone of these general statements supports a very broad interpretation of the scope of freedom of expression. According to the Supreme Court of Canada, section 2(b) protects any activity that 'conveys or attempts to convey a meaning' (*Irwin Toy* 1989, 968). An act of expression is distinguished from other voluntary human acts by the intention with which it is performed. If the act is intended by the actor to convey a message to someone then it is an act of expression, and prima facie protected under section 2(b). Protection is given 'irrespective of the particular meaning or message sought to be conveyed' (*Keegstra* 1990, 729), because 'in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual' (*Irwin Toy* 1989, 968).

Despite the Supreme Court's stated commitment to interpret Charter rights purposively, the court has defined expression without any explicit reference to the values said to underlie freedom of expression.

Indeed, the Supreme Court has said on several occasions that it will not exclude an act of expression from the scope of the freedom simply because it is thought to be without value (*Keegstra* 1990, 760).[1] The underlying values of truth, democracy, and self-realization play an active or explicit role later in the adjudicative process, after the court has defined the category of 'expression' and, most clearly, at the section 1 limitations stage.

In *Irwin Toy* 1989, the Supreme Court of Canada used the example of illegal or unauthorized parking to illustrate the potential breadth of the category of protected expression. The court observed that parking is not ordinarily an expressive act, because it is not ordinarily intended to carry a message. In most cases people park illegally because they cannot find a convenient or available space or because they are unwilling to pay parking charges. According to the court, however, if an individual parks his or her car illegally as a protest against the way that parking spaces are allocated or against some other policy or practice, then the act of illegal parking will fall within the scope of section 2(b) because it is performed for a communicative purpose.[2] In a variety of decisions the court has held that the category of human acts intended to carry a message, and so protected under section 2(b), includes advertising, picketing, hate promotion, soliciting for the purposes of prostitution, and pornography.

There are two exceptions to the court's broad definition of the scope of freedom of expression under section 2(b). First, the court has said that a violent act, even if intended to carry a message, does not fall within the scope of the section: 'While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection' (*Irwin Toy* 1989, 970). This exclusion extends only to expression that has a violent *form*. Expression that advocates violence or threatens violence is protected under section 2(b), although subject to limits under section 1.

The court has also narrowed the scope of section 2(b) by drawing a distinction between two different types of state restriction on expressive activity: state acts that have as their purpose the restriction of expression and those which are not designed to restrict expression but nevertheless have this effect.[3] The significance of the purpose/effect distinction, which roughly parallels the distinction in American jurisprudence between content restrictions and time, place, and manner restrictions,[4] is that a law intended to limit expression, and in particular the expression of certain messages, will be found to violate section 2(b) 'automati-

cally,' while a law that simply has the effect of limiting expression will be found to violate section 2(b) only if the person attacking the law can show that the restricted expression advances the values that underlie freedom of expression.[5] In particular, he or she must show that the restricted expression contributes to the realization of truth, participation in social and political decision making, and diversity in the forms of individual self-fulfilment and human flourishing (*Irwin Toy* 1989, 976).

Limits on Freedom of Expression

Once the court has determined that the state has restricted expression protected by section 2(b), it then considers whether the restriction is justified under the terms of section 1 of the Charter. The court asks whether the restriction represents a substantial purpose, advances this purpose rationally, impairs the freedom no more than is necessary, and is proportionate to the impairment of the freedom (*Oakes* 1986, 138–9).

While the Supreme Court of Canada has often said that freedom of expression can only be overridden when its exercise would result in a substantial harm to social or individual interests,[6] it has adopted what it calls a 'contextual approach' to the assessment of limits on the freedom (*Edmonton Journal* 1989, 1356; *Dagenais* 1994, 878).[7] In deciding whether a limit is justified the court will consider the necessity or importance of the restriction but also the extent to which freedom of expression interests are impaired by the restriction.[8] While the court has defined the scope of the freedom under section 2(b) broadly so that it protects all non-violent forms of expression, when assessing limits under section 1 the court distinguishes between core and marginal forms of expression, identifying different instances of expression as more or less valuable and more or less vulnerable to restriction.[9] Political expression, for example, is considered core expression. As such it can be restricted only for the most substantial and compelling reasons. In contrast, pornography and advertising are seen as marginal forms of expression, because they are less directly linked to the values underlying freedom of expression. As a consequence they may be restricted for less substantial reasons. The court has also said that time, place, and manner restrictions may be justified more easily than content-based restrictions.

In practice, the Supreme Court has been prepared to uphold limits on freedom of expression when it is convinced that the exercise of the

freedom causes harm to the interests of another, including harm to reputation, business operations, and public order. In most of its freedom of expression cases the court has looked to social science evidence of the link between expression and harm. Yet such evidence is often inconclusive. In many of these cases the court has either fallen back on a 'common sense' recognition of the causal link between a particular form of expression and harmful consequences or deferred to the legislature's judgment that such a link exists, particularly when the restriction is meant to protect a vulnerable group in the community.[10] In a few cases, however, the court has been unwilling to defer to legislative judgment and has struck down the restriction because the link between the restricted expression and the alleged harm was not made out clearly enough.

Critiques of the Approach

There has been some criticism of the way in which the Supreme Court has applied the two-step approach to freedom of expression cases. First, the court has been criticized for failing to maintain the distinction between questions of scope under section 2(b) and questions of limitation under section 1. In particular, there has been criticism of the exclusion of violent expression from the scope of the freedom under section 2(b) (Macklem 1990, 552; Cameron 1989, 268; Cameron 1990, 98; Lepofsky 1993, 52; Anand 1998, 151).[11] It is argued that if the exclusion of violence is really an exception to the protection of expression, and does not simply rest on a judgment that violence is not expression because it does not convey a message, then it is a limitations issue that should be addressed under section 1. The concern is that the violence exclusion involves a premature narrowing of the constitutional understanding of freedom of expression under section 2(b) that may permit limitations on expression that are not properly scrutinized.

Similar concerns have been expressed about the rule that requires a person challenging a law that has the effect (rather than the purpose) of restricting expression, to show that his or her restricted expression advances the values underlying the freedom (Macklem 1990, 553; Lepofsky 1993, 73; Cameron 1990, 125; Cameron 1991, 99; Cameron 1989, 270; Kanter 1992, 493). The concern is that this involves a judgment about the relative value of the restricted expression and/or the importance of the competing claims that support the restriction. It is a limitation issue and should be dealt with under section 1 so that the

burden falls on the state, rather than the person challenging the law, to show that the limit is demonstrably justified.

Second, the court has been criticized for taking a deferential approach under section 1 to state restrictions on expression (Cameron 1992, 1151; Cameron 1997, 5; Kramer 1992, 87; Lepofsky 1993, 93; Valois 1992, 423). It is claimed that the court's willingness to defer to the legislature's judgment that a particular form of expression is harmful and should be restricted (along with its unwillingness to accept that social conflict and offence are a necessary cost of freedom of expression) has undermined the constitutional commitment to the freedom. If freedom of expression is a fundamental right, it should be restricted only on the basis of clear and convincing evidence that it causes substantial harm.[12]

The complaint then is that the courts (and in particular the Supreme Court of Canada) have been unfaithful to the established adjudicative structure and as a consequence have eroded the constitutional protection of freedom of expression. I believe, however, that the places where critics see an undermining of the two-step structure are simply points of stress in a structure built on an understanding of freedom of expression as a right of the *individual* to be free from state *interference.*

First, the idea that there is a clear and complete division between questions of scope (breach) and limits (justification) rests on the view that freedom of expression is part of the individual's personal sphere or domain – a sphere that ordinarily should not be interfered with by the state. The issue under section 2(b) is the proper definition of the individual's personal sphere, the activity of expression, while the issue under section 1 is the need or justification for incursions by the state into that sphere. However, if we recognize that freedom of expression is concerned not so much with the protection of an individual's independence from others as with the protection or creation of a relationship of communication between two or more individuals, then the distinction between scope and limits begins to break down.

Many freedom of expression issues involve abuses of the communicative relationship, such as manipulation or deceit. It is unclear whether these should be understood as issues of scope under section 2(b) or limitation issues under section 1. The exclusion of violent acts of expression under section 2(b), as a matter of the freedom's scope rather than its limitation, suggests some recognition by the court that freedom of expression is concerned with the protection of a social relationship. Even though an act of violence may carry a message, it does so in a way

that undermines or negates the relationship of communication. Freedom from violence is not simply a competing interest that might justify restriction of expression under section 1 of the Charter.

The distinction between scope and limits also breaks down once we recognize that the freedom has a distributive dimension. The established two-step model is built on an understanding of freedom of expression as a right to be free from external interference, and in particular, government interference. Government interference with the individual's expression will be justified only if necessary to advance a substantial and pressing purpose. In the two-step adjudicative structure it is unclear where concerns about the individual's opportunity (power) to communicate are to be addressed.

The special rule under section 2(b) applied to time, place, and manner restrictions (a law that has the effect, rather than the purpose, of restricting expression will violate section 2(b) only if it is shown that the restricted expression advances the values underlying the freedom) reflects the problems involved in fitting distributive issues into the established framework of freedom of expression adjudication. An assessment of a specific (time, place, and manner) limit on the individual's opportunity to participate in public communication depends not so much on the strength of the state's justification for the limitation as on the alternative spaces available to the individual (or his or her message) in the social distribution of communicative power. Yet the issue of the adequacy of communicative power cuts across the scope/limits divide because it turns on neither the definition of expression nor the identification of a harm substantial enough to override the value of expression.

Finally, I believe that the deferential approach followed by the Supreme Court of Canada in its consideration of limits on freedom of expression under section 1 reflects a basic tension in the court's individualist understanding of the freedom's justification. When defining the scope of the freedom the court sees the individual as free and rational, as a maker of choices, as an autonomous agent capable of giving direction to his or her life. In expressing her/himself, an individual gives voice to her/his thoughts and feelings and provides ideas and information for other individuals to consider, adopt or reject. However, when the court moves from section 2(b) to section 1, it often seems to shift from a discourse of freedom and rationality to a behavioural or causal discourse. Under section 1 (sometimes explicitly and sometimes implicitly) a different image of the individual surfaces, a counter-image to the dominant image of section 2(b). The individual is

seen as irrational, manipulable, directed by unchosen preferences, urges, and desires. Expression is seen as a form of action that impacts on the individual, sometimes causing harm or sometimes causing him or her to engage in harmful behaviour.

This shift occurs because the court's initial view of the individual as free and rational, and communication as transparent, makes it difficult to explain the risks or harms of expression. When confronted with issues of manipulation, intimidation, and economic power, the court's faith in the freedom and rationality of the individual collapses. The court recognizes that the expression of others can influence, distort, and sometimes even direct an individual's thoughts and actions. Unable to explain this influence within the discourse of individual freedom and rationality, the court simply shifts to a behavioural or cause/effect discourse that discards the liberal image of the individual and treats him or her as determined, radically situated, and irrational.[13] The individual is viewed as socially determined, subject to the push and pull of external influences. The shift to a behavioural discourse at this second stage of adjudication occurs without any explicit reconsideration of the rationalist assumptions that underlie the court's section 2(b) analysis.

The result in a particular case turns on whether or not the expression at issue can be shown to 'cause' harm to another individual or group by affecting their behaviour or the behaviour of others towards them. The court listens for the crack of the billiard balls. However, the social science evidence of the causal link between expression and harm does not yield a crisp and clear sound. In most cases the court is prepared to defer to the legislature's judgment that a particular form of expression causes harm and should be restricted. Occasionally, however, the court declines to defer to the legislature and instead strikes down the restriction on the ground that the evidence does not establish that the restricted expression causes harm. The difficulty involved in establishing whether an act of expression has 'caused' an individual to act in a certain way, and more significantly the uncertainty about what we mean by causation in the context of human behaviour, means that the result in any particular case turns on whether the court decides to defer to legislative judgment, a decision that rests on unarticulated reasons.

As long as the court operates on the basis of established individualist assumptions about agency, which are reinforced by traditional conceptions of rights and the structure of constitutional adjudication, it will be unable to reconcile a belief in free and rational human agency with a

recognition that society influences individual behaviour in significant ways. It will continue to oscillate between a conception of the individual as free and rational and a conception of him or her as socially determined. It will continue to bury any consideration of the real and important conditions of public communication beneath a behavioural discourse.

2. The Relationship of Communication

The culture of rights and the structure of rights adjudication supports an individualist understanding of freedom of expression. Freedom of expression, like other constitutional rights and freedoms, is seen as an important part of the individual's personal sphere that should be protected from external interference, particularly state interference. Most contemporary accounts of the legitimacy of the judicial role in the enforcement of constitutional rights against the state rest on the view that rights are aspects of the individual's basic liberty or autonomy that should be insulated from the ordinary give and take of preference-based politics.

The established justifications for freedom of expression tend to focus on either the interests of the speaker (writer) or those of the listener (reader). Listener-centred theories emphasize the right of the listener to hear and judge expression for him/herself as both intrinsically and instrumentally valuable. The listener's right is protected as a matter of respect for his or her autonomy as a rational agent, but also for its contribution to social goals, such as the development of truth or the advancement of democratic government. Speaker-centred theories emphasize the intrinsic value of self-expression. The individual's freedom to express herself as she chooses is a matter of her fundamental autonomy.

The Supreme Court of Canada, like most contemporary commentators, draws on both listener-centred and speaker-centred accounts of the value of freedom of expression.[14] Added together speaker and listener interests are thought to represent a powerful justification for the constitutional protection of expression. In the Supreme Court's account, while there is an obvious connection between the activities of speaking and listening, each is understood and valued independently. Freedom of expression is valued because it protects an important individual interest of the listener and/or an important individual interest of the speaker.

However, the activities of speaking and listening are interdependent, they are part of a process and a relationship.[15] The interests of the speaker and listener are realized in the joint activity of creating meaning. The court's focus on the individual interests of the speaker and/or the listener misses the central dynamic of freedom of expression: the communicative relationship that joins the interests of speaker and listener. Freedom of expression is concerned not so much with the protection of the individual's personal sphere from external interference as with the protection of (and perhaps even support for) a relationship of communication between two or more persons. There is often a degree of conflict or tension in the communicative relationship: the audience may not always want to hear the message, or the message may seem harsh and even hostile to its audience. Nevertheless, in most of these situations the speaker is still seeking in some sense to engage her or his audience and not simply to deceive or threaten them. It is a cost of freedom of expression that people sometimes have to endure unwanted communication.

The Supreme Court's definition of expression as 'the conveyance of a message' suggests the idea of a communicative relationship. Yet its abstract and formal definition of the freedom's scope allows the court to downplay the relational character of expression (the engagement of speaker and listener) and the constitutive character of expression (the way that speaking and listening shape the speaker's/listener's thoughts and feelings). Indeed, in many cases the court barely acknowledges that the conveyance of a message involves an audience to whom the message is conveyed. Consider, for example, the court's reply in *Butler* 1992, 489–90) to the claim that pornographic films do not convey a message:

> 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.

The court seemed to assume that the meaning of an act is simply a matter of the actor's intention and that the conveyance of a message

need not involve any engagement with, or attempt to engage, an audience. The court's general definition of expression suppresses the tension between the individualist assumptions that underlie the culture and structure of rights adjudication and the relational character of freedom of expression.

The assumption that a clear distinction can be drawn between issues of scope and issues of limitation rests on an individualist understanding of freedom of expression. In applying the Charter, there are two issues for the court:[16] the scope of the individual activity of expression and the justification for state interference with this activity. However, if freedom of expression is more about human connection than individual independence, scope and limits issues may not be so easy to separate.

Some interests, such as privacy or reputation, may be seen as competing with freedom of expression and as the basis for restriction of the freedom under section 1.[17] Other interests, such as freedom from intimidation, deceit, or manipulation, are less easily viewed in this way. Expression that deceives, intimidates, manipulates, or physically injures its audience involves a significant abuse of the communicative relationship. It is unclear where in the two-step model the courts should deal with these abuses of the relationship, in which the individual interests of speaker and listener diverge. Where in the existing structure should the harm of deceit, for example, be addressed? From one perspective the harm of deceit to the listener seems external to, or separate from, the definition of the individual's freedom of expression. Yet, from another perspective, freedom from deceit can be seen as more than simply a competing interest to be addressed under section 1. It can be viewed as integral to the value and definition of expression.

Generally, when a speaker seeks to deceive, manipulate, or intimidate the listener the court considers that his or her 'expression' falls within the protection of section 2(b) but that the injury to the listener is a possible ground for limitation under section 1. The injury represents a competing interest that should be balanced against the speaker's freedom of expression in a way that takes account of various contextual factors. Yet we may feel uneasy in identifying manipulative or deceitful expression as valuable and protected under section 2(b) and as subject to restriction only because it happens to violate the independent interests of the listener. These harms or abuses seem to undermine freedom of expression values in the most fundamental way.

The Violence Exception

While many commentators have argued that the violence exception represents a failure to apply properly the distinction between scope and limits, I believe that it reflects the problematic nature of the distinction between scope and limits. The Supreme Court has provided very little explanation for the exception, relying simply on our general revulsion to violence. However, its decision to exclude violence from the scope of section 2(b) suggests some recognition that the communicative relationship is central to freedom of expression and that preventing abuse of that relationship is not simply an external competing interest that should be balanced against the freedom under section 1. Chief Justice Dickson in *Keegstra* 1990, 732, referring to the exclusion of violence, stated that 'the extreme repugnance of this form to free expression values justif[ies] such an extraordinary step.' But it is not clear how easily the issue fits here either. There are problems in dealing with violent expression under section 2(b) rather than under section 1. The most obvious is the difficulty in defining the scope of the exclusion, in determining when harmful expression should be excluded under section 2(b) and when it should be addressed under section 1, with the court taking account of all the circumstances.

Irwin Toy 1989: The Violence Exception Introduced

In *Irwin Toy* 1989 the Supreme Court described a potentially significant exception to its definition of 'expression' as the conveyance of meaning. According to the court, expression that takes a violent form falls outside the protection of section 2(b).[18]

This exception may rest simply on a judgment by the court that violent acts are not intended to carry a message and for that reason do not fall within the scope of the freedom. Such a judgment, though, would require a narrower, or at least a clearer, definition of expression than that offered by the court. Indeed, it appears that the court specifically excluded violent acts from the scope of freedom of expression because it recognized that its broad and vague definition of the freedom could be seen as extending protection to many violent acts. Violent acts have 'meaning': they express anger; they assert power. Sometimes an act of violence is described as meaningless, which serves as a reminder that with other such acts the victim (or the larger audience)

understands all too well the message that he/she should be afraid or should submit.

Instead of creating an exclusion for violent acts the court might have followed through with its broad understanding of freedom of expression and included these acts within its scope but relied on section 1 to justify their restriction. After all, this has been the court's general approach – to define expression broadly and use section 1 to deal with difficult issues. While a violent act may be expressive, it involves serious harm to others and so its restriction would be easily justified under section 1. Almost certainly the court deviates from its broad and inclusive approach to the scope of freedom of expression, and its reliance on section 1, because it feels uncomfortable treating a violent act as a matter of freedom of expression (the exercise of a fundamental human right) that must give way only when it comes into conflict with another fundamental human interest. The court might reasonably have felt that this gave a small, but undeserved, amount of legitimacy to acts of violence.

The issue of violent expression will not fit comfortably into the existing two-step structure, regardless of how carefully the court may think about the definition of 'expression.' This structure rests on an understanding of freedom of expression as a right of the individual to either speak or listen. Because an act of violence may be seen as expressing the feelings of the actor and even as having meaning or carrying a message, it may be considered expression under section 2(b). But, of course, a violent act represents a crude denial of the listener's interests or rights. This might be seen as a conflict of individual interests that should be resolved through balancing under section 1. Yet the listener's interests are not external to the freedom. Freedom of expression protects the interests of both speaker and listener. Under the established model, when these interests conflict it is unclear which should prevail. More fundamentally, it is unclear whether the interests of the individual listener should be seen as an important aspect of the freedom or as in competition with it. If freedom of expression protects communicative relationships and the combined interests of both speaker and listener, then the issue of violent expression is not simply a matter of balancing separate and competing interests, as the two step-model assumes. Violent 'expression' is an abuse of the communicative process. It attacks or undermines the relationship of communication in a basic way.

Keegstra 1990 : Defining the Scope of the Violence Exception

In *Keegstra* 1990, supporters of the Criminal Code restriction of hate promotion argued that the hateful expression prohibited by the Code fell within the violence exception described in *Irwin Toy* 1989. It was argued that hate propaganda, like other violent forms of expression, is 'inimical' to the values underlying the freedom. More particularly, it was claimed that hate propaganda falls within the exclusion because 'it imperils the ability of target group members themselves to convey thoughts and feelings in non-violent ways without fear of censure' (*Keegstra* 1990, 731). Chief Justice Dickson (for the majority) and Madame Justice McLachlin (for the dissenting minority) confirmed that violent expression was excluded from the protection of section 2(b) but rejected the argument that hate promotion fell within this exclusion.

Chief Justice Dickson drew from the court's previous judgments the principle that 'the content of expression is irrelevant in determining the scope of the Charter provision.' From this he reasoned that the 'violent conduct' exception extends only 'to expression communicated directly through physical harm' (*Keegstra* 1990, 732). In his view, the hateful expression restricted by section 319(2) of the Code is objectionable because of its message, and so is not analogous to violence and does not fall within the exception. Even threats of violence do not fall within the exception, because the harm they cause stems from the audience's understanding of the message.

According to Chief Justice Dickson, when expression has a violent form rather than simply a harmful message, it interferes with the basic values underlying freedom of expression and should not be given protection under section 2(b): 'the extreme repugnance of this form to free expression values justifying such an extraordinary step' (*Keegstra* 1990, 732). However, as Dickson C.J. acknowledged, the distinction between form and content is problematic in a number of ways.[19] First, restriction of a particular form of expression always affects the opportunity to communicate some messages more than others. More fundamentally, though, meaning is inseparable from the form in which it is manifested. A restriction on a particular form of expression must be understood as a restriction on meaning, even if the purpose of the restriction is not to prevent the communication of a particular message. Second, all acts of expression have some sort of direct physical consequences: if not a broken nose, then perhaps broken silence. It is un-

clear when the physical effects of an expressive act will be considered violent, so that the act falls outside the protection of section 2(b), or when the act will be protected under that section, even though it causes injury to the interests of another – injury such as obstruction or harassment that might justify restriction under section 1. If an act is intended to carry a message, and the reason for its restriction is its harmful effect, then the court must decide whether this effect is such that the expressive conduct should be excluded from the scope of freedom of expression or whether the effect simply justifies restriction under section 1. It is unclear where, or even how, this line is to be drawn.

Madame Justice McLachlin in her dissenting judgment took a broader view of the exclusion, arguing that it should apply to both acts and threats of violence. In her view, threats of violence, like acts of violence, are coercive: they 'tak[e] away free choice and undermin[e] freedom of action' (*Keegstra* 1990, 830). She observed that threats 'undercut one of the essential justifications of free expression – the role of expression in enhancing the freedom to choose between ideas (the argument based on truth) or between courses of conduct (the argument based on democracy). Being antithetical to the values underlying the guarantee of free expression, it is logical and appropriate that violence and threats of violence be excluded from its scope' (*Keegstra* 1990, 830). She did not think that James Keegstra's expression amounted to either a violent act or threat and so she found that the exception did not apply in this case.[20]

The inclusion of threats within the category of violent expression would add to the definitional difficulties. The judgment as to whether harsh and intimidating words should be restricted because they cause fear and upset or because they silence and isolate the listener must take into account a wide range of factors, including the nature of the message and the opportunity for reflection and choice. It is a judgment that cannot rely on any clear divide between acceptable challenge and criticism and unacceptable aggression and antagonism.

Once again the issue of the restriction of acts (or threats) of violence cuts across the scope/limits divide. If the court waits to deal with violent or threatening expression under section 1, it seems to miss the point of freedom of expression and to give legitimacy to unacceptable actions. However, if the court seeks to exclude acts and threats of violence from the protection of section 2(b), it takes on the difficult task of defining the scope of the exclusion. It is unclear when an expressive action should be denied protection under section 2(b) and when it should be protected but subject to restriction under section 1.

Other Abuses of the Relationship

Instead of simply limiting violent expression under section 1, through the process of balancing or accommodating competing interests, the Supreme Court has decided that this form of expression should be excluded entirely from the scope of section 2(b). Yet violence may be seen as expressive of the actor and as advancing (instrumentally) his or her interests, even though it harms the interests of the audience (through physical injury of the victim or intimidation of the larger audience). The established approach to freedom of expression issues would seem to require a choice, even if an easy choice, between the competing interests of speaker and listener, of the sort that is made under section 1 rather than section 2(b).

The court's conclusion that violence undermines the values underlying freedom of expression and should be excluded from the freedom's scope suggests some recognition that freedom of expression is concerned with the protection of a social relationship – that the interests of the speaker and listener are tied. However, in an adjudicative structure and a rights culture that emphasize the protection of individual independence rather than relationship, this recognition can only be partial. In extreme cases, such as physical violence, the court excludes this expression from the scope of section 2(b). In other cases the issue is resolved in the established way under section 1 and is described as a balancing of the speaker's rights against the listener's rights. Sometimes the court even describes this as a balancing of competing freedom of expression values.

The court's decision to exclude violent expression from the scope of section 2(b) rests on a recognition that violence undermines the freedom in a very basic way. Yet this exclusion raises all sorts of definitional problems. How do we define its scope? Why should other instances of harmful expression not be excluded from the scope of freedom of expression? Do we run the risk of excluding harsh but nevertheless valuable expression without proper consideration? Can the line between unpleasant but constitutionally protected expression and unprotected abusive and threatening expression be drawn without taking account of the social, political, economic, and historical context in which the act of expression occurs?[21]

Not surprisingly, the court has decided to define the violence exception narrowly so that it encompasses only those cases in which the action/expression involves serious harm, regardless of the precise cir-

cumstances in which it occurs. Other instances of expression, which may cause injury to the listener and may undermine the relationship of communication, are dealt with under section 1. In these cases, the court can consider the larger social context to determine whether the communication should be seen as part of the inevitable 'rough and tumble' of public debate or as an unacceptable instance of abusive or harmful expression.[22]

The relationship of communication can be abused or undermined by means other than physical violence. Manipulation, like violence, might be viewed simply as an abuse or negation of the relationship of communication and not as an interest in competition with freedom of expression. Lying might also be seen as an abuse of the communicative relationship. When a speaker lies, he intends to mislead the listener. He wants the listener to trust him and to treat his words as true.[23] Not only is lying a wrong against the particular listener but, inasmuch as it discourages future trust, it is damaging to the practice of communication and so is a wrong against the larger community. Yet in a shocking passage in the majority judgment in *Zundel* 1992, 262, Madame Justice McLachlin found not only that lying to the general public was protected expression under section 2(b) but that it may sometimes have real value. She offered some examples of valuable lies:

> Exaggeration – even clear falsification – may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty to animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g. 'cruelty must be stopped.' A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's *Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet. All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfillment. To accept the proposition that deliberate lies can never fall under section 2(b) would be to exclude statements such as the examples above from the possibility of constitutional protection. I cannot accept that such was the intention of the framers of the Constitution. (*Zundel* 1992, 754)[24]

These lies may have seemed valuable to McLachlin J. because she was sympathetic to the ends the liar sought to achieve and because she believed that 'experts' know what is best for the general population. But, as is the case with all lies, these involve an injury to the listener and an undermining of the relationship of communication. Again, this may be seen as an abuse of freedom of expression and not simply as a conflict between the speaker's interests in expressing him/herself and the listener's interests in not being deceived.

While the court has chosen to deal with abuses such as manipulation and deception under section 1, as limitation issues, it has adopted a 'contextual approach' to limitations. Even though all non-violent expression is protected under section 2(b), 'not all expression is equally worthy of protection' (*Rocket* 1990, 78). Some forms of expression can be restricted only if the state shows clear and strong reasons. However, the restriction of other forms of 'expression' will be easier to justify under section 1. In this way 'expression' that undermines the communicative relationship, although covered by section 2(b), may have little or no value when assessed under section 1.

In *Irwin Toy* 1989, for example, while the court was prepared to regard advertising directed at children as expression protected under section 2(b), it had no difficulty finding that the state was justified under section 1 in restricting this expression. The right of an advertiser to express itself was balanced against the right of children to be free from manipulation. However, because the expression was manipulative, it had very little value, perhaps even no value, under section 1.

3. The Distributive Dimension of Freedom of Expression: Interference and Opportunity

The scope/limits divide also comes under pressure when distributive issues are addressed. Traditional accounts of freedom of expression emphasize the importance of protecting the individual's personal sphere from interference by the state. When the state interferes with an individual's expression, a court must decide whether the state has good and strong reasons for its action. Yet, if expression is a valuable activity, we should also be concerned about the real opportunities that individuals have to express themselves and to participate in public discourse. An individual's opportunity to communicate effectively with others depends significantly on the state rules of property, which determine who

has a right to use, and to exclude others from using, a particular place or thing. In allocating exclusive control over certain locations, state rules facilitate the communication of some individuals and constrain the communication of others.

Concern about communicative opportunity explains the court's willingness to review the constitutionality not only of government efforts to suppress the expression of certain messages but also government efforts to control 'the physical consequences of certain human activity, regardless of the meaning being conveyed,' including restrictions on the noise volume and location of expression (*Irwin Toy* 1989, 974). Time, place, and manner restrictions, as they are called in the United States, are a concern because they affect the individual's ability to communicate with others, a positively valued activity. However, the courts have applied a less rigorous standard of justification to time, place, and manner restrictions. A time, place, and manner restriction will breach section 2(b) only if the restricted expression advances important values. As well, a time, place, and manner restriction may be justified under section 1 even when it does not represent a substantial and compelling purpose of the kind necessary to justify a content-based restriction.

The special rule that says that a law that has the effect (rather than the purpose) of restricting expression will violate section 2(b) only if it is shown that the restricted expression advances the values underlying the freedom, reflects the problems involved in fitting distributive issues into the established framework of adjudication. On its face, the rule is about ensuring that only valuable expression is protected from time, place, and manner restrictions. However, when examined more closely, the rule seems to involve the introduction into section 2(b) of a lower, or at least a more flexible, standard for justifying this sort of restriction. The introduction of this standard of justification under section 2(b) shows some recognition that the justification of time, place, or manner restrictions does not depend on a simple, one-dimensional balancing of competing interests, the ordinary process under section 1. Instead, it involves an assessment of alternative opportunities for communication, a systemic issue that does not really fit into either of the two steps of adjudication: the definition of the scope of expression or the balancing of competing interests under section 1.

Because the Supreme court of Canada has defined expression broadly to include all acts intended to convey a message, any act is potentially an act of expression. This also means that any law is potentially a time, place, and manner restriction on expression. Understandably, the courts

are reluctant to require substantial justification for a law, such as a parking restriction, that would not ordinarily be seen as impeding expressive freedom. In the case of such restrictions, it will almost always be the case that the individual speaker has effective alternatives. In some circumstances, however, where the means of expression seem critical to the effectiveness of the message, the court may choose to exempt the expressive act from the rule's application but not strike down the entire rule.

Irwin Toy 1989: The Purpose/Effect Distinction

The Supreme Court of Canada in *Irwin Toy* 1989 said that a state act that has the effect (and not the purpose) of restricting expression (a time, place, and manner restriction) will violate section 2(b) only if the restricted expression is shown to advance the values underlying the freedom.[25] Yet this additional requirement in the case of time, place, and manner restrictions seemed redundant. Once the court had reached this stage of section 2(b) analysis, it had already decided that the restricted activity was expression prima facie protected under section 2(b). The court's initial decision, that expression included all acts that convey a message, might have been thought to rest on the view that such acts advance the important values associated with freedom of expression. If an act does not advance these values, why should it be considered an act of 'expression' in the first instance?

The court seemed to say that the definition of expression is an issue separate from, and prior to, the assessment of its value – that expression is not defined in a purposive or functional way. It also seemed to assume an instrumental account of the freedom's value – that the expression of ideas and feelings is not valuable in and of itself but is valuable only when it advances truth, democracy, or self-realization. Yet if the first stage of free expression adjudication (the definition of the freedom's scope) does not involve a judgment that the particular act (of expression) advances the values underlying the freedom, why should there be a difference at this next stage between laws that have as their purpose the restriction of expression and laws that simply have this effect? Why should a plaintiff seeking to attack a particular law under section 2(b) have the burden of showing that his or her expression advances the values that underlie the freedom only when the law has the unintended effect of restricting expression. If a law seeks to restrict a particular human act that does not advance the values associated with

freedom of expression, why should a court hold that it violates the freedom and go on to assess the law's justification under section 1?

It seems likely that the Supreme Court has taken this approach to laws that simply have a restrictive effect on expression (time, place, and manner restrictions) as a way of avoiding two aspects of section 1 analysis: first, the section 1 requirement that a restriction on the freedom represent a substantial and pressing purpose and second the one-dimensional balancing of competing interests under section 1. Time, place, or manner restrictions, unlike content-based restrictions, do not directly restrict particular messages (although they may be used to conceal the restriction of certain messages or speakers). Ordinarily these restrictions are intended to protect interests such as peace and quiet, privacy, or property use, interests that are sometimes compromised by public expression. The court is prepared to scrutinize these restrictions on expression because it recognizes that a particular restriction, or an accumulation of restrictions, may significantly impair communicative opportunity generally or for certain speakers or messages. However, this will not always be the case. A particular time, place, or manner restriction will not impair the freedom in a significant way when there are other times, places, and manners at/in which the same message may be communicated or the same speaker may speak.[26]

The court wants to uphold time, place, and manner restrictions on the freedom which advance purposes that are worthwhile, but not necessarily substantial and pressing, and that do not significantly impair the freedom, in the sense that they leave a variety of alternative means for public communication. Indeed, the court has begun to do this more explicitly through the introduction of contextual balancing and lower standards of justification for time, place, and manner restrictions under section 1. But what is required in the case of a time, place, and manner restriction is not so much a lower standard of justification as a more flexible standard, one which takes account of the distribution of effective opportunities for communication. When judging the legitimacy of a time, place, and manner restriction, the central issue is not the proper balance between the value of expression and the value of privacy or quiet but whether the individual seeking to express himself is left with adequate alternatives for his communication.

For example, it is not clear that a ban on loud noises in the evening in residential areas would survive section 1 if the state were required to show that the ban represented a substantial and compelling purpose.

Yet a noise by-law of this sort does represent a reasonable state policy and a relatively minor restriction on freedom of expression, since ordinarily it will leave the individual with a variety of other ways to communicate his or her message. The courts may insulate this minor restriction from section 1 and the demand of a substantial and compelling purpose by holding that it does not amount to a violation of section 2(b). In the alternative, the court may uphold the restriction under section 1 by adopting a reduced standard of justification.

If this is the basis for the special rule applied to state acts that have the effect of restricting expression, then the decision that a particular restriction does not violate section 2(b) rests not (or not simply), as the court pretends, on the quality of the restricted expression (whether it advances the values that underlie the freedom) but instead on the degree to which the particular expressive activity is prevented (whether the same message can be communicated in other ways or forums). It is difficult to think of many cases in which a particular time, place, or manner is so ill-suited to public communication that a restriction on expression at/in that time, place, or manner does not constitute at least a minor interference with the speaker's freedom of expression interests.

The court's decision to consider the justification of (some) time, place, and manner restrictions under section 2(b) rather than under section 1, shows some recognition that what is involved is an assessment of the opportunities for communication and not a simple balancing of competing interests of the sort that ordinarily occurs under section 1. The issue of the fairness or adequacy of an individual's opportunity to communicate cuts across the scope/limits distinction. It is an issue that does not really fit into either of the steps of the established structure of constitutional adjudication, the definition of the scope of expression or the balancing of interests under section 1. It does not require the court to determine whether a particular action is expressive or to strike the correct balance between competing values or interests. The court tries to fit this distributive issue into the established model by describing it as an assessment of the value of the restricted expression under section 2(b). However, the special treatment of time, place, and manner restrictions can only really be understood as the introduction of a more flexible standard of protection under section 2(b), a standard that takes account, at least implicitly, of the availability and adequacy of alternative times, places, and manners for/of communication.[27]

4. Limits on Freedom of Expression under Section 1

When the Supreme Court describes the value and scope of freedom of expression under section 2(b) it speaks generously of the freedom's contribution to democracy, truth, and self-realization. At this stage of the court's judgments the tone is one of confidence about what can be achieved through freedom of expression. Yet when the court moves to consider limits on the freedom under section 1, the tone of its judgments often changes: the court becomes sceptical about the value of expression and fearful of its harms. Under section 1 the court is often prepared to defer to legislative judgment and to uphold a wide range of restrictions without clear evidence that the restricted expression 'causes' harm to important individual or social interests.[28]

The change in tone that occurs between section 2(b) and section 1 is obscured to some degree by the abstract language used by the court to describe both scope and limits issues. Some commentators have thought that in many cases the court's section 1 analysis is simply a mistake made possible by the court's abstract approach and that this mistake might be avoided if the court would only keep the underlying justification for the freedom in clearer focus (Cameron 1992, 1151). However, I believe that the shift in tone between section 2(b) and section 1 reflects a basic tension in the court's understanding of the value of freedom of expression and more deeply in its conception of human agency and language/discourse. The court's abstract description of the justification for freedom of expression and the grounds for limiting the freedom simply serves to obscure this tension.

The Supreme Court's approach to freedom of expression under section 2(b) rests on a conception of the individual as a free and rational being, a maker of choices, an autonomous agent capable of giving direction to his or her life. This image underlies the court's account of the different justifications for freedom of expression, including the attainment of truth, democracy, and self-realization, and drives its definition of the freedom's scope. According to the Supreme Court freedom of expression is valuable because truth is more likely to emerge when free and rational individuals are permitted to discuss and consider information and ideas. Democracy is advanced when free and rational individuals are permitted to discuss public issues. Individual autonomy is respected when free and rational individuals are permitted to express their views and to consider the views of others.

TAB 3

HOW DEMOCRACIES DIE

STEVEN LEVITSKY &
DANIEL ZIBLATT

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First Edition

To our families:

Liz Mineo and Alejandra Mineo-Levitsky

& Suriya, Lilah, and Talia Ziblatt

Introduction

Is our democracy in danger? It is a question we never thought we'd be asking. We have been colleagues for fifteen years, thinking, writing, and teaching students about failures of democracy in other places and times—Europe's dark 1930s, Latin America's repressive 1970s. We have spent years researching new forms of authoritarianism emerging around the globe. For us, how and why democracies die has been an occupational obsession.

But now we find ourselves turning to our own country. Over the past two years, we have watched politicians say and do things that are unprecedented in the United States—but that we recognize as having been the precursors of democratic crisis in other places. We feel dread, as do so many other Americans, even as we try to reassure ourselves that *things can't really be that bad here.* After all, even though we know democracies are always fragile, the one in which we live has somehow managed to defy gravity. Our Constitution, our national creed of freedom and equality, our historically robust middle class, our high levels of wealth and education, and our large, diversified

private sector—all these should inoculate us from the kind of democratic breakdown that has occurred elsewhere.

Yet, we worry. American politicians now treat their rivals as enemies, intimidate the free press, and threaten to reject the results of elections. They try to weaken the institutional buffers of our democracy, including the courts, intelligence services, and ethics offices. American states, which were once praised by the great jurist Louis Brandeis as "laboratories of democracy," are in danger of becoming laboratories of authoritarianism as those in power rewrite electoral rules, redraw constituencies, and even rescind voting rights to ensure that they do not lose. And in 2016, for the first time in U.S. history, a man with no experience in public office, little observable commitment to constitutional rights, and clear authoritarian tendencies was elected president.

What does all this mean? Are we living through the decline and fall of one of the world's oldest and most successful democracies?

At midday on September 11, 1973, after months of mounting tensions in the streets of Santiago, Chile, British-made Hawker Hunter jets swooped overhead, dropping bombs on La Moneda, the neoclassical presidential palace in the center of the city. As the bombs continued to fall, La Moneda burned. President Salvador Allende, elected three years earlier at the head of a leftist coalition, was barricaded inside. During his term, Chile had been wracked by social unrest, economic crisis, and political paralysis. Allende had said he would not leave his post until he had finished his job—but now the moment of truth had arrived. Under the command of General Augusto Pinochet, Chile's armed forces were seizing control of the country.

Early in the morning on that fateful day, Allende offered defiant words on a national radio broadcast, hoping that his many supporters would take to the streets in defense of democracy. But the resistance never materialized. The military police who guarded the palace had abandoned him; his broadcast was met with silence. Within hours, President Allende was dead. So, too, was Chilean democracy.

This is how we tend to think of democracies dying: at the hands of men with guns. During the Cold War, coups d'état accounted for nearly three out of every four democratic breakdowns. Democracies in Argentina, Brazil, the Dominican Republic, Ghana, Greece, Guatemala, Nigeria, Pakistan, Peru, Thailand, Turkey, and Uruguay all died this way. More recently, military coups toppled Egyptian President Mohamed Morsi in 2013 and Thai Prime Minister Yingluck Shinawatra in 2014. In all these cases, democracy dissolved in spectacular fashion, through military power and coercion.

But there is another way to break a democracy. It is less dramatic but equally destructive. Democracies may die at the hands not of generals but of elected leaders—presidents or prime ministers who subvert the very process that brought them to power. Some of these leaders dismantle democracy quickly, as Hitler did in the wake of the 1933 Reichstag fire in Germany. More often, though, democracies erode slowly, in barely visible steps.

In Venezuela, for example, Hugo Chávez was a political outsider who railed against what he cast as a corrupt governing elite, promising to build a more "authentic" democracy that used the country's vast oil wealth to improve the lives of the poor. Skillfully tapping into the anger of ordinary Venezuelans, many of whom felt ignored or mistreated by the established political parties, Chávez was elected president in 1998. As a woman in Chávez's home state of Barinas put it on election

night, "Democracy is infected. And Chávez is the only antibiotic we have."

When Chávez launched his promised revolution, he did so democratically. In 1999, he held free elections for a new constituent assembly, in which his allies won an overwhelming majority. This allowed the *chavistas* to single-handedly write a new constitution. It was a democratic constitution, though, and to reinforce its legitimacy, new presidential and legislative elections were held in 2000. Chávez and his allies won those, too. Chávez's populism triggered intense opposition, and in April 2002, he was briefly toppled by the military. But the coup failed, allowing a triumphant Chávez to claim for himself even more democratic legitimacy.

It wasn't until 2003 that Chávez took his first clear steps toward authoritarianism. With public support fading, he stalled an opposition-led referendum that would have recalled him from office—until a year later, when soaring oil prices had boosted his standing enough for him to win. In 2004, the government blacklisted those who had signed the recall petition and packed the supreme court, but Chávez's landslide reelection in 2006 allowed him to maintain a democratic veneer. The *chavista* regime grew more repressive after 2006, closing a major television station, arresting or exiling opposition politicians, judges, and media figures on dubious charges, and eliminating presidential term limits so that Chávez could remain in power indefinitely. When Chávez, now dying of cancer, was reelected in 2012, the contest was free but not fair: *Chavismo* controlled much of the media and deployed the vast machinery of the government in its favor. After Chávez's death a year later, his successor, Nicolás Maduro, won another questionable reelection, and in 2014, his government imprisoned a major opposition leader. Still, the opposition's landslide victory in the 2015 legislative elections seemed to belie critics' claims that Venezuela was no longer democratic. It was only when a new single-party constituent assembly usurped the power of Congress in 2017, nearly two decades after Chávez first won the presidency, that Venezuela was widely recognized as an autocracy.

This is how democracies now die. Blatant dictatorship—in the form of fascism, communism, or military rule—has disappeared across much of the world. Military coups and other violent seizures of power are rare. Most countries hold regular elections. Democracies still die, but by different means. Since the end of the Cold War, most democratic breakdowns have been caused not by generals and soldiers but by elected governments themselves. Like Chávez in Venezuela, elected leaders have subverted democratic institutions in Georgia, Hungary, Nicaragua, Peru, the Philippines, Poland, Russia, Sri Lanka, Turkey, and Ukraine. Democratic backsliding today begins at the ballot box.

The electoral road to breakdown is dangerously deceptive. With a classic coup d'état, as in Pinochet's Chile, the death of a democracy is immediate and evident to all. The presidential palace burns. The president is killed, imprisoned, or shipped off into exile. The constitution is suspended or scrapped. On the electoral road, none of these things happen. There are no tanks in the streets. Constitutions and other nominally democratic institutions remain in place. People still vote. Elected autocrats maintain a veneer of democracy while eviscerating its substance.

Many government efforts to subvert democracy are "legal," in the sense that they are approved by the legislature or accepted by the courts. They may even be portrayed as efforts to *improve* democracy—making the judiciary more efficient, combating corruption, or cleaning up the electoral process.

Newspapers still publish but are bought off or bullied into self-censorship. Citizens continue to criticize the government but often find themselves facing tax or other legal troubles. This sows public confusion. People do not immediately realize what is happening. Many continue to believe they are living under a democracy. In 2011, when a Latinobarómetro survey asked Venezuelans to rate their own country from 1 ("not at all democratic") to 10 ("completely democratic"), 51 percent of respondents gave their country a score of 8 or higher.

Because there is no single moment—no coup, declaration of martial law, or suspension of the constitution—in which the regime obviously "crosses the line" into dictatorship, nothing may set off society's alarm bells. Those who denounce government abuse may be dismissed as exaggerating or crying wolf. Democracy's erosion is, for many, almost imperceptible.

How vulnerable is American democracy to this form of backsliding? The foundations of our democracy are certainly stronger than those in Venezuela, Turkey, or Hungary. But are they strong enough?

Answering such a question requires stepping back from daily headlines and breaking news alerts to widen our view, drawing lessons from the experiences of other democracies around the world and throughout history. Studying other democracies in crisis allows us to better understand the challenges facing our own democracy. For example, based on the historical experiences of other nations, we have developed a litmus test to help identify would-be autocrats before they come to power. We can learn from the mistakes that past democratic leaders have made in opening the door to would-be authoritarians—and, conversely, from the ways that other democracies have kept

extremists out of power. A comparative approach also reveals how elected autocrats in different parts of the world employ remarkably similar strategies to subvert democratic institutions. As these patterns become visible, the steps toward breakdown grow less ambiguous—and easier to combat. Knowing how citizens in other democracies have successfully resisted elected autocrats, or why they tragically failed to do so, is essential to those seeking to defend American democracy today.

We know that extremist demagogues emerge from time to time in all societies, even in healthy democracies. The United States has had its share of them, including Henry Ford, Huey Long, Joseph McCarthy, and George Wallace. An essential test for democracies is not whether such figures emerge but whether political leaders, and especially political parties, work to prevent them from gaining power in the first place—by keeping them off mainstream party tickets, refusing to endorse or align with them, and when necessary, making common cause with rivals in support of democratic candidates. Isolating popular extremists requires political courage. But when fear, opportunism, or miscalculation leads established parties to bring extremists into the mainstream, democracy is imperiled.

Once a would-be authoritarian makes it to power, democracies face a second critical test: Will the autocratic leader subvert democratic institutions or be constrained by them? Institutions alone are not enough to rein in elected autocrats. Constitutions must be defended—by political parties and organized citizens, but also by democratic norms. Without robust norms, constitutional checks and balances do not serve as the bulwarks of democracy we imagine them to be. Institutions become political weapons, wielded forcefully by those who control them against those who do not. This is how elected autocrats subvert democracy—packing and "weaponizing" the courts and other

neutral agencies, buying off the media and the private sector (or bullying them into silence), and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy—gradually, subtly, and even legally—to kill it.

America failed the first test in November 2016, when we elected a president with a dubious allegiance to democratic norms. Donald Trump's surprise victory was made possible not only by public disaffection but also by the Republican Party's failure to keep an extremist demagogue within its own ranks from gaining the nomination.

How serious is the threat now? Many observers take comfort in our Constitution, which was designed precisely to thwart and contain demagogues like Donald Trump. Our Madisonian system of checks and balances has endured for more than two centuries. It survived the Civil War, the Great Depression, the Cold War, and Watergate. Surely, then, it will be able to survive Trump.

We are less certain. Historically, our system of checks and balances *has* worked pretty well—but not, or not entirely, because of the constitutional system designed by the founders. Democracies work best—and survive longer—where constitutions are reinforced by unwritten democratic norms. Two basic norms have preserved America's checks and balances in ways we have come to take for granted: mutual toleration, or the understanding that competing parties accept one another as legitimate rivals, and forbearance, or the idea that politicians should exercise restraint in deploying their institutional prerogatives. These two norms undergirded American democracy for most of the twentieth century. Leaders of the two major parties accepted one another as legitimate and resisted the temptation to use their temporary control of institutions to maximum partisan advantage. Norms of toleration and restraint served as the soft guardrails of American democracy, helping it avoid the kind of partisan fight to the death that has destroyed democracies elsewhere in the world, including Europe in the 1930s and South America in the 1960s and 1970s.

Today, however, the guardrails of American democracy are weakening. The erosion of our democratic norms began in the 1980s and 1990s and accelerated in the 2000s. By the time Barack Obama became president, many Republicans, in particular, questioned the legitimacy of their Democratic rivals and had abandoned forbearance for a strategy of winning by any means necessary. Donald Trump may have accelerated this process, but he didn't cause it. The challenges facing American democracy run deeper. The weakening of our democratic norms is rooted in extreme partisan polarization—one that extends beyond policy differences into an existential conflict over race and culture. America's efforts to achieve racial equality as our society grows increasingly diverse have fueled an insidious reaction and intensifying polarization. And if one thing is clear from studying breakdowns throughout history, it's that extreme polarization can kill democracies.

There are, therefore, reasons for alarm. Not only did Americans elect a demagogue in 2016, but we did so at a time when the norms that once protected our democracy were already coming unmoored. But if other countries' experiences teach us that that polarization can kill democracies, they also teach us that breakdown is neither inevitable nor irreversible. Drawing

lessons from other democracies in crisis, this book suggests strategies that citizens should, and should *not*, follow to defend our democracy.

Many Americans are justifiably frightened by what is happening to our country. But protecting our democracy requires more than just fright or outrage. We must be humble *and* bold. We must learn from other countries to see the warning signs—and recognize the false alarms. We must be aware of the fateful missteps that have wrecked other democracies. And we must see how citizens have risen to meet the great democratic crises of the past, overcoming their own deep-seated divisions to avert breakdown. History doesn't repeat itself. But it rhymes. The promise of history, and the hope of this book, is that we can find the rhymes before it is too late.

1

Fateful Alliances

A quarrel had arisen between the Horse and the Stag, so the Horse came to a Hunter to ask his help to take revenge on the Stag. The Hunter agreed but said: "If you desire to conquer the Stag, you must permit me to place this piece of iron between your jaws, so that I may guide you with these reins, and allow this saddle to be placed upon your back so that I may keep steady upon you as we follow the enemy." The Horse agreed to the conditions, and the Hunter soon saddled and bridled him. Then, with the aid of the Hunter, the Horse soon overcame the Stag and said to the Hunter: "Now get off, and remove those things from my mouth and back." "Not so fast, friend," said the Hunter. "I have now got you under bit and spur and prefer to keep you as you are at present."

—"The Horse, the Stag, and the Hunter," *Aesop's Fables*

On October 30, 1922, Benito Mussolini arrived in Rome at 10:55 A.M. in an overnight sleeping car from Milan. He had

Chechnya and a large-scale crackdown. As in the case of Nazi Germany, there is some debate over whether the bombings were committed by Chechen terrorists or by the Russian government's own intelligence service. What is clear, however, is that Putin's political popularity received a major boost with the bombings. The Russian public rallied behind Putin, tolerating, if not supporting, attacks on the opposition over the months and years that followed.

Most recently, the Erdoğan government in Turkey used security crises to justify his tightening grip on power. After the AKP lost its parliamentary majority in June 2015, a series of ISIS terrorist attacks enabled Erdoğan to use the rally-'round-the-flag effect to call snap elections and regain control of parliament just five months later. Even more consequential was the July 2016 coup attempt, which provided justification for a wide-ranging crackdown. Erdoğan responded to the coup by declaring a state of emergency and launching a massive wave of repression that included a purge of some 100,000 public officials, the closure of several newspapers, and more than 50,000 arrests—including hundreds of judges and prosecutors, 144 journalists, and even two members of the Constitutional Court. Erdoğan also used the coup attempt as a window of opportunity to make the case for sweeping new executive powers. The power grab culminated in the April 2017 passage of a constitutional amendment that demolished checks on presidential authority.

For demogagues hemmed in by constitutional constraints, a crisis represents an opportunity to begin to dismantle the inconvenient and sometimes threatening checks and balances that come with democratic politics. Crises allow autocrats to expand their room to maneuver and protect themselves from perceived enemies. But the question remains: Are democratic institutions so easily swept away?

5

The Guardrails of Democracy

For generations, Americans have retained great faith in their Constitution, as the centerpiece of a belief that the United States was a chosen nation, providentially guided, a beacon of hope and possibility to the world. Although this larger vision may be fading, trust in the Constitution remains high. A 1999 survey found that 85 percent of Americans believed the Constitution was the major reason "America had been successful during this past century." Indeed, our constitutional system of checks and balances was designed to prevent leaders from concentrating and abusing power, and for most of American history, it has succeeded. President Abraham Lincoln's concentration of power during the Civil War was reversed by the Supreme Court after the war ended. President Richard Nixon's illegal wiretapping, exposed after the 1972 Watergate break-in, triggered a high-profile congressional investigation and bipartisan pressure for a special prosecutor that eventually forced his resignation in the face of certain impeachment. In these and other instances, our political institutions served as crucial bulwarks against authoritarian tendencies.

But are constitutional safeguards, by themselves, enough to

secure a democracy? We believe the answer is no. Even well-designed constitutions sometimes fail. Germany's 1919 Weimar constitution was designed by some of the country's greatest legal minds. Its long-standing and highly regarded *Rechtsstaat* ("rule of law") was considered by many as sufficient to prevent government abuse. But both the constitution and the *Rechtsstaat* collapsed rapidly in the face of Adolf Hitler's usurpation of power in 1933.

Or consider the experience of postcolonial Latin America. Many of the region's newly independent republics modeled themselves directly on the United States, adopting U.S.-style presidentialism, bicameral legislatures, supreme courts, and in some cases, electoral colleges and federal systems. Some wrote constitutions that were near-replicas of the U.S. Constitution. Yet almost all the region's embryonic republics plunged into civil war and dictatorship. For example, Argentina's 1853 constitution closely resembled ours: Two-thirds of its text was taken directly from the U.S. Constitution. But these constitutional arrangements did little to prevent fraudulent elections in the late nineteenth century, military coups in 1930 and 1943, and Perón's populist autocracy.

Likewise, the Philippines' 1935 constitution has been described as a "faithful copy of the U.S. Constitution." Drafted under U.S. colonial tutelage and approved by the U.S. Congress, the charter "provided a textbook example of liberal democracy," with a separation of powers, a bill of rights, and a two-term limit in the presidency. But President Ferdinand Marcos, who was loath to step down when his second term ended, dispensed with it rather easily after declaring martial law in 1972.

If constitutional rules were enough, then figures such as Perón, Marcos, or Brazil's Getúlio Vargas—all of whom took

office under U.S.-style constitutions that, on paper, contained an impressive array of checks and balances—would have been one- or two-term presidents rather than notorious autocrats.

Even well-designed constitutions cannot, by themselves, guarantee democracy. For one, constitutions are always incomplete. Like any set of rules, they have countless gaps and ambiguities. No operating manual, no matter how detailed, can anticipate all possible contingencies or prescribe how to behave under all possible circumstances.

Constitutional rules are also always subject to competing interpretations. What, exactly, does "advice and consent" entail when it comes to the U.S. Senate's role in appointing Supreme Court justices? What sort of threshold for impeachment does the phrase "crimes and misdemeanors" establish? Americans have debated these and other constitutional questions for centuries. If constitutional powers are open to multiple readings, they can be used in ways that their creators didn't anticipate.

Finally, the written words of a constitution may be followed to the letter in ways that undermine the spirit of the law. One of the most disruptive forms of labor protests is a "work to rule" campaign, in which workers do exactly what is asked of them in their contracts or job descriptions but nothing more. In other words, they follow the written rules to the letter. Almost invariably, the workplace ceases to function.

Because of the gaps and ambiguities inherent in all legal systems, we cannot rely on constitutions alone to safeguard democracy against would-be authoritarians. "God has never endowed any statesman or philosopher, or any body of them," wrote former U.S. president Benjamin Harrison, "with wisdom enough to frame a system of government that everybody could go off and leave."

That includes our own political system. The U.S. Constitution is, by most accounts, a brilliant document. But the original Constitution—only four pages long—can be interpreted in many different, and even contradictory, ways. We have, for example, few constitutional safeguards against filling nominally independent agencies (such as the FBI) with loyalists. According to constitutional scholars Aziz Huq and Tom Ginsburg, only the "thin tissue of convention" prevents American presidents from capturing the referees and deploying them against opponents. Likewise, the Constitution is virtually silent on the president's authority to act unilaterally, via decrees or executive orders, and it does not define the limits of executive power during crises. Thus, Huq and Ginsburg recently warned that "the constitutional and legal safeguards of [American] democracy . . . would prove to be fairly easy to manipulate in the face of a truly antidemocratic leader."

If the constitution written in Philadelphia in 1787 is not what secured American democracy for so long, then what did? Many factors mattered, including our nation's immense wealth, a large middle class, and a vibrant civil society. But we believe much of the answer also lies in the development of strong democratic norms. All successful democracies rely on informal rules that, though not found in the constitution or any laws, are widely known and respected. In the case of American democracy, this has been vital.

As in all facets of society, ranging from family life to the operation of businesses and universities, unwritten rules loom large in politics. To understand how they work, think of the example of a pickup basketball game. Street basketball is not governed by rules set up by the NBA, NCAA, or any other league. And there are no referees to enforce such rules. Only shared understandings about what is, and what is not, acceptable prevent such games from descending into chaos. The unwritten rules of a half-court game of pickup basketball are familiar to anyone who has played it. Here are some of the basics:

- Scoring is by ones, not by twos as in regular basketball, and the winning team must win by two points.
- The team that makes a basket keeps the ball ("make it, take it"). The scoring team takes the ball to the top of the key and, to ensure that the defending team is ready, "checks" it by passing it to the nearest opposing player.
- The player who starts with the ball cannot shoot; he or she must pass it in.
- Players call their own fouls but with restraint; only egregious fouls are legitimate ("no blood, no foul"). But when fouls are called, the calls must be respected.

Democracy, of course, is not street basketball. Democracies *do* have written rules (constitutions) and referees (the courts). But these work best, and survive longest, in countries where written constitutions are reinforced by their own unwritten rules of the game. These rules or norms serve as the soft guardrails of democracy, preventing day-to-day political competition from devolving into a no-holds-barred conflict.

Norms are more than personal dispositions. They do not simply rely on political leaders' good character, but rather are shared codes of conduct that become common knowledge within a particular community or society—accepted, respected, and enforced by its members. Because they are unwritten, they are often hard to see, especially when they're functioning well.

This can fool us into thinking they are unnecessary. But nothing could be further from the truth. Like oxygen or clean water, a norm's importance is quickly revealed by its absence. When norms are strong, violations trigger expressions of disapproval, ranging from head-shaking and ridicule to public criticism and outright ostracism. And politicians who violate them can expect to pay a price.

Unwritten rules are everywhere in American politics, ranging from the operations of the Senate and the Electoral College to the format of presidential press conferences. But two norms stand out as fundamental to a functioning democracy: mutual toleration and institutional forbearance.

Mutual toleration refers to the idea that as long as our rivals play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern. We may disagree with, and even strongly dislike, our rivals, but we nevertheless accept them as legitimate. This means recognizing that our political rivals are decent, patriotic, law-abiding citizens—that they love our country and respect the Constitution just as we do. It means that even if we believe our opponents' ideas to be foolish or wrong-headed, we do not view them as an existential threat. Nor do we treat them as treasonous, subversive, or otherwise beyond the pale. We may shed tears on election night when the other side wins, but we do not consider such an event apocalyptic. Put another way, mutual toleration is politicians' collective willingness to agree to disagree.

As commonsensical as this idea may sound, the belief that political opponents are not enemies is a remarkable and sophisticated invention. Throughout history, opposition to those in

power had been considered treason, and indeed, the notion of legitimate opposition parties was still practically heretical at the time of America's founding. Both sides in America's early partisan battles—John Adams's Federalists and Thomas Jefferson's Republicans—regarded each other as a threat to the republic. The Federalists saw themselves as the embodiment of the Constitution; in their view, one could not oppose the Federalists without opposing the entire American project. So when Jefferson and Madison organized what would become the Republican Party, the Federalists regarded them as traitors, even suspecting them of harboring loyalties to Revolutionary France—with which the United States was nearly at war. The Jeffersonians, for their part, accused the Federalists of being Tories and of plotting a British-backed monarchic restoration. Each side hoped to vanquish the other, taking steps (such as the 1798 Alien and Sedition Acts) to legally punish mere political opposition. Partisan conflict was so ferocious that many feared the new republic would fail. It was only gradually, over the course of decades, that America's opposing parties came to the hard-fought recognition that they could be rivals rather than enemies, circulating in power rather than destroying each other. This recognition was a critical foundation for American democracy.

But mutual toleration is not inherent to all democracies. When Spain underwent its first genuine democratic transition in 1931, for example, hopes were high. The new left-leaning Republican government, led by Prime Minister Manuel Azaña, was committed to parliamentary democracy. But the government confronted a highly polarized society, ranging from anarchists and Marxists on the left to monarchists and fascists on the right. Opposing sides viewed each other not as partisan

rivals but as mortal enemies. On the one hand, right-wing Catholics and monarchists, who watched in horror as the privileges of the social institutions they valued most—the Church, the army, and the monarchy—were dismantled, did not accept the new republic as legitimate. They viewed themselves, in the words of one historian, as engaged in a battle against "bolshevizing foreign agents." Unrest in the countryside and hundreds of acts of arson against churches, convents, and other Catholic institutions left conservatives feeling besieged, in the grips of a conspiratorial fury. Religious authorities darkly warned, "We have now entered the vortex . . . we have to be ready for everything."

On the other hand, many Socialists and other leftist Republicans viewed rightists such as José María Gil-Robles, the leader of the Catholic conservative Confederación Española de Derechas Autónomas (CEDA), as monarchist or fascist counterrevolutionaries. At best, many on the left regarded the well-organized CEDA as a mere front for the ultraconservative monarchists who were plotting the republic's violent overthrow. Although CEDA was apparently willing to play the democratic game by competing in elections, its leaders refused to unconditionally commit to the new regime. So they remained targets of extreme suspicion. In short, neither the Republicans on the left nor the Catholics and monarchists on the right fully accepted one another as legitimate opponents.

When norms of mutual toleration are weak, democracy is hard to sustain. If we view our rivals as a dangerous threat, we have much to fear if they are elected. We may decide to employ any means necessary to defeat them—and therein lies a justification for authoritarian measures. Politicians who are tagged as criminal or subversive may be jailed; governments deemed to pose a threat to the nation may be overthrown.

In the absence of strong norms of mutual toleration, the Spanish Republic quickly fell apart. The new republic descended into crisis after the right-wing CEDA won the 1933 elections and became the largest bloc in parliament. The governing center-left Republican coalition collapsed and was replaced by a minority centrist government that excluded the Socialists. Because many Socialists and left Republicans viewed the original (1931–33) center-left government as the embodiment of the republic, they regarded efforts to revoke or change its policies as fundamentally "disloyal" to the republic. And when CEDA—which had a fascist-leaning youth group among its rank and file—joined the government the following year, many Republicans viewed it as a profound threat. The Republican left party declared that

> the monstrous fact of turning over the government of the Republic to its enemy is a treason. [We] break all solidarity with the present institutions of the regime and affirm [our] decision to turn to all means in defense of the Republic.

Facing what they saw as a descent into fascism, leftists and anarchists rebelled in Catalonia and Asturias, calling a general strike and forming a parallel government. The rightist government brutally repressed the uprising. It then tried to associate the entire Republican opposition with it, even jailing former Prime Minister Azaña (who did not participate in the uprising). The country sank into increasingly violent conflict in which street battles, bombings, church burnings, political assassinations, and coup conspiracies replaced political competition. By 1936, Spain's nascent democracy had degenerated into a civil war.

In just about every case of democratic breakdown we have studied, would-be authoritarians—from Franco, Hitler, and Mussolini in interwar Europe to Marcos, Castro, and Pinochet during the Cold War to Putin, Chávez, and Erdoğan most recently—have justified their consolidation of power by labeling their opponents as an existential threat.

A second norm critical to democracy's survival is what we call institutional forbearance. *Forbearance* means "patient self-control; restraint and tolerance," or "the action of restraining from exercising a legal right." For our purposes, institutional forbearance can be thought of as avoiding actions that, while respecting the letter of the law, obviously violate its spirit. Where norms of forbearance are strong, politicians do not use their institutional prerogatives to the hilt, even if it is technically legal to do so, for such action could imperil the existing system.

Institutional forbearance has its origins in a tradition older than democracy itself. During the time when kings proclaimed divine-right rule—where religious sanction provided the basis of monarchic authority—no mortal constraint legally limited the power of kings. But many of Europe's predemocratic monarchs nevertheless acted with forbearance. To be "godly," after all, required wisdom and self-restraint. When a figure such as King Richard II, portrayed as a tyrant in one of Shakespeare's most famous historical plays, abuses his royal prerogatives in order to expropriate and plunder, his violations are not illegal; they merely violate custom. But the violations are highly consequential, for they unleash a bloody civil war. As Shakespeare's character Carlisle warns his compatriots in the play, abandoning forbearance meant "the Blood of English shall manure the ground. . . . And future ages groan for this foul act."

Just as divine-right monarchies required forbearance, so do democracies. Think of democracy as a game that we want to keep playing indefinitely. To ensure future rounds of the game, players must refrain from either incapacitating the other team or antagonizing them to such a degree, that they refuse to play again tomorrow. If one's rivals quit, there can be no future games. This means that although individuals play to win, they must do so with a degree of restraint. In a pickup basketball game, we play aggressively, but we know not to foul excessively—and to call a foul only when it is egregious. After all, you show up at the park to play a basketball game, not to fight. In politics, this often means eschewing dirty tricks or hardball tactics in the name of civility and fair play.

What does institutional forbearance look like in democracies? Consider the formation of governments in Britain. As constitutional scholar and author Keith Whittington reminds us, the selection of the British prime minister is "a matter of royal prerogative. Formally, the Crown could select anyone to occupy the role and form the government." In practice, the prime minister is a member of Parliament able to command a majority in the House of Commons—usually, the head of the largest parliamentary party. Today we take this system for granted, but for centuries the Crown adhered to it voluntarily. There is still no written constitutional rule.

Or take presidential term limits. For most of American history, the two-term limit was not a law but a norm of forbearance. Before ratification of the Twenty-Second Amendment in 1951, nothing in the Constitution dictated that presidents step down after two terms. But George Washington's retirement after two

terms in 1797 set a powerful precedent. As Thomas Jefferson, the first sitting president to follow the norm, observed,

> If some termination of the services of the [President] be not fixed by the Constitution, or supplied by practice, his office, nominally for four years, will in fact become for life. . . . I should unwillingly be the person who, disregarding sound precedent set by an illustrious predecessor, should furnish the first example of prolongation beyond the second term in office.

Thus established, the informal two-term limit proved remarkably robust. Even ambitious and popular presidents such as Jefferson, Andrew Jackson, and Ulysses S. Grant refrained from challenging it. When friends of Grant encouraged him to seek a third term, it caused an uproar, and the House of Representatives passed a resolution declaring:

> The precedent established by Washington and other presidents . . . in retiring from . . . office after their second term has become . . . a part of our republican system. . . . [A]ny departure from this time-honored custom would be unwise, unpatriotic, and fraught with peril to our free institutions.

Likewise, the Democratic Party refused to nominate Grover Cleveland for a nonconsecutive third term in 1892, warning that such a candidacy would violate an "unwritten law." Only FDR's reelection in 1940 clearly violated the norm—a violation that triggered the passage of the Twenty-Second Amendment.

Norms of forbearance are especially important in presidential democracies. As Juan Linz argued, divided government can

easily bring deadlock, dysfunction, and constitutional crisis. Unrestrained presidents can pack the Supreme Court or circumvent Congress by ruling via decree. And an unrestrained Congress can block the president's every move, threaten to throw the country into chaos by refusing to fund the government, or vote to remove the president on dubious grounds.

The opposite of forbearance is to exploit one's institutional prerogatives in an unrestrained way. Legal scholar Mark Tushnet calls this "constitutional hardball": playing by the rules but pushing against their bounds and "playing for keeps." It is a form of institutional combat aimed at permanently defeating one's partisan rivals—and not caring whether the democratic game continues.

Argentine presidents have long been masters of constitutional hardball. In the 1940s, President Juan Perón used his majority in congress to impeach three out of five supreme court justices, taking "maximum advantage" of a vaguely defined constitutional clause listing "malfeasance" as grounds for impeachment. Nearly half a century later, President Carlos Menem showed a similar flair for pushing the boundaries. Argentina's 1853 constitution was ambiguous in defining the president's authority to issue decrees. Historically, elected presidents had used this authority sparingly, issuing just twenty-five decrees between 1853 and 1989. Menem showed no such restraint, issuing 336 decrees in less than a single presidential term.

The judiciary may also be deployed for constitutional hardball. After opposition parties won control of the Venezuelan congress in a landslide election in December 2015, they hoped to use the legislature to check the power of autocratic president Nicolás Maduro. Thus, the new congress passed an amnesty law that would free 120 political prisoners, and it voted to block Maduro's declaration of a state of economic emergency (which

granted him vast power to govern by decree). To fend off this challenge, Maduro turned to the supreme court, which was packed with loyalists. The *chavista* court effectively incapacitated the legislature by ruling nearly all of its bills—including the amnesty law, efforts to revise the national budget, and the rejection of the state of emergency—unconstitutional. According to the Colombian newspaper *El Tiempo*, the court ruled against congress twenty-four times in six months, striking down "all the laws it has approved."

Legislatures may also overindulge their constitutional prerogatives. Take the 2012 impeachment of President Fernando Lugo in Paraguay. Lugo, a leftist ex-priest, was elected in 2008, ending the Colorado Party's sixty-one-year run in power. An outsider with few friends in congress, Lugo faced impeachment attempts throughout his presidency. These efforts succeeded in 2012, after the president's popularity had eroded and his former Liberal allies had abandoned him. The trigger was a violent conflict between police and peasant squatters that killed seventeen people. Although similar violence had occurred under previous governments, the opposition used the incident to bring Lugo down. On June 21, just six days after the killings, the chamber of deputies voted to impeach Lugo on grounds of "poor performance of duties." A day later, following a rushed trial in which the president had only two hours to present his defense, Lugo was removed from office by the senate. According to one observer, the trial was an "obvious farce. . . . Lugo's impeachment barely even rose to the level of show trial." Strictly speaking, however, it was legal.

Something similar happened in Ecuador in the 1990s. President Abdalá Bucaram was a populist who rose to the presidency by attacking Ecuador's political establishment. Nicknamed *El Loco*, or "The Crazy One," Bucaram thrived on controversy,

which tested the forbearance of his opponents. In his first months in office, he engaged in blatant nepotism, called former President Rodrigo Borja a "donkey," and distributed subsidized milk named after himself. Though scandalous, these were almost certainly not impeachable offenses. Nevertheless, efforts to impeach Bucaram began within weeks of his inauguration. When it became clear that the opposition lacked the two-thirds vote required for impeachment, it found a dubious but constitutional alternative: Ecuador's 1979 constitution allowed a simple legislative majority to remove the president on the grounds of "mental incapacity." On February 6, 1997, congress did just that. In a clear violation of the spirit of the constitution, it voted to remove Bucaram without even debating whether he was, in fact, mentally impaired.

The United States has also had its share of constitutional hardball. As we have noted, after the Fourteenth and Fifteenth Amendments formally established universal male suffrage, Democratic-controlled legislatures in the South came up with new means of denying African Americans the right to vote. Most of the new poll taxes and literacy tests were deemed to pass constitutional muster, but they were clearly designed to counter its spirit. As Alabama state legislator Anthony D. Sayre declared upon introducing such legislation, his bill would "eliminate the Negro from politics, and in a perfectly legal way."

Mutual toleration and institutional forbearance are closely related. Sometimes they reinforce each other. Politicians are more likely to be forbearing when they accept one another as legitimate rivals, and politicians who do not view their rivals as subversive will be less tempted to resort to norm breaking to keep them out of power. Acts of forbearance—for example,

a Republican-controlled Senate approving a Democratic president's Supreme Court pick—will reinforce each party's belief that the other side is tolerable, promoting a virtuous circle.

But the opposite can also occur. The erosion of mutual toleration may motivate politicians to deploy their institutional powers as broadly as they can get away with. When parties view one another as mortal enemies, the stakes of political competition heighten dramatically. Losing ceases to be a routine and accepted part of the political process and instead becomes a full-blown catastrophe. When the perceived cost of losing is sufficiently high, politicians will be tempted to abandon forbearance. Acts of constitutional hardball may then in turn further undermine mutual toleration, reinforcing beliefs that our rivals pose a dangerous threat.

The result is politics without guardrails—what political theorist Eric Nelson describes as a "cycle of escalating constitutional brinksmanship." What does such politics look like? Nelson offers an example: the collapse of Charles I's monarchy in England during the 1640s. A religious conflict between the Crown, the Church of England, and the Puritans in Parliament led to mutual accusations of heresy and treason and a breakdown of the norms that had sustained the English monarchy. England's constitutional tradition endowed Parliament with the exclusive right to collect the taxes necessary to fund the government. But Parliament, which viewed Charles as dangerously close to the papacy, refused to fund the monarchy unless it met a set of far-reaching demands, including a virtual dismantling of the Church of England. Parliament maintained this position even after England was invaded by the Scots and desperately needed revenue for national defense. Charles responded to this norm violation with some of his own: He dissolved Parliament and ruled without it for eleven years.

As Nelson observes, "At no point . . . did Charles claim the right to make law without parliament." Rather, he "simply tried to make do without the passage of any new laws." Eventually, the need for revenue drove Charles to circumvent Parliament's monopoly on taxation, which left his outraged opposition even more unyielding when Parliament reopened in 1640. As Nelson concludes, "The spiral of legislative obstruction and royal overreaching continued until it could be resolved only by war." The civil war that ensued dismantled the English monarchy and cost Charles his life.

Some of history's most tragic democratic breakdowns were preceded by the degrading of basic norms. One example can be found in Chile. Prior to the 1973 coup, Chile had been Latin America's oldest and most successful democracy, sustained by vibrant democratic norms. Even though Chilean political parties ranged from a Marxist left to a reactionary right, a "culture of compromise" predominated throughout much of the twentieth century. As reporter Pamela Constable and Chilean political scientist Arturo Valenzuela put it:

> Chile's strong, law-abiding traditions kept competition confined within certain rules and rituals, softening class hostility and ideological conflict. There was no argument, it was said, that could not be settled over a bottle of Chilean cabernet.

Beginning in the 1960s, however, Chile's culture of compromise was strained by Cold War polarization. Some on the left, inspired by the Cuban Revolution, began to dismiss the country's tradition of political give and take as a bourgeois anachronism. Many on the right began to fear that if the leftist Popular Unity coalition gained power, it would turn Chile into

another Cuba. By the 1970 presidential election, these tensions had reached extreme levels. Popular Unity candidate Salvador Allende faced what Radomiro Tomic, his Christian Democratic rival, described as a "gigantic campaign of hatred" in the media that "systematically foster[ed] fears" on the right.

Allende won, and although he was committed to democracy, the prospect of his presidency generated panic among conservatives. The extreme rightist Fatherland and Freedom Party demanded that Allende be kept out of office by any means necessary, and the right-wing National Party, funded by the CIA, engaged in hardball tactics before he was even sworn in. Chile's constitution stipulated that if no presidential candidate won at least 50 percent of the vote, the election would be decided by congress; Allende had won with only 36 percent. Although established norms dictated that congress elect the first-place candidate, no rule required such action. Abandoning forbearance, the National Party tried to persuade the centrist Christian Democrats to vote for its candidate, Jorge Alessandri, who had finished a close second. The Christian Democrats refused, but in exchange for their vote, they forced Allende to sign a constitutional Statute of Guarantees requiring the president to respect free elections and civil liberties such as press freedom. The demand was reasonable enough, but as Arturo Valenzuela observed, it "marked a breakdown in mutual understanding" between leaders "for whom a respect of the rules of the game had been implicit."

Allende's presidency witnessed the continued erosion of democratic norms. Lacking a legislative majority, his government was unable to fully implement its socialist program. So Allende exploited his presidential powers, threatening to pass laws via national referendum if congress blocked them and using "legal loopholes" to advance his program at the margins of the

legislature. The opposition responded in kind. In a speech delivered at a social gathering during the second month of Allende's presidency, right-wing senator Raúl Morales mapped out what he called a strategy of "institutional checkmate." Although the opposition lacked the two-thirds vote in the senate necessary to impeach Allende, a senate majority could remove ministers via a vote of censure. On the books since 1833, the censure vote was designed for use only in exceptional circumstances and had been seldom used before 1970. Now, however, it would be a weapon. In January 1972, the senate impeached Interior Minister José Tohá, a close Allende ally. Allende responded by reappointing Tohá to the cabinet as defense minister.

Partisan hostility intensified over the course of Allende's presidency. His leftist allies took to describing opponents as fascists and "enemies of the people," while rightists described the government as totalitarian. The growing mutual intolerance undermined efforts by Allende and the Christian Democrats to negotiate any sort of modus vivendi: Whereas Allende's radical allies viewed such negotiations as "opening the door to fascism," right-wing groups criticized Christian Democrats for not resisting the communist threat. To pass legislation, the government needed Christian Democratic support, but by early 1973 the Christian Democrats had decided, in the words of party leader Patricio Aylwin, to "not let Allende score a single goal."

Polarization can destroy democratic norms. When socioeconomic, racial, or religious differences give rise to extreme partisanship, in which societies sort themselves into political camps whose worldviews are not just different but mutually exclusive, toleration becomes harder to sustain. Some polarization is healthy—even necessary—for democracy. And indeed, the historical experience of democracies in Western Europe shows us that norms can be sustained even where parties are separated

by considerable ideological differences. But when societies grow so deeply divided that parties become wedded to incompatible worldviews, and especially when their members are so socially segregated that they rarely interact, stable partisan rivalries eventually give way to perceptions of mutual threat. As mutual toleration disappears, politicians grow tempted to abandon forbearance and try to win at all costs. This may encourage the rise of antisystem groups that reject democracy's rules altogether. When that happens, democracy is in trouble.

Politics without guardrails killed Chilean democracy. Both the government and the opposition viewed the March 1973 midterm legislative elections as an opportunity to win the fight for good. Whereas Allende sought the congressional majority he needed to legally impose his socialist program, the opposition sought the two-thirds majority necessary for Allende's "constitutional overthrow" via impeachment. But neither side achieved the majority it sought. Unable to permanently defeat each other and unwilling to compromise, Chilean parties threw their democracy into a death spiral. Hard-liners took over the Christian Democratic Party, vowing to employ any means necessary to block what ex-president Eduardo Frei described as Allende's "attempt to implement totalitarianism in Chile." And Allende's desperate efforts to reestablish a dialogue with the opposition were undercut by his own allies, who called on him to reject "all dialogues with reactionary . . . parties" and instead dissolve congress. Allende refused, but he sought to placate his allies by pushing harder against his opponents. When judicial authorities blocked the expropriation of forty firms seized by striking workers, Allende responded with a constitutionally dubious "decree of insistence," which in turn triggered opposition calls for his impeachment. One right-wing senator proclaimed on national television that Allende was now "an illegitimate

head of state," and in August 1973, the Chamber of Deputies passed a resolution declaring that the government was unconstitutional.

Less than a month later, the military seized power. Chileans, who had long prided themselves on being South America's most stable democracy, succumbed to dictatorship. The generals would rule Chile for the next seventeen years.

TAB 4

The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter

Yasmin Dawood*

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* Canada Research Chair in Democracy, Constitutionalism, and Electoral Law, and Associate Professor, Faculty of Law and the Department of Political Science, University of Toronto. I am grateful to Sonia Lawrence and an anonymous reviewer for their very helpful comments on an earlier version of the paper. My thanks as well to Vicki Jackson for a very helpful conversation on some of the themes in the paper. Special thanks are owed to Daiana Kostova, Ryan Shah, and Aya Schechner for their superb research and editorial assistance. This research was supported by the SSHRC and the Canada Research Chairs program.

I. INTRODUCTION

The Supreme Court of Canada's political process cases cover a wide array of issues, including the right to vote, electoral redistricting, campaign finance and the regulation of political parties.[1] This article focuses on the Court's most recent section 3 decision, *Frank v. Canada (Attorney General)*,[2] as well as an upcoming section 2(b) case, *Toronto (City) v. Ontario (Attorney General)*.[3] In *Frank*, the Court held that provisions banning long-term non-resident citizens from voting in a federal election infringed section 3 and were not justified under section 1 of the *Canadian Charter of Rights and Freedoms*.[4] While the *Frank* decision is notable for its powerful defence of the right to vote, it raises significant implications for the constitutionality of voter qualifications and election administration more generally.

Toronto (City) concerns Ontario's mid-election change to Toronto's electoral districts. Not only is this case unprecedented and disquieting, it also gives rise to a novel doctrinal puzzle: whether the mid-election restructuring of Toronto's electoral districts infringes the freedom of expression as protected by section 2(b) of the Charter. I argue that a central question in the case is whether courts ought to take a formal approach or a contextual approach to electoral expression, and its infringement, under section 2(b). While the formal approach is intuitive and logical, I claim that the contextual approach, which leads to a finding of infringement in this case,

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[1] The main cases are: *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158 (S.C.C.); *Sauvé v. Canada (Attorney General)*, [1993] S.C.J. No. 59, [1993] 2 S.C.R. 438 (S.C.C.); *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.); *Harvey v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 82, [1996] 2 S.C.R. 876 (S.C.C.); *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.); *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.); *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 (S.C.C.) [hereinafter "*Sauvé II*"]; *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.); *R. v. Bryan*, [2007] S.C.J. No. 12, 2007 SCC 12 (S.C.C.); *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31 (S.C.C.); *Opitz v. Wrzesnewskyj*, [2012] S.C.J. No. 55, 2012 SCC 55 (S.C.C.); *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General)*, [2017] S.C.J. No. 6, 2017 SCC 6 (S.C.C.); *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.).

[2] [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.) [hereinafter "*Frank*"].

[3] [2018] O.J. No. 4596, 2018 ONSC 5151 (Ont. S.C.J.) [hereinafter "*Toronto (City)* (ONSC)"]; *Toronto (City) v. Ontario (Attorney General)*, [2019] O.J. No. 4741, 2019 ONCA 732 (Ont. C.A.) [hereinafter "*Toronto (City)* (ONCA)"]; *Toronto (City) v. Ontario (Attorney General)*, [2019] S.C.C.A. No. 414 (S.C.C.).

[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

is ultimately more consistent with the Supreme Court's section 2(b) political process decisions.

Although *Frank* and *Toronto (City)* are not doctrinally connected, a joint appraisal of these two cases sheds light on the common underlying structure of the Court's doctrines under sections 3 and 2(b). As I have argued elsewhere, the Court's election law decisions identify multiple democratic rights[5] and are attuned to the institutional context within which these rights are exercised.[6] A joint appraisal also provides an opportunity to consider the relationship between section 3 and section 2(b). I claim that, with respect to political process cases, section 3 and section 2(b) are best understood as *distinct yet complementary rights* that are animated by the fundamental democratic values protected by the Charter.

This article is organized in three parts. Part II discusses *Frank* and considers some of its implications for future challenges to voter qualifications. Part III discusses the Court's approach in its election law cases, and addresses the relationship between section 3 and section 2(b). Part IV focuses on *Toronto (City)* and argues for a contextual approach to electoral expression, and its infringement, under section 2(b). The conclusion summarizes the main themes.

II. *FRANK V. CANADA (ATTORNEY GENERAL)* AND THE RIGHT TO VOTE

The *Canada Elections Act*[7] prohibited Canadians from voting in a federal election after spending five years residing outside the country, subject to certain exceptions such as membership in the public service or in international organizations.[8] In a decision by Penny J., the Ontario Superior Court held that the five-year non-resident voting restriction infringed section 3 of the Charter, and was not justified under section 1.[9] The court found that any limitation, such as the non-resident voting restriction, clearly constituted an infringement of the right to vote given the textual language of section 3.[10] None of the steps in the section 1 analysis were satisfied.[11]

In a 2-1 decision, the Ontario Court of Appeal reversed the Superior Court,

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[5] Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 254-55.

[6] Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499, 503, 519-23.

[7] S.C. 2000, c. 9.

[8] *Canada Elections Act*, S.C. 2000, c. 9, ss. 11(d), 222. These provisions were amended by *Elections Modernization Act*, S.C. 2018, c. 31, ss. 7, 152.

[9] *Frank v. Canada (Attorney General)*, [2014] O.J. No. 2098, 2014 ONSC 907, at paras. 98, 115, 130, 143, 153 (Ont. S.C.J.).

[10] *Frank v. Canada (Attorney General)*, [2014] O.J. No. 2098, 2014 ONSC 907, at paras. 79, 98 (Ont. S.C.J.).

[11] *Frank v. Canada (Attorney General)*, [2014] O.J. No. 2098, 2014 ONSC 907, at paras. 112-115, 126, 130, 136, 151 (Ont. S.C.J.).

holding that while the non-resident voting restriction infringed section 3 it was nonetheless justifiable under section 1.[12] The majority opinion by Strathy C.J.O. and Brown J.A. accepted the government's contention that its goal of preserving "the social contract" was a pressing and substantial objective.[13] The social contract idea, which was drawn from a passage in *Sauvé v. Canada (Chief Electoral Officer)*, referred to the connection between the "citizens' obligation to obey the law and their right to elect the lawmakers".[14] The majority found that rational connection, minimal impairment and the final balancing were all satisfied.[15] In a dissenting opinion, Laskin J.A. raised a number of concerns about the government's social contract objective and concluded that it did not satisfy any of the section 1 requirements.[16]

1. Residence and the Right to Vote

In a 5-2 majority decision by Wagner C.J.C., the Supreme Court held that the five-year non-resident voting restriction could not be justified under section 1.[17] Although the Attorney General had conceded that the non-resident voting restriction infringed section 3, the majority nevertheless addressed the right to vote and the role of residence in order to provide the proper context for the justification analysis.[18] Because voting is a "fundamental political right",[19] explained the majority, section 3 warrants a broad and purposive interpretation of its terms particularly in view of its exemption from the notwithstanding clause in section 33.[20] The majority emphasized that the Charter "tethers voting rights to citizenship, and citizenship alone".[21] For this reason, and consistent with *Sauvé II*,[22] the Court rejected internal

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[12] *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at para. 160 (Ont. C.A.).

[13] *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at para. 93 (Ont. C.A.).

[14] *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at para. 95 (Ont. C.A.), citing *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68, at para. 31 (S.C.C.) [hereinafter "*Sauvé II*"].

[15] *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at paras. 115-157 (Ont. C.A.).

[16] *Frank v. Canada (Attorney General)*, [2015] O.J. No. 3820, 2015 ONCA 436, at paras. 165-167 (Ont. C.A.), *per* Laskin J.A., dissenting.

[17] *Frank*, at para. 83. The majority opinion was joined by Moldaver, Karakatsanis, and Gascon JJ. For an analysis of *Frank*, see Léonid Sirota, *Doing Right on Rights*, CanLII Connects (February 9, 2019), online: <https://canliiconnects.org/en/commentaries/65435>.

[18] *Frank*, at paras. 4, 24-35.

[19] *Frank*, at para. 1.

[20] *Frank*, at paras. 25, 27, 31.

[21] *Frank*, at para. 29.

limits, such as residence, on the right to vote.[23] Section 3 makes no mention of residence, noted the majority, and this omission by the framers of the Charter is significant.[24] Residence is best treated as "an organizing mechanism for the purposes of the right to vote", rather than as an internal limit.[25]

Given the fundamental nature of the right to vote, any restrictions placed on section 3 must therefore "be carefully scrutinized and cannot be tolerated without a compelling justification".[26] The Court drew a sharp line between limitations on the right to vote, which require a stringent standard of justification, and laws regulating other aspects of the electoral process, such as campaign finance rules, which are subject to judicial deference.[27] The majority explained that the "natural attitude of deference", referenced in past decisions such *Harper v. Canada (Attorney General)*[28] and *R. v. Bryan*,[29] is appropriate for those cases that involve Parliament's choices with respect to "selecting and implementing Canada's electoral model" but not for the judicial review of "an absolute prohibition of a core democratic right".[30] The Court's position in *Frank* is consistent with its determination in *Sauvé II* that the "right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination."[31]

In a concurring opinion, Rowe J. expressed concern that the majority opinion had not recognized the importance of residence in Canada's system of representation.[32] For Rowe J., residence is not simply an organizing mechanism; instead, it is a foundational part of the system.[33] In addition, he emphasized that *Frank* should not foreclose the constitutional permissibility of residence requirements in another context.[34] While residence is not an inherent limit on the right to vote, it could still constitute a justifiable limit on section 3.[35]

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[22] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68, at para. 11 (S.C.C.).

[23] *Frank*, at para. 31.

[24] *Frank*, at para. 29.

[25] *Frank*, at para. 28.

[26] *Frank*, at para. 1.

[27] *Frank*, at para. 43.

[28] [2004] S.C.J. No. 28, 2004 SCC 33, at para. 87 (S.C.C.).

[29] [2007] S.C.J. No. 12, 2007 SCC 12, at para. 9 (S.C.C.).

[30] *Frank*, at paras. 43-44.

[31] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68, at para. 9 (S.C.C.).

[32] *Frank*, at para. 84, Rowe J., concurring.

[33] *Frank*, at para. 90, Rowe J., concurring.

[34] *Frank*, at para. 84, Rowe J., concurring.

[35] *Frank*, at para. 90, Rowe J., concurring.

2. Revisiting Objectives in the Section 1 Analysis

Frank is also significant for its discussion of the first step of the section 1 *Oakes* analysis, which requires a pressing and substantial objective. Although this step is usually easily satisfied, the *Frank* majority concluded that the government's social contract objective was not pressing and substantial because it was "at once too general, providing no meaningful ability to analyze the means employed to achieve it, and too narrow, effectively collapsing any distinction between legislative means and ends".[36] Because the social contract objective aims to prevent those who are not subject to Canada's laws from voting — which is also the effect of the means employed by the government (exclusion of citizens who are insufficiently subjected to the law) — the social contract objective was found to be no more than a restatement of the legislation itself.[37] In addition, the majority observed that the use of social contract theory by the Court of Appeal to uphold the disenfranchisement of long-term non-residents fundamentally misinterpreted the inclusive view of voting rights in *Sauvé II*.[38] Although the Court rejected the preservation of the social contract as a viable objective, it held that the related objective of maintaining electoral fairness was pressing and substantial.[39]

In a dissenting opinion, Côté and Brown JJ. argued for a new approach to section 1, urging that the analysis must acknowledge Parliament's policy-making and law-making capacity, including "defining and defending the boundaries of rights".[40] Consistent with its constitutional vision, the dissent explained that the term "limit" ought to be used instead of the term "infringement" when describing the government measure at issue.[41] Not only should Parliament have an active role in defining the boundaries of Charter rights, the dissent contended, but this role is particularly relevant for the right to vote because it is a "*positive* entitlement" as compared to most Charter rights, which are "*negative* in the sense that they preclude the state from acting in ways that would impair them".[42] In particular, explained the dissent, this approach implies that the legislature can pursue a range of objectives, some of

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[36] *Frank*, at para. 53. The Court cited the factum of the intervener David Asper Centre for Constitutional Rights for the idea that the social contract objective and the means used to bring it about were mutually defined. *Frank* (Factum of the Interveners, David Asper Centre for Constitutional Rights, University of Toronto Faculty of Law, at para. 13) [Disclosure: I was a member of the team that worked on the Asper factum].

[37] *Frank*, at para. 53.

[38] *Frank*, at paras. 51-52.

[39] *Frank*, at para. 54.

[40] *Frank*, at para. 126, Côté and Brown JJ., dissenting, referencing Grégoire C.N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009), at 104.

[41] *Frank*, at para. 121, Côté and Brown JJ., dissenting.

[42] *Frank*, at para. 142, Côté and Brown JJ., dissenting [emphasis in original].

which will be targeting a concrete problem while others will be pursuing "broader philosophical goals".[43] The dissent argued that although Parliament's social contract objective is based on a particular philosophical vision of democracy, this alone does not render it an illegitimate objective.[44]

3. Section 3 and the Question of Deference

The *Frank* majority doubted that the Attorney General had satisfied rational connection with respect to a residence limit of any duration.[45] However, the majority did not reach a final conclusion on rational connection since it found that the voting measure failed the minimal impairment stage. The time period of five years had little justification and was not carefully tailored to minimize the impairment of voting rights.[46] The limit was also overbroad in its application, denying the vote to citizens who continued to have a deep connection to Canada and who were often subject to its laws.[47] In the final balancing, the majority found that the salutary effects of ensuring electoral fairness were "illusory" and clearly outweighed by the deleterious effects of "disenfranchising well over one million non-resident Canadians who are abroad for five years or more".[48] In addition, the Court was not persuaded by the claim that the denial of the vote was temporary and reversible, observing that in "no other context do we tolerate the idea that a person can earn his or her *Charter* rights back through voluntary conduct".[49]

Notably, the *Frank* majority rejected rationales based on voter worthiness. For the Court, the denial of the right to vote not only undermines citizens' fundamental rights but it also "comes at the expense of their dignity and their sense of self-worth".[50] Thus, the denial of the right to vote "*in and of itself*, inflicts harm on affected citizens".[51] This harm is augmented when there is no evidence that the denial solves a concrete problem. In the absence of such a problem, the denial is inevitably about citizen worthiness, a rationale that the Court had rightly rejected in past cases.[52]

The dissenting opinion by Côté and Brown JJ. objected to the majority's

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[43] *Frank*, at para. 139, Côté and Brown JJ., dissenting.

[44] *Frank*, at para. 140, Côté and Brown JJ., dissenting.

[45] *Frank*, at para. 60.

[46] *Frank*, at para. 67.

[47] *Frank*, at paras. 68-72.

[48] *Frank*, at paras. 77-78.

[49] *Frank*, at para. 81.

[50] *Frank*, at para. 82.

[51] *Frank*, at para. 82 [emphasis in original].

[52] *Frank*, at para. 82.

"unjustifiably absolutist" interpretation of section 3.[53] Instead, the dissent urged an approach that has two key features. First, the dissent argued that Parliament was not attempting to solve a problem but rather was "quite properly striving to shape the boundaries of the right".[54] In view of Parliament's rights-shaping role, the dissent was deferential in the section 1 analysis, finding that Parliament's objective of preserving a relationship of currency between electors and the elected was pressing and substantial.[55] Rational connection and minimal impairment were met.[56] As for the final balancing, the salutary effects of preserving Parliament's conception of the right to vote outweighed the deleterious effect of the reversible disenfranchisement of long-term non-residents.[57]

Second, Côté and Brown JJ. placed considerable weight on the historical significance of Canada's geographically based electoral system as enshrined in the *Constitution Act, 1867*.[58] Rather than an adopting an originalist account of section 3, the dissent suggested that historical commitments about the regional structure of the electoral system are relevant to deciding whether a particular limit to section 3 is justifiable under section 1.[59] For the dissent, limits to voting rights should be deferentially treated in light of such historical commitments — a sharp contrast to the textualism, and vision of progressive enfranchisement, espoused by the *Frank* majority.

4. Voter Qualifications and Election Administration

The *Frank* decision has implications for voter qualifications, most notably, the minimum age requirement. As Colin Feasby argues, considerable support can be mustered for the view that the voting age could be lowered to 16 in the wake of *Frank*.[60] Future challenges could also be brought against other administrative

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[53] *Frank*, at para. 148, Côté and Brown JJ., dissenting.

[54] *Frank*, at para. 140, Côté and Brown JJ., dissenting.

[55] *Frank*, at paras. 139, 151-158, Côté and Brown JJ., dissenting.

[56] *Frank*, at paras. 150-151, 160-164, Côté and Brown JJ., dissenting.

[57] *Frank*, at paras. 168-172, Côté and Brown JJ., dissenting.

[58] *Frank*, at paras. 154-157, 169, Côté and Brown JJ., dissenting; *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[59] *Frank*, at para. 155, Côté and Brown JJ., dissenting. For an argument about the Court's use of history and originalism, see J. Gareth Morley, "Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court Act References Bring the Originalism Debate to Canada" (2016) 53 Osgoode Hall L.J. 745, at 746-50. For an analysis of the dissent's approach to section 1, see Prof. J. Weinrib, The *Frank* Dissent's Novel Theory of the Charter: The Rhetoric and the Reality, in this volume.

[60] Colin Feasby, "Taking Youth Seriously: Reconsidering the Constitutionality of the Voting Age" ABlawg (June 11, 2019), online: <http://ablawg.ca/wp-content/uploads/2019/06/Blog_CF_Frank.pdf>.

measures, such as voter identification requirements,[61] the location of polling places, the number of days of early voting, and so forth. Given the need for effective electoral administration, however, some limitations on the right to vote are to be expected.[62] The *Frank* majority was careful to insist that its rejection of internal limits did not mean that every restriction on the right to vote would necessarily be unconstitutional.[63] Limits must be justified under section 1 rather than being incorporated into the scope of the right itself.[64] Given the rigour of the Court's approach to section 1 with respect to voting restrictions, however, the available social science evidence may be insufficient.[65] The *Frank* majority acknowledged these evidentiary difficulties, stating that in such cases the government can rely on "inferential reasoning that is premised on logic and common sense".[66] While the *Frank* majority did not place much weight on the comparative experience of other democracies with respect to non-resident voting,[67] a comparative view could be useful in the absence of reliable social science evidence.

III. DEMOCRATIC RIGHTS UNDER SECTION 3 AND SECTION 2(b)

Frank provides an opportunity to consider the Supreme Court's political process jurisprudence as a whole.[68] The Court has played an important role in supervising democratic processes, rights and values. According to the Court, the principle of democracy is a "fundamental value in our constitutional law and political culture".[69] Many of its decisions have significant implications for democratic rights and the

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[61] Lower courts have upheld voter identification requirements as a justified infringement of section 3. See *Henry v. Canada (Attorney General)*, [2010] B.C.J. No. 798, 2010 BCSC 610 (B.C.S.C.); *Henry v. Canada (Attorney General)*, [2014] B.C.J. No. 122, 2014 BCCA 30 (B.C.C.A.), leave to appeal refused [2014] S.C.C.A. No. 134 (S.C.C.). For a discussion of voter identification requirements in Canada, see Maxime St-Hilaire & Léonid Sirota, "Canadian Voter Identification Requirements in a Comparative Perspective" (2015) J.P.P.L. 1.

[62] Although *Opitz v. Wrzesnewskyj*, [2012] S.C.J. No. 55, 2012 SCC 55 (S.C.C.) did not address the constitutionality of voter eligibility procedures, the Court was mindful of the need for various requirements to administer an election (at para. 38).

[63] *Frank*, at para. 31.

[64] *Frank*, at para. 31.

[65] Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election Law Cases" (2013-2014) 32 N.J.C.L. 173, at 176-80.

[66] *Frank*, at para. 64.

[67] *Frank*, at para. 62.

[68] For an overview and analysis, see Yasmin Dawood, "Democratic Rights" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017).

[69] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 61 (S.C.C.).

functioning of the electoral process. This set of political process cases can be described alternatively as the Court's election law decisions or as the law of democracy.[70] These cases have been decided under section 3,[71] section 2(b),[72] section 2(d)[73] and section 15.[74] Some cases address more than one Charter right.[75]

In these cases, the Court has developed complex and nuanced theories about democracy and the right to vote. As I have argued elsewhere, there are two important features of the Court's approach.[76] First, the Court has recognized multiple democratic rights;[77] second, it has paid attention to the individual and

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[70] Colin Feasby, "Constitutional Questions About Canada's New Political Finance Regime" (2007) 43 Osgoode Hall L.J. 514, at 539 (defining the law of the political process as encompassing decisions that fall under ss. 2, 3 and 15).

[71] The main section 3 cases are: *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158 (S.C.C.), *Sauvé v. Canada (Attorney General)*, [1993] S.C.J. No. 59, [1993] 2 S.C.R. 438 (S.C.C.), *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.), *Harvey v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 82, [1996] 2 S.C.R. 876 (S.C.C.), *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 (S.C.C.), *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37 (S.C.C.), *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.), and *Frank*.

[72] The main section 2(b) cases are: *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.), *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.), *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.), *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.), *R. v. Bryan*, [2007] S.C.J. No. 12, 2007 SCC 12 (S.C.C.), and *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General)*, [2017] S.C.J. No. 6, 2017 SCC 6 (S.C.C.).

[73] The main section 2(d) cases are: *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.) and *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.).

[74] The main section 15 case is *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.), in which the Court held that s. 15 was not infringed. In *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.), the Supreme Court held that a provision of the *Indian Act*, R.S.C. 1985, c. I-5 that excluded off-reserve band members from the right to vote in band elections infringed s. 15 and was not justified under s. 1.

[75] The cases which consider more than one right are: *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.), *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.), and *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33 (S.C.C.).

[76] Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 254-56.

[77] Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 254-55.

institutional aspects of these rights.[78] In so doing, the Court has developed a set of sophisticated jurisprudential tools to supervise various aspects of democratic governance — not only the structures, institutions and processes of democracy, but also its values, ideals and principles. As a result of its nuanced treatment of democratic rights, the Court has considerable flexibility in responding to a wide range of issues — such as electoral redistricting, campaign finance regulation, voter qualifications and the regulation of political parties.[79]

1. Democratic Rights Under Section 3

The first feature of the Court's approach, I claim, is that the Court has interpreted the right to vote as a plural right. That is, the Court has adopted what I refer to as a "bundle of rights" approach, which recognizes multiple democratic rights, each of which is concerned with a particular facet of democratic participation and governance.[80] Following a purposive approach, the Court has recognized that section 3 protects, in addition to the activities of voting and running for office, the following democratic rights: (1) the right to effective representation; (2) the right to meaningful participation; and (3) the right to an informed vote.[81]

Not only are these democratic rights indispensable to the Court's review of the democratic process, but the violation of any right constitutes a breach of section 3. The Court has also identified a fourth democratic right, noting that section 3 "imposes on Parliament an obligation not to interfere with the *right of each citizen to participate in a fair election*".[82] Although the right to participate in a fair election is underdeveloped, I have argued elsewhere that it offers a promising way for the

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[78] Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 254-55.

[79] Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 256; Yasmin Dawood, "Democratic Rights" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), at 724-25.

[80] Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 254-55.

[81] Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499, at 524. In the *Saskatchewan Reference*, McLachlin J. (as she was then) stated that "the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to 'effective representation'": *Reference re Provincial Electoral Boundaries (Saskatchewan)*, [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158, at 183 (S.C.C.). For a discussion of the right to effective representation, see Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 269-75.

[82] *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at para. 51 (S.C.C.) [emphasis added].

Court to ensure the fairness and legitimacy of the electoral process.[83] For instance, it would enable the Court to counter the undue influence of partisanship on the formation of electoral laws.[84]

The second feature of the Court's approach is that it has been highly attuned to the dual individual-institutional nature of democratic rights. Rights do not exist in a vacuum but are instead exercised within a particular political, institutional and societal context. For example, the right to vote presupposes the existence of an entire infrastructure of institutions and actors, including candidates, electoral districts, elections, political parties and legislatures. Democratic rights are held by individuals, yet the exercise of these rights takes place within a particular institutional context. I use the term "structural rights" to capture the complex nature of democratic rights.[85] The participation of individuals is the key focus (hence the emphasis on rights), but individuals exercise these rights within an institutional context (hence the emphasis on structure).[86]

Although the Court does not employ the language of "structural rights", its decisions are notable for their attention to the complex nature of democratic rights. The democratic rights described above — the right to effective representation, the right to meaningful participation and the right to an informed vote — have both an individual and an institutional dimension. Although the Court has described these rights as being held by individuals, it is attuned to the broader institutional framework within which these democratic rights are defined, held and exercised.[87]

To illustrate both features of the Court's approach, consider the right to play a meaningful role in the democratic process.[88] This right was first recognized by the Court in *Haig v. Canada (Chief Electoral Officer)*[89] and subsequently developed in *Figueroa v. Canada (Attorney General)*.[90] In *Figueroa*, the Court found that the purpose of section 3 "includes not only the right of each citizen to have and to vote

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[83] Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499, at 504.

[84] Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499, at 504.

[85] Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499, at 519-20, 525.

[86] Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 255-56.

[87] Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499, at 519-25.

[88] For a discussion of the right to play a meaningful role in the democratic process, see Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 276-81.

[89] [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1031 (S.C.C.).

[90] [2003] S.C.J. No. 37, 2003 SCC 37 (S.C.C.). The right to meaningful participation was

for an elected representative in Parliament or a legislative assembly, but also *the right of each citizen to play a meaningful role in the electoral process*".[91] In a democracy, each citizen "must have a genuine opportunity to take part in in the governance of the country through participation in the selection of elected representatives".[92] In *Figueroa*, the Court held that a registration rule that denied benefits to smaller political parties infringed section 3 and was not justifiable under section 1.[93] Although this registration rule did not prevent citizens from casting a ballot, it diminished the ability of citizens to participate fully in the democratic process. As noted by the Court, political parties act "as both a vehicle and outlet" for the participation of citizens in the electoral process.[94] Thus, the rules governing political parties have a direct impact on the ability of citizens to play a meaningful role in the democratic process.[95] The right to meaningful participation, while held by individuals, has an institutional dimension because an individual's ability to participate meaningfully is affected by the broader institutional framework within which her participation is taking place.

2. Democratic Rights Under Section 2(b)

As the Supreme Court has observed, "voting is a form of expression"[96] and section 2(b) pertains to the "expressive aspects of voting".[97] Campaigning is another activity that receives section 2(b) protection. Election advertising is situated at the "core" of free expression, "war-rant[ing] a high degree of constitutional protection".[98] The Court has affirmed that the connection "between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee".[99]

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also acknowledged in *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1, at para. 26 (S.C.C.).

[91] *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at para. 25 (S.C.C.) [emphasis added].

[92] *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at para. 30 (S.C.C.).

[93] *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at paras. 3, 90 (S.C.C.).

[94] *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, at para. 39 (S.C.C.).

[95] For a discussion of *Figueroa*, see Heather MacIvor, "The *Charter* of Rights and Party Politics: The Impact of the Supreme Court Ruling in *Figueroa v. Canada (Attorney General)*" (2004) 10:4 IRPP Choices 1.

[96] *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1040 (S.C.C.).

[97] *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 57 (S.C.C.).

[98] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 84 (S.C.C.).

[99] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 763-764 (S.C.C.).

I argue that, similar to its approach under section 3, the Court has interpreted section 2(b) to protect more than a person's right to cast a ballot or engage in campaigning. I claim that the Court has identified two democratic rights — the right to equal participation and the right to a free and informed vote — that apply to electoral expression under section 2(b). These two rights were first recognized in *Libman v. Quebec (Attorney General)*[100] and subsequently endorsed in *Harper v. Canada (Attorney General)*.[101]

The right of equal participation was first recognized by the Court in *Libman*.[102] The Court explained that to "ensure a *right of equal participation in democratic government*, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others".[103] The Court held that restrictions on independent spending in the context of a referendum infringed section 2(b) and were not justified under section 1.[104] Although the Court struck down the restrictions, it appeared to favour, as noted by Colin Feasby, an "egalitarian" approach to the rules governing spending during a referendum or an election.[105] Due to the "competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard".[106] In *Harper*, Bastarache J. labelled *Libman*'s first principle, "the right of equal participation in democratic government", as being concerned with an "equal dissemination of points of view".[107]

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[100] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.).

[101] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.).

[102] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.). For a discussion of the right of equal participation, see Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 281-85.

[103] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.) [emphasis added].

[104] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at paras. 35, 85 (S.C.C.).

[105] Colin Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999) 44 McGill L.J. 5, at 8, 31-32.

[106] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.).

[107] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.).

The right to a free and informed vote was also first identified in *Libman*.[108] The Court recognized "the *right of electors to be adequately informed* of all the political positions advanced by the candidates and by the various political parties".[109] In *Harper*, the Court labelled this right in *Libman* as a "free and informed vote".[110] Although the right to a free and informed vote falls within the scope of section 2(b), I claim that, in *Harper*, the Court recognized that the right to a free and informed vote also protects an interest under section 3. The Court explained that the "right to meaningful participation includes a *citizen's right to exercise his or her vote in an informed manner*".[111] Voters must "be able to weigh the relative strengths and weaknesses of each candidate and political party".[112] In addition, the citizen "must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist".[113] Drawing from *Libman*, the Court declared that "the voter has a right to be 'reasonably informed of all the possible choices'".[114] To be an informed voter, voters must "be able to hear all points of view", which means that the "information disseminated by third parties, candidates and political parties cannot be unlimited" because the political discourse could otherwise be dominated by the affluent or by groups who can "flood the electoral discourse with their message".[115] This unequal dissemination of viewpoints undermines the "voter's ability to be adequately informed of all views".[116]

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[108] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.). For a discussion of the right to a free and informed vote, see Yasmin Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 285-90.

[109] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.) [emphasis added]. An earlier version of the right appeared in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 98 (S.C.C.).

[110] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.).

[111] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.) [emphasis added].

[112] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.).

[113] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.).

[114] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.), citing *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.).

[115] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 72 (S.C.C.).

[116] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 72 (S.C.C.).

Since the right to a free and informed vote was discussed interchangeably by the Court as protecting an interest under both section 2(b) and section 3, I argue that this right is the one area of doctrinal overlap between sections 2(b) and 3. In addition, and similar to the rights under section 3, the right of equal participation and the right to a free and informed vote are intelligible only with reference to the larger institutional, political, and social context within which these rights are exercised.

In my view, the Court's discussion of these two rights suggests that they are not intended for exclusive use by the government to justify campaign finance limits. Instead, I argue that these principles can be used by the Court as a general matter to assess the constitutional sufficiency of legislation that has an impact on electoral expression. In *Harper*, the Court noted that in *Libman* it had "endorsed several principles applicable to the regulation of election spending",[117] including the right of equal participation and the right to a free and informed vote. The Court also observed that its own conception of electoral fairness, as reflected in the *Libman* principles, was "consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society".[118] This wording suggests that the Court has established an independent set of principles and rights — one which is consistent with Parliament's egalitarian model. Certainly, these two rights can be used as the basis for the government's legislative objectives. Indeed, in *R. v. Bryan*, the government identified "informational equality among voters" as a pressing and substantial objective.[119] Informational equality can be viewed as the government-objective corollary of the right to a free and informed vote.

3. The Relationship Between Section 3 and Section 2(b)

Although sections 3 and 2(b) can both apply to the same set of facts, they are not interchangeable provisions. In my view, section 3 and section 2(b) are best understood as *distinct yet complementary rights* that are animated by the fundamental democratic values protected by the Charter. In *Thomson Newspapers Co. v. Canada (Attorney General)*, the Court explained that one significant distinction between these rights is that section 2(b) is subject to the override in section 33 of the Charter, but section 3 is not.[120] The Court rejected a hierarchical approach to rights, and instead observed that "*Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights".[121]

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[117] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 61 (S.C.C.).

[118] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 62 (S.C.C.).

[119] [2007] S.C.J. No. 12, 2007 SCC 12, at paras. 12, 35 (S.C.C.).

[120] [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 79 (S.C.C.).

[121] *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 877 (S.C.C.), as cited in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 80 (S.C.C.).

In the event of an overlap between the right to free expression and the right to vote, "[e]ach right is distinct and must be given effect".[122] In *Baier v. Alberta*, the Court clarified that the scope of one Charter right does not narrow the scope of another.[123] Section 3, the Court explained, "does not 'occupy the field' just because the right claimed . . . involves standing for an election".[124] When both the right to vote and free expression are at issue "*each* right must be given effect".[125] This means that "finding that s. 3 does not apply does not foreclose consideration of a claim under s. 2(b)".[126] In the event of a conflict between the right to vote and freedom of expression, it is necessary to "find an appropriate balance between both sets of rights".[127]

Although section 3 and section 2(b) are distinct rights, I argue that both provisions share the common ground of fundamental democratic values. According to the Court, the Charter "protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada".[128] The content of each right "imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole".[129] As noted by the Court, "a value-oriented approach to the broadly worded guarantees of the *Charter* has been repeatedly endorsed by *Charter* jurisprudence over the last quarter century".[130] For these reasons, I claim that sections 3 and 2(b) are *distinct* rights with their own meaning and precedents, but are also *complementary* rights because they are animated by and jointly reinforce the fundamental democratic values protected by the Charter.[131]

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[122] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 80 (S.C.C.).

[123] [2007] S.C.J. No. 31, 2007 SCC 31, at para. 58 (S.C.C.).

[124] *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 59 (S.C.C.).

[125] *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 59 (S.C.C.).

[126] *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 59 (S.C.C.).

[127] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 80 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at paras. 67, 72-74 (S.C.C.).

[128] *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 58 (S.C.C.) [citations omitted], quoting from *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 326 (S.C.C.). According to the Court, the values essential to a free and democratic society include "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society." *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 64 (S.C.C.).

[129] *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 58 (S.C.C.), quoting from *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 326 (S.C.C.).

[130] *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20, at para. 96 (S.C.C.).

[131] For a discussion of the democratic values of equality and liberty in the context of

IV. *TORONTO (CITY) V. ONTARIO (ATTORNEY GENERAL)* AND THE FREEDOM OF EXPRESSION

The Supreme Court's section 2(b) political process jurisprudence is relevant to the upcoming *Toronto (City)* case. The facts of this case are unprecedented. In 2018, the Province of Ontario enacted Bill 5, known as the *Better Local Government Act, 2018*, which reduced the number of electoral wards in the City of Toronto from 47 to 25.[132] When Bill 5 came into force on August 14, 2018, Toronto's municipal election had already been underway since May 1, 2018 under the 47-ward structure, with 509 candidates running for municipal office.[133] Election day was set for October 22, 2018. The Ontario Superior Court held that Bill 5 was unconstitutional on the basis that it unjustifiably infringed section 2(b).[134] Within a few days, the Ontario Court of Appeal granted a stay on the Superior Court's order, allowing the election to proceed along the new 25-ward structure.[135] The following year, in a 3-2 judgment on the merits, the Ontario Court of Appeal reversed the Superior Court on the basis that Bill 5 had not infringed section 2(b).[136] The Supreme Court granted leave to appeal in March 2020.[137]

Toronto (City) raises a novel doctrinal issue: did the mid-election restructuring of Toronto's electoral districts infringe the freedom of expression as protected by section 2(b) of the Charter? In what follows, I claim that a central question in the case is whether courts ought to take a formal approach or a contextual approach to electoral expression, and its infringement, under section 2(b). A formal approach treats the expressive activity in isolation, without reference to the wider circumstances in which the expressive activity takes place. Under a formal approach, it is irrelevant that the expression in question is that of registered candidates campaigning in an election for public office during the official election period.

A contextual approach, by contrast, treats the expressive activity as being embedded within a particular institutional, political and social context. Under a contextual approach, the fact that the expression is *electoral* is central to the analysis. The use of the term "contextual" here is conceptually consistent with the contextual approach to section 1 analysis. As Wilson J. explained in *Edmonton*

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electoral expression, see Yasmin Dawood, "Democracy and the Freedom of Speech: Rethinking the Conflict Between Liberty and Equality" (2013) 26 Can J.L. & Jur. 293.

[132] *Better Local Government Act, 2018*, S.O. 2018, c. 11.

[133] *Toronto (City) v. Ontario (Attorney General)*, [2018] O.J. No. 4596, 2018 ONSC 5151, at paras. 4-5 (Ont. S.C.J.) [hereinafter "*Toronto (City)* (ONSC)"].

[134] *Toronto (City)* (ONSC), at para. 10.

[135] *Toronto (City) v. Ontario (Attorney General)*, [2018] O.J. No. 4742, 2018 ONCA 761, at para. 1 (Ont. C.A.).

[136] *Toronto (City) v. Ontario (Attorney General)*, [2019] O.J. No. 4741, 2019 ONCA 732, at paras. 6-8 (Ont. C.A.) [hereinafter "*Toronto (City)* (ONCA)"].

[137] *Toronto (City) v. Ontario (Attorney General)*, [2019] S.C.C.A. No. 414 (S.C.C.).

Journal v. Alberta (Attorney General), "[o]ne virtue of the contextual approach . . . is that it recognizes that a particular right or freedom may have a different value depending on the context".[138] The contextual approach is relevant both with respect to the determination of the meaning and scope of the right, and with respect to section 1 balancing.[139] In practice, however, the contextual approach has been predominantly used in the section 1 balancing,[140] subject to some limited exceptions.[141]

To explore these ideas, this Part is organized in the following sections. Part IV.1 briefly discusses the lower court judgments. Part IV.2 elaborates the *Irwin Toy*[142] framework and applies it to Bill 5. The main issue is whether Bill 5, in its effects, infringes section 2(b). Part IV.3 sets out three distinct approaches under the contextual account, all of which lead to a finding that section 2(b) is infringed. First, Bill 5 infringes the candidates' electoral expression. Second, Bill 5 also infringes the two principles —- the candidates' right to equal participation and the voters' right to a free and informed vote —- which are protected by section 2(b). Third, under a broader contextual account, Bill 5 also infringes section 2(b)'s protection of the deliberative exchange among all electoral participants, an approach exemplified by MacPherson J.A.'s dissenting judgment at the Court of Appeal. Part IV.4 focuses on the *Baier* framework and positive rights. Part IV.5 compares the formal and

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[138] [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, at 1355 (S.C.C.), Wilson J., concurring.

[139] As Wilson J. put it, "a right or freedom may have different meanings in different contexts", and as a result, the "value to be attached to in different contexts for the purpose of the balancing under s. 1 might also be different." *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, at 1365 (S.C.C.), Wilson J., concurring. In a later case, Cory J. explained that "[c]ontext is relevant both with respect to the delineation of the meaning and scope of *Charter* rights, as well as the determination of the balance to be struck between individual rights and the interests of society." *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154, at 226 (S.C.C.), Cory J., dissenting in part.

[140] The contextual approach has been used extensively in the s. 1 analysis in freedom of expression cases in order to draw distinctions between different forms of expression. See Kent Roach & David Schneiderman, "Freedom of Expression in Canada" (2013) 61 S.C.L.R. (2d) 429, at 439. For a critique of the Court's contextual approach in s. 2(b) cases, see Jamie Cameron, "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012" (2012) 58 S.C.L.R. (2d) 163, at 171; Jamie Cameron, "Justice in Her Own Right: Bertha Wilson and the Canadian Charter of Rights and Freedoms" (2008) 41 S.C.L.R. (2d) 371, at 401-402.

[141] For example, the contextual approach has been used to determine the scope of rights in s. 7 and s. 8 cases: *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154, at 238 (S.C.C.), Cory J., dissenting in part; *R. v. White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417, at paras. 45-48 (S.C.C.); *R. v. Fitzpatrick*, [1995] S.C.J. No. 94, [1995] 4 S.C.R. 154, at paras. 49-52 (S.C.C.).

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

contextual approaches, and concludes that the contextual approach is ultimately more persuasive.

1. Decisions of the Superior Court and the Court of Appeal

At the Ontario Superior Court, Belobaba J. found that Bill 5 unjustifiably infringed section 2(b) in two respects.[143] First, the candidate's freedom of expression was breached by the enactment of the new ward structure while the election campaign was already underway.[144] Relying on the *Irwin Toy* framework, Belobaba J. held that Bill 5's mid-election change to the electoral districts "substantially interfered with the candidate's ability to effectively communicate his or her political message to the relevant voters".[145] Second, the voter's free expression "right to cast a vote that can result in effective representation" was breached by Bill 5's effect of nearly doubling the population size of the wards.[146]

In a majority judgment by Miller J.A., the Court of Appeal held that Belobaba J. incorrectly expanded the scope of section 2(b) from a protection against government interference with expression to a guarantee that "government action would not impact the effectiveness of that expression in achieving its intended purpose".[147] That is, section 2(b) protects individuals from government interference with the expressive activity itself, not the intended result of the activity.[148] Thus, legislation that changes the ward structure, "such that a person's past communications lose their relevance and no longer contribute to the desired project (election to public office)" does not amount to an infringement of section 2(b).[149] As for the second infringement, Miller J.A. held that it was based on an interpretation of free expression that impermissibly imported the value of effective representation from section 3 into the scope of section 2(b).[150]

In addition, Miller J.A. held that the candidates were actually making a positive rights claim to a platform for expression, and therefore *Baier*, rather than *Irwin Toy*, applied.[151] According to Miller J.A., the first two steps of the test in *Baier* were met.[152] This establishes that the claim is a positive rights claim, at which point, at

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[143] *Toronto (City)* (ONSC), at paras. 10, 20.

[144] *Toronto (City)* (ONSC), at para. 20.

[145] *Toronto (City)* (ONSC), at para. 32.

[146] *Toronto (City)* (ONSC), at para. 20.

[147] *Toronto (City)* (ONCA), at para. 39.

[148] *Toronto (City)* (ONCA), at para. 41.

[149] *Toronto (City)* (ONCA), at para. 41.

[150] *Toronto (City)* (ONCA), at para. 71. I agree with this assessment.

[151] *Toronto (City)* (ONCA), at para. 48.

[152] The majority found that the first step of *Baier* was met: a form of expression (electoral campaigning) was at issue. At the second step, the majority determined that the claimants were making a positive rights claim to a particular platform, rather than a claim to be free from government interference. *Toronto (City)* (ONCA), at paras. 51, 55, applying *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 30 (S.C.C.).

the third step of *Baier*, the three factors set forth in *Dunmore v. Ontario (Attorney General)* must be satisfied.[153] Because none of the three *Dunmore* factors could be satisfied in this case, Miller J.A. held that the claimants' section 2(b) claim had failed.[154]

In a dissenting opinion, MacPherson J.A. held that Bill 5 infringed section 2(b) because it "substantially interfered with the right of all electoral participants to freely express themselves within the terms of the election after it had begun".[155] The mid-election timing of Bill 5 "changed the entire landscape" of an election that was almost two-thirds of the way through the election period.[156] As such, it amounted to a "substantial attack on the centrepiece of democracy" in an active election in one of the three levels of government.[157]

2. The *Irwin Toy* Framework

To determine whether expressive activity is protected by section 2(b), there are three inquiries under the *Irwin Toy* framework. First, does the activity in question have expressive content, thereby bringing it within the scope of section 2(b) protection? Second, is the activity excluded from that protection as a result of either the method or location of expression? Third, if the activity is protected by section 2(b), does an infringement of the protected right result from either the purpose or the effect of the government action?[158] The first two steps are met: the activity in question — electoral expression — falls within the scope of section 2(b) and there is nothing about its method or location that would warrant exclusion. As for the third step, the main question is whether Bill 5, in purpose or effect, infringed the freedom of expression.

The purpose of Bill 5 does not infringe free expression. In order to effectuate the

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[153] *Toronto (City)* (ONCA),, at para. 56, citing *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, 2001 SCC 94, at paras. 24-26 (S.C.C.) [hereinafter "*Dunmore*"].

[154] Under the first *Dunmore* factor, the majority reasoned that the candidates' claim was not grounded in the freedom of expression because it was ultimately concerned with the efficacy of expression, which is not protected by s. 2(b). While the claim failed here, Miller J.A. nonetheless analyzed the two remaining factors. Under the second factor, the majority concluded that there was no substantial interference because the ward change did not prevent the candidates from engaging in expression. As for the third factor, the majority stated that this factor must also fail because the claimants had not been barred from engaging in free expression. *Toronto (City)* (ONCA), at paras. 60-61, 63, 68.

[155] *Toronto (City)* (ONCA), at para. 128, MacPherson J.A., dissenting.

[156] *Toronto (City)* (ONCA), at para. 114, MacPherson J.A., dissenting.

[157] *Toronto (City)* (ONCA), at para. 116, MacPherson J.A., dissenting.

[158] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 967-977 (S.C.C.); *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, 2005 SCC 62, at para. 56 (S.C.C.); *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, 2011 SCC 2, at para. 38 (S.C.C.).

change to the ward system, however, Ontario enacted regulations in addition to Bill 5. One of these regulations, Ontario Regulation 407/18,[159] which came into effect on August 15, 2018, established special rules for the 2018 and 2022 elections by replacing various provisions of the *Municipal Elections Act, 1996*.[160] Reg 407/18 provides a number of new campaign finance rules, including directing the city clerk to calculate new maximum expense limits for candidates,[161] establishing a new formula for determining the number of electors,[162] requiring the use of this new formula to calculate the expense limits for candidates and third parties,[163] and directing the city clerk to notify candidates about their maximum expense limits.[164]

It is plausible to argue that the campaign finance provisions in Reg 407/18 satisfy the purpose prong of the *Irwin Toy* framework. A possible objection, however, is that Reg 407/18 did not engage in a "restriction" of speech because the new campaign finance limits were doubled due to the larger ward sizes imposed by Bill 5. Yet *Irwin Toy* does not draw this distinction: it simply asks "whether the purpose or effect of the impugned governmental action was to *control* attempts to convey meaning through that activity".[165] *Irwin Toy* is not concerned with whether the government has engaged in greater or lesser regulation of expression as compared to some earlier state of affairs; the only issue is whether the government has aimed to control expression. The *Irwin Toy* infringement standard is easy to meet; courts seem to accept any degree of limitation as a restriction of section 2(b). That being said, even if the purpose of Reg 407/18 is to control expression, it would likely be treated separately from Bill 5.

For this reason, the effects prong of *Irwin Toy* must be considered. As described above, the second step of *Irwin Toy* asks whether the impugned law, in purpose or effect, restricts the freedom of expression. For the effects prong, a claimant must additionally show that her activity promotes at least one of values underlying free expression, namely, the pursuit of truth, democratic participation or individual self-fulfillment.[166] This additional requirement is met since electoral expression clearly advances the underlying values of section 2(b).

The remaining question is whether the effects of Bill 5 restrict expression. Both

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[159] *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18 [hereinafter "Reg 407/18"].

[160] S.O. 1996, c. 32, Sch.

[161] *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18, ss. 10(2), 10(3).

[162] *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18, s. 11(2).

[163] *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18, s. 11(2).

[164] *2018 and 2022 Regular Elections – Special Rules*, O. Reg. 407/18, ss. 10(2), 10(3).

[165] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 972 (S.C.C.) [emphasis added].

[166] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 976 (S.C.C.).

Belobaba J. at the Superior Court and MacPherson J.A. dissenting at the Court of Appeal found that Bill 5 "substantially interfered" with free expression.[167] The "substantial interference" standard of infringement is used in section 2(d) cases. It is also used under the positive rights section 2(b) *Baier*/*Dunmore* test because *Dunmore* is a section 2(d) case. The "substantial interference" test is considered to be far more demanding than the infringement standard under section 2(b).[168] No doubt this tougher standard was used by Belobaba J. and MacPherson J.A. because if the section 2(b) infringement standard is satisfied under the positive rights *Baier* framework, then it would certainly be met under the *Irwin Toy* framework. For clarity, though, "substantial interference" is not the standard under *Irwin Toy* for demonstrating infringement when the effects of government action are at issue.[169] To demonstrate an infringement, *Irwin Toy* asks "whether the purpose or effect of the government action in question was to restrict freedom of expression", which the Court alternatively describes as an inquiry into whether "the purpose or effect of the impugned governmental action was to control attempts to convey meaning through that activity".[170]

3. The Contextual Approach to Electoral Expression

To shed further light on the question of whether Bill 5, in its effects, infringed section 2(b), it is helpful to consider, first, the nature of electoral expression, and, second, the impact of Bill 5 and its accompanying regulations on electoral expression.

(a) Electoral Expression as Legally Mediated Speech

Campaign speech plays a central role in the election process. It is comprised of two kinds of speech: regulated and unregulated. Unregulated campaign speech is akin to ordinary expression: it takes place when candidates have conversations with voters, engage in debates with political opponents or give interviews to the media. Regulated speech — which I will refer to as "electoral expression" — is subject to a set of complex and stringent rules in order to ensure the fairness of an election. In the electoral context, money is effectively the equivalent of speech. To ensure electoral fairness, campaign finance rules place strict limits on the amount of money

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[167] *Toronto (City)* (ONSC), at paras. 10, 32, 38; *Toronto (City)* (ONCA), at para. 128, MacPherson J.A., dissenting.

[168] Jamie Cameron & Nathalie Des Rosiers, "The Right to Protest, Freedom of Expression, and Freedom of Association" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), at 749.

[169] *Langenfeld v. Toronto Police Services Board*, [2019] O.J. No. 4619, 2019 ONCA 716, at paras. 33, 36-39 (Ont. C.A.) (affirming that the "substantial interference" standard should not be used for the effects prong of *Irwin Toy*).

[170] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 971-972 (S.C.C.).

that candidates can spend on election advertising during the election period. There are also limits that apply to donors and third parties.

The *Municipal Elections Act, 1996*, as modified by Bill 5 and its accompanying regulations, contains several rules specifying the amount of money that can be spent by candidates or contributed to them. Crucially, there are significant penalties for breach. If a candidate for municipal office contravenes any provision of the *Municipal Elections Act, 1996*, she is guilty of an offence.[171] If convicted of an offence, she could be fined up to $25,000.[172] If a judge finds that a candidate knowingly committed an offence, the candidate can be imprisoned for a term of up to six months.[173] This means that if a municipal candidate knowingly overspends on election advertising — that is, knowingly engages in more electoral expression than the rules allow — she could face imprisonment if she is convicted. The possibility of incarceration as a consequence for engaging in political speech signals that electoral expression can be distinguished from ordinary expression. We might ask why it is constitutionally permissible to imprison a municipal candidate for six months for knowingly engaging in more political speech than is allowed by the *Municipal Elections Act, 1996*. The answer is that electoral expression amounts to a particular kind of expression that is heavily regulated in order to ensure the fairness of elections. The legally mediated nature of electoral expression is what distinguishes it from ordinary speech.

(b) The Impact of Bill 5 on Electoral Expression

In order to explore the impact of Bill 5 on the candidates' electoral expression and the campaign finance rules to which they were subject, I have developed a stylized illustration. Bill 5's provisions, and the provisions of Reg 407/18, are elaborated in detail in order to counter the idea that the problem lies with the underlying *Municipal Elections Act, 1996* and not with Bill 5.[174] While the sums of money are simplified for convenience, the illustration uses the actual provisions of Bill 5 and its accompanying regulations, as detailed in the notes.

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[171] *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 94.

[172] *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 94.1(1).

[173] *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 94.1(1).

[174] Ontario claims that there is "no evidentiary foundation" for the court "to address a s 2(b) challenge with respect to electoral finances". Such a claim, argues Ontario, would require expert evidence analyzing "detailed information on campaign fundraising and spending from a broad range of candidates who entered the race before or after Bill 5 was enacted". *Toronto (City)* (ONCA) (Reply Factum of the Appellant Attorney General of Ontario at para. 23) [citations omitted]. This assertion is puzzling. A court could simply read the plain words of Bill 5 and the accompanying regulations to discover how the new rules applied to candidates who had registered prior to Bill 5 coming into force. In *Harper*, for example, the Supreme Court interpreted the campaign finance provisions in the *Canada Elections Act* without recourse to an in-depth study. *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at paras. 53, 57 (S.C.C.).

The illustration involves two candidates, Candidate A ("Anna") and Candidate B ("Bob"). Anna registered as a municipal candidate for Ward 47 on May 1, the first day of the election period.[175] Her spending limit for electoral expression was $1,000 for the election period.[176] Anna spent $1,000 on lawn signs, which displayed her name, a map of Ward 47, and a slogan "Anna for Ward 47". The nomination period ended on July 27.[177]

Bill 5 came into force on August 14 and the accompanying regulations, Reg 407/18, came into effect on August 15. Ward 47 no longer existed, and Anna found herself in Ward 25. On August 16, Anna filed a Change of Ward Notification with the City Hall Elections Office to stay in the race, as required by Bill 5.[178] As provided for by the new regulations, Anna was given a new expense limit of $2,000 by the City Clerk.[179] The new spending limit reflected the fact that Ward 25 had a population twice as big as the former Ward 47, which it replaced.[180] As provided for by Bill 5, any money Anna had already spent carried over and counted against her new $2,000 expense limit.[181] Because Anna had already spent $1,000, she was left with $1,000 for electoral expression in her new ward (Ward 25) for the remainder of the election period. Since she could not use her lawn signs for Ward 47, she was forced to start anew.

On the same day, August 16, Bob registered as a first-time candidate in the same ward (Ward 25) as Anna. As provided for by Bill 5, Bob received an expense limit of $2,000. Bob thus had $2,000 to spend on campaign speech for the remainder of the election period, while Anna had only $1,000 for the same time period.

Did the effects of Bill 5 restrict Anna's electoral expression?

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[175] The ward numbers are fictional but they are meant to capture the fact that all the electoral districts changed in the middle of the election period.

[176] In the period prior to Bill 5, the actual spending limit was calculated by a formula based on the ward population. *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., ss. 88.20(7), 88.20(11) (providing formula for electors); *General*, O. Reg 101/97, s. 5 (providing formula for expense limit).

[177] City of Toronto Election Services, "Municipal Election Report" (2018), at 15, online: <https://www.toronto.ca/wp-content/uploads/2019/07/96b2-2018-Election-Report.pdf>.

[178] *Better Local Government Act, 2018*, S.O. 2018, c. 11, Sch. 3, s. 10.1(4), amending the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(4).

[179] *2018 and 2022 Regular Elections – Special Rules*, O. Reg 407/18, s. 10.

[180] *2018 and 2022 Regular Elections – Special Rules*, O. Reg 407/18, s. 11(2) (providing new calculation for the number of electors).

[181] The guidelines state that "[f]iling the Change of Ward Notification Form does not constitute a new nomination or campaign; any money you already raised or spent carries over". Toronto City Hall, "Bulletin for Candidates: Changes to Municipal Election Legislation" (August 2018), at 1, online: <https://www.toronto.ca/wp-content/uploads/2018/08/9775-Bulletin-for-Candidates-August-16.pdf>. Candidates that carried over from before Bill 5 came into force to after Bill 5 came into force were deemed not to be newly nominated. *Better Local Government Act, 2018*, S.O. 2018, c. 11, Sch. 3, s. 10.1(6), amending the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(6).

(c) The Formal Approach to the Effects of Bill 5

A formal approach would find no restriction of section 2(b). The fact that Anna could no longer use her lawn signs after August 14 did not constitute an infringement of her expression because the lawn signs were still in existence. As Miller J.A. noted, there was no interference with freedom of expression because Bill 5 "did not, and could not, erase the messages that had already been communicated".[182] The candidates were still able to speak on any topic they chose. All that happened was that the candidates' past communications lost relevance and were no longer useful to the candidates' campaigns for public office.[183] For this reason, their complaint was better understood as a plea that the government not diminish the effectiveness of their expression. Section 2(b), however, provides no guarantee that the government will protect the effectiveness of speech; indeed, the government may engage in its own speech, such as the issuance of health warnings on products, which could undermine the speech of others.[184]

Nor would a formalist think that Anna has any legitimate constitutional complaint about the fact that she has only $1,000 to spend in the new Ward 25 as compared to Bob, who has double the amount of money for electoral expression. Bill 5 deemed that the nomination period had not yet ended by changing its end date from July 27, 2018 to September 14, 2018.[185] On this view, there was one long nomination period from May 1 to September 14. Candidates within an electoral ward had the same expense limits, regardless of when they registered during the nomination period. From a formal perspective, both Anna and Bob have the same cumulative expense limit — $2,000 — for the election period, and hence there is no constitutional injury. Indeed, a formal approach would say that Bill 5 *increased* the amount of available speech for each candidate. Due to the doubling of ward sizes, the expense limits, and hence the available speech for each candidate, had likewise doubled.

(d) The Contextual Approach to the Effects of Bill 5

By contrast, a contextual approach would place significant weight on the nature of electoral expression as speech which is taking place within and being constrained by the legal and institutional framework of an election. An important caveat: while attention to this legal and institutional context is helpful for understanding *why* section 2(b) is infringed, it does not mean that the legal and institutional framework *itself* is brought under section 2(b). Section 2(b) only protects electoral expression, not the framework of the election.

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[182] *Toronto (City)* (ONCA), at para. 58.

[183] *Toronto (City)* (ONCA), at para. 41.

[184] *Toronto (City)* (ONCA), at para. 43.

[185] *Better Local Government Act, 2018*, S.O. 2018, c. 11, Sch. 3, s. 10.1(3), amending the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(3). The nomination date was extended by a court order to September 21, 2018. *Toronto (City) v. Ontario (Attorney General)*, Order of the Ontario Court of Appeal (dated September 19, 2018), at para. 3.

The contextual approach would start with the observation that the 2018 municipal election actually consisted of *two* elections with different electoral districts, different nomination periods and different campaign finance limits. By dint of Bill 5's legislative fiat, these two elections were "deemed" to be a single, continuous election. In reality, however, a new election forcibly supplanted an active election two-thirds of the way through the existing election period. As a result of Bill 5's dismantling of the first election, and its replacement with a second election, the electoral expression of certain candidates was infringed.

To illustrate the infringement of section 2(b), consider the function of one type of electoral expression: the lawn sign. A lawn sign's expressive contribution consists of various messages, including information about the candidate, the electoral district and the key issues that form the candidate's platform. The lawn sign also sends a message from the voter who exhibits it. The sign speaks continuously and passively for the duration of the election period; the candidate and the voter displaying the sign can take no further action and the message will continue to be expressed. If a street displays lawn signs from several candidates, the collective electoral expression amounts to continuous, ongoing speech which forms an essential part of the democratic discourse, allowing for reflection and deliberative exchanges among voters.

If Bill 5 had not eliminated Ward 47, Anna would have been able to speak continuously through her lawn signs for the entire election period. As a direct result of Bill 5, the messages from those lawn signs no longer amount to electoral expression; that is, they no longer play the function of electoral expression given the change to the underlying institutional context within which that expression is taking place. Electoral expression is, as a definitional matter, regulated campaign speech that takes place within and is constrained by the legal framework of an election.

Hence, a change in the rules such that the lawn signs no longer constituted electoral expression in the context of the election (even if they still amounted to ordinary speech) amounts to the "control" of speech, and thus infringes section 2(b) under the *Irwin Toy* standard. The infringement arises because Bill 5's mid-election change to the ward structure prevented certain candidates from engaging in meaningful electoral expression in the context of the election and in light of the electoral laws to which they were subject. The *Baier* standard of substantial interference is also arguably satisfied: the degree of interference with the candidates' electoral expression is so profound that their speech no longer even amounts to electoral expression as a definitional matter.

That the effects of Bill 5 result in the control of speech, and hence a restriction of section 2(b), is also evident when we compare Anna to Bob. The direct effect of Bill 5 (rather than the underlying *Municipal Elections Act*) is that Anna has half the electoral expression available to her as compared to Bob, even though they are both candidates for the same seat in the new Ward 25. Bill 5's interference is heightened by the fact that the candidates may not engage in more electoral expression than is allowed by the rules; indeed, a conviction for knowingly overspending on election

advertising could result in imprisonment. From a contextual perspective, the mid-election change to the ward structure controlled, restricted and substantially interfered with the candidates' electoral expression, rather than merely reducing its effectiveness.

A formalist may object that the above analysis essentially amounts to an argument about the effectiveness of speech, which is not protected by section 2(b). This proposition is based on *Delisle v. Canada (Deputy Attorney General)*, in which the Court held that section 2(b) is not infringed if the exclusion of claimants from a statutory platform "diminished the effectiveness of the conveyance of this message [of solidarity]".[186] The expression at issue in *Delisle* — the "message of solidarity" — referred to the activity of forming an official union under a collective bargaining statute.[187] The positive rights cases hold that, in the context of a claim for inclusion in a statutory platform, section 2(b) does not protect the effectiveness of the conveyance of a message.

I suggest, however, that the effectiveness of the *conveyance* of a message refers specifically to the expressive activity of inclusion in a statutory platform; it does not mean that section 2(b) never protects meaningful expression. Consider, for example, the Supreme Court's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, which held that section 2(b) "may require disclosure of documents in government hands where it is shown that, without the desired access, *meaningful public discussion and criticism on matters of public interest* would be substantially impeded".[188] Crucially, the Court used the *Irwin Toy* framework and explicitly declined to rely on the positive rights *Baier*/*Dunmore* framework.[189] To engage section 2(b), a claimant must show that access to documents "is necessary to permit *meaningful debate and discussion* on a matter of public interest",[190] provided, however, that it "does not encroach on protected privileges, and is compatible with the function of the institution concerned".[191] Section 2(b) does not guarantee access to information; instead, it is "a derivative right which may arise where it is a

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[186] [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, at para. 41 (S.C.C.). The Court held that the exclusion of RCMP officers from a statutory bargaining scheme did not violate either s. 2(d) or s. 2(b) (at paras. 10, 40-41).

[187] *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, at paras. 39-41 (S.C.C.).

[188] [2010] S.C.J. No. 23, 2010 SCC 23, at para. 37 (S.C.C.) [emphasis added]. For an analysis of this case, see Kent Roach & David Schneiderman, "Freedom of Expression in Canada" (2013) 61 S.C.L.R. (2d) 429, at 518-19.

[189] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 31 (S.C.C.).

[190] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 58 (S.C.C.) [emphasis added].

[191] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 5 (S.C.C.).

necessary precondition of meaningful expression on the functioning of government".[192] If the preconditions for meaningful expression can, in certain limited circumstances, attract section 2(b) protection, it is reasonable to infer that section 2(b) protects meaningful expression itself in certain limited circumstances.

My claim here is not that section 2(b) always protects either meaningful expression or the preconditions necessary for it, but rather that section 2(b) can do so in certain limited circumstances. Similar to the access to information context, I suggest that a claimant would have to show that the government's action "substantially impeded" meaningful electoral expression. In addition, I suggest that the protection against government action that substantially impedes meaningful electoral expression would exist *only during the election period*. This qualification would allow the government to regulate elections, including subjecting expression to various campaign finance rules, provided that there is no substantial mid-election impediment to meaningful electoral expression.

(e) Democratic Rights and Principles Under Section 2(b)

A related argument is that the effects of Bill 5 also violated certain rights and principles announced by the Supreme Court in its section 2(b) political process decisions. As described above in Part III.2, the Court has interpreted the freedom of expression as protecting more than the activities of voting and campaigning. In *Harper*, the Court noted that in *Libman*, it had "endorsed several principles applicable to the regulation of election spending", including the "right to equal participation" and the "right to a free and informed vote".[193]

A threshold question is whether these principles should be applied to a municipal election. A possible objection is that these section 2(b) principles should not apply because section 3 does not apply to municipalities.[194] As discussed above in Part III.3, however, the Court has explained that the scope of section 3 should not be used

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[192] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 30 (S.C.C.).

[193] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.).

[194] *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1031 (S.C.C.); *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 39 (S.C.C.). As s. 3 does not apply to municipalities, the democratic rights under s. 3 (such as the right to meaningful participation) would also not apply to a municipal election. For an intriguing argument about how s. 3 could be interpreted to apply to elections outside the federal and provincial context, see Colin Feasby, "*City of Toronto v Ontario* and Fixing the Problem with Section 3 of the Charter" ABlawg (September 28, 2018), online: <http://ablawg.ca/wp-content/uploads/2018/09/Blog_CF_Toronto_Section_3_Sept2018.pdf>. Given space constraints, this article does not address the larger question of the constitutional status of cities. At a minimum, it is worth noting that ″Municipal Institutions″ fall under provincial jurisdiction according to section 92(8) of the *Constitution Act, 1867*.

to narrow the scope of section 2(b).[195] In addition, the cases in which these principles are developed concern issues outside campaign finance regulation, such as opinion polls,[196] referendums[197] and blackout rules.[198] This suggests that the principles have a broader application than simply campaign finance regulation in provincial and federal elections. Another possible objection is that these principles are restricted for the sole use by the government to justify campaign finance limits. However, as discussed above in Part III.2, these democratic rights apply to electoral expression under section 2(b) as a general matter and therefore are not restricted to such use.

The first principle, the right to equal participation, is concerned with the "equal dissemination of points of view".[199] In its section 2(b) cases, the Court has been highly attuned to the differential impact of wealth on democratic discourse. Although Bill 5 and its regulations do not on their face provide different limits for candidates, their effects result in a situation in which one candidate (Bob) has effectively double the available budget; *i.e.*, double the amount of electoral expression, as compared to another candidate (Anna), when both candidates are competing for the same seat in the same electoral district. One reason why it is unpersuasive to argue that the "real election period" took place between August 14 and October 22 is that Bill 5's impact on the campaign finance rules destroyed the level playing field among candidates. For a contextualist, the stark difference in available campaign expenses, and hence in available electoral expression, between Anna and Bob infringes the right to equal participation as recognized by the Court's section 2(b) cases.

Libman's second principle, the right to a free and informed vote, involves "the right of electors to be adequately informed of all the political positions advanced by the candidates and the various political parties".[200] In *Harper*, the Court declared

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[195] *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 58 (S.C.C.). The Court explained that s. 3 "does not 'occupy the field' just because the right claimed . . . involves standing for an election" (at para. 59).

[196] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.).

[197] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.).

[198] *R. v. Bryan*, [2007] S.C.J. No. 12, 2007 SCC 12 (S.C.C.).

[199] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.). For a discussion of the right of equal participation, see Yasmin Dawood, ″Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter″ (2013) 51 Osgoode Hall L.J. 251, at 281-85.

[200] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 61 (S.C.C.). For a discussion of the right to a free and informed vote, see Yasmin

that "the voter has a right to be 'reasonably informed of all the possible choices'".[201] It will be difficult for Anna to adequately inform voters in the new Ward 25 of her political positions. Not only is Anna working with half the amount of electoral expression as Bob, but she is also confronted with the confusion of voters in the new ward who may no longer be focusing on the issues at stake given all the upheaval. Indeed, moving back to the actual case, Belobaba J. stated that the "evidence is that the candidates spent more time on doorsteps addressing the confusing state of affairs with potential voters than discussing relevant political issues".[202] The candidates' efforts "to convey their political message about the issues in their particular ward were severely frustrated and disrupted".[203] If the candidates are unable to convey their campaign messages, then the voters' right to be adequately informed about the candidates' political positions has been infringed.

(f) Deliberative Engagement in the Electoral Context

A related contextual approach is to focus on the campaign speech of *all* the electoral participants (candidates, voters, volunteers, donors and the media, among others) who engage in a deliberative exchange within the legal and institutional framework of an election. This broader approach is exemplified by MacPherson J.A.'s dissenting opinion at the Ontario Court of Appeal.[204] Justice MacPherson stated that the expressive activity affected by Bill 5 was explained by the intervener, the David Asper Centre for Constitutional Rights:

> The *Charter*'s guarantee of freedom of expression is a key individual right that exists within and is essential to the broader institutional framework of our democracy. In the election context, freedom of expression is not a soliloquy. It is not simply the right of candidates to express views and cast ballots. It expands to encompass a framework for the full deliberative engagement of voters, incumbents, new candidates, volunteers, donors, campaign organizers and staff, and the media, throughout a pre-determined, stable election period. [Citations omitted.][205]

Because the rules of a municipal election are established from the beginning of the election period, candidates "make decisions within these terms about whether

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Dawood, "Democracy and the Right to Vote: Rethinking Democratic Rights under the Charter" (2013) 51 Osgoode Hall L.J. 251, at 285-90.

[201] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, 2004 SCC 33, at para. 71 (S.C.C.), *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569, at para. 47 (S.C.C.).

[202] *Toronto (City)* (ONSC), at para. 31.

[203] *Toronto (City)* (ONSC), at para. 31.

[204] *Toronto (City)* (ONCA), at paras. 117-118, MacPherson J.A., dissenting.

[205] *Toronto (City)* (ONCA), at para. 117, MacPherson J.A., dissenting, citing the Factum of the Intervener David Asper Centre for Constitutional Rights, at para. 1. [Disclosure: I provided comments to the team that drafted the Asper factum. The omitted citation is to Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499, at 503].

and where to run, what to say, how to raise money, and how to publicize their views".[206] Voters learn about the candidates and the issues, and they form their views and preferences. The news media facilitate the sharing of information about the election, which is essential for democratic deliberation.[207] These expressive activities "unfold and intersect within a legal framework".[208] As such, the guarantee of free expression would be "meaningless if the terms of the election, as embodied in the legal framework, could be upended mid-stream".[209] For these reasons, Bill 5 "substantially interfered with the right of all electoral participants to freely express themselves within the terms of the election after it had begun",[210] thus infringing section 2(b).

4. The *Baier* Framework and Positive Rights

At the Court of Appeal, Miller J.A. held that because the claimants could not satisfy the *Baier* requirements, their section 2(b) claim failed.[211] A possible rejoinder is that the *Baier*/*Dunmore* criteria are satisfied on the facts of this case. The advantage to this response is that it supports the proposition in *Haig* that while the government is not required to provide a platform, it must abide by the Charter when it chooses to provide one.[212] The difficulty with treating this case as a successful positive rights claim, however, is that it runs the risk of turning every election law case into a statutory platform case. In my view, this would be enormously cumbersome.

Another possible response is to distinguish *Baier*. In his dissenting judgment, MacPherson J.A. distinguished *Baier* on three grounds. Whereas *Baier* concerned the exclusion of a class of people from an election, the present case involved the "mid-stream destruction" and replacement of that platform. Second, the applicants in *Baier* asserted a positive entitlement whereas the City made a claim for non-interference in an ongoing election. Finally, *Baier* did not involve changes to an active election.[213]

An alternative argument, I suggest, is that *Baier* is inapplicable because the "expression" at issue in the section 2(b) positive rights cases involves the expressive activity of participating in a specific statutory platform. In *Baier*, for instance, the expression at issue was the expressive activity of standing for election for the office

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[206] *Toronto (City)* (ONCA), at para. 121, MacPherson J.A., dissenting.

[207] *Toronto (City)* (ONCA), at para. 122, MacPherson J.A., dissenting.

[208] *Toronto (City)* (ONCA), at para. 122, MacPherson J.A., dissenting.

[209] *Toronto (City)* (ONCA), at para. 123, MacPherson J.A., dissenting.

[210] *Toronto (City)* (ONCA), at para. 128, MacPherson J.A., dissenting.

[211] *Toronto (City)* (ONCA), at paras. 68-69.

[212] *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1041 (S.C.C.).

[213] *Toronto (City)* (ONCA), at para. 132, MacPherson J.A., dissenting.

of school trustee.[214] In *Delisle*, the expression at issue was the "message of solidarity" expressed by the activity of forming an official union under a collective bargaining statute.[215] In *Haig*[216] and *Siemens v. Manitoba (Attorney General)*,[217] the expression at issue was the activity of voting in a referendum and a plebiscite, respectively. Given the nature of the expression at issue in these cases, the claimants demanded inclusion in a statutory regime or platform, which transformed their claim into a positive rights claim under section 2(b). By contrast, the expression at issue in this case is *not* the candidates' expressive activity of standing for office; instead, the relevant expression is their actual campaign speech. Anna does not need inclusion in a statutory platform to speak through her lawn signs. All she has to do is purchase the signs with her campaign funds and ask her supporters to display them.

It is also relevant that the Supreme Court appears to have limited the application of the *Baier/Dunmore* framework in two cases decided after *Baier*. In *Criminal Lawyers' Assn.*, the section 2(b) access to information decision discussed above, the Court noted that some of the parties had relied on *Baier/Dunmore* and that the lower courts were divided on the application of *Dunmore*.[218] The Court stated that "[i]n our view, nothing would be gained by furthering this debate".[219] Rather than applying *Baier/Dunmore*, the Court went on to use the *Irwin Toy* framework.

Without delving into the Court's recent case law on section 2(d),[220] it is also worth noting that in another post-*Baier* case, *Ontario (Attorney General) v. Fraser*, the Court explained that it had consistently rejected the distinction between negative

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[214] *Baier v. Alberta*, [2007] S.C.J. No. 31, 2007 SCC 31, at para. 31 (S.C.C.). The Court held that the exclusion of teachers from the school trustee election did not infringe s. 2(b) (at para. 60).

[215] *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, at paras. 39-41 (S.C.C.). The Court held that the exclusion of RCMP officers from a statutory bargaining scheme did not violate either s. 2 (d) or s. 2(b) (at paras. 10, 40-41).

[216] *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995, at 1041 (S.C.C.). The Court held that s. 2(b) does not "impose upon a government . . . any positive obligation to consult its citizens through the particular mechanism of a referendum" (at 1041).

[217] *Siemens v. Manitoba (Attorney General)*, [2002] S.C.J. No. 69, 2003 SCC 3, at para. 41 (S.C.C.). The Court held that the plebiscite was a creation of legislation and thus any right to vote in it must be provided for by the statute itself (at para. 42).

[218] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 31 (S.C.C.) [emphasis added].

[219] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, 2010 SCC 23, at para. 31 (S.C.C.) [emphasis added].

[220] Due to space constraints, this article does not consider the Court's recent s. 2(d) decisions.

freedoms and positive rights.[221] For the Court, the purposive approach to Charter interpretation is what ultimately matters: "A purposive protection of freedom of association may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities, just as a purposive interpretation of freedom of expression may require the state to disclose documents to permit meaningful discussion."[222] As discussed above in Part III.2, the Court's interpretation of section 2(b) in the political process context resulted in the identification of two key principles — the right of equal participation and the right to a free and informed vote — both of which shed useful light on Bill 5's infringement of section 2(b).

5. The Formal Approach vs. the Contextual Approach

The formal approach, which finds no infringement of section 2(b) on account of Bill 5, is intuitive and possesses an immediate logic. Despite the strength of the formal approach, I suggest that the contextual approach is, on balance, ultimately more persuasive. In its political process cases, the Court has already adopted a contextual approach in its purposive analysis of sections 2(b) and 3. These cases have not only recognized a number of democratic rights but have also described these rights with a nuanced attention to the institutional context within which these rights are exercised. A contextual approach to electoral expression and its infringement at issue in *Toronto (City)* is consistent with the Court's existing purposive and contextual approach to sections 2(b) and 3.

Another consideration is that, unlike certain Charter rights such as section 7 and section 15, the Supreme Court has consistently taken a capacious approach to the scope of section 2(b) and the finding of infringement, such that the analysis in section 2(b) cases usually takes place at the justification stage under section 1. An additional consideration is that the unwritten constitutional principles of democracy and the rule of law[223] reinforce the conclusion that mid-election changes to electoral rules are inconsistent with the underlying values of the Constitution. While unwritten constitutional principles have been used to invalidate governmental action,[224] neither the democracy principle nor the rule of law principle should, in my view, be used to invalidate the legislation at issue in this case.

A final consideration lies outside the four corners of section 2(b). In recent years,

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[221] *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20, at paras. 67, 69 (S.C.C.).

[222] *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20, at para. 70 (S.C.C.).

[223] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 49-54, 61-69, 70-78 (S.C.C.).

[224] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at paras. 83, 89 (S.C.C.); *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, [2016] S.C.J. No. 39, 2016 SCC 39 (S.C.C.).

nations around the globe have fallen prey to democratic decline. This erosion of democracy has been brought about, in part, by executive-driven, legislatively endorsed alterations to electoral structures, which while technically "legal", have subverted the norms and spirit of constitutional democracy, not to mention its accountability and representativeness.[225] This dismantling of electoral and constitutional protections is usually defended on the grounds that such changes are necessary to improve efficiency and reduce corruption. The only defence against such democracy-undermining laws is a contextual approach that provides a greater range of interpretive options than a purely formal approach.

Under the contextual approach, section 2(b) has been infringed, at which point the analysis would turn to section 1. According to Belobaba J., the province failed to show that its objectives — improved efficiency and voter parity — were so pressing and substantial that the ward structure had to be altered in the middle of the election.[226] The court also found that the province could not establish minimal impairment because it had not shown why a less intrusive measure, such as restructuring the wards after the election, was not chosen.[227] Justice MacPherson, dissenting at the Court of Appeal, agreed with Belobaba J. that there was no pressing and substantial objective to support Bill 5.[228] In my view, and in keeping with international standards, mid-election changes to election rules should be discouraged in order to safeguard electoral fairness.[229] For this reason, the burden on the state to justify a mid-election change should be commensurately heavy.

V. CONCLUSION

As I have argued elsewhere, the Supreme Court has long played a vital role in protecting the fairness and legitimacy of the democratic process.[230] Continuing this

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[225] Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy* (Chicago: Chicago University Press, 2018), at 43-48; Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (New York: Broadway Books, 2018), at 1-10; Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015).

[226] *Toronto (City)* (ONSC), at para. 72.

[227] *Toronto (City)* (ONSC), at paras. 74-75.

[228] *Toronto (City)* (ONCA), at para. 135, MacPherson J.A., dissenting.

[229] International norms emphasize the importance of the stability of electoral rules. See, e.g., Council of Europe (European Commission for Democracy through Law), *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, II.2.63, at para. 64, online: <https://www.cvk.lv/upload_file/Code_ENG.pdf> (noting that the "stability of some of the more specific rules of electoral law, especially those covering the electoral system [such as] . . . the drawing of constituency boundaries" must be protected for the credibility of the electoral process).

[230] Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62 U.T.L.J. 499, at 504.

function in *Frank*, the Court described the right to vote as a "core tenet of our democracy".[231] Given our global era of democratic decline and rising authoritarianism, accompanied by various practices to erect barriers to the right to vote, the *Frank* decision sends a clear message to legislatures that restrictions on the right to vote will be subject to exacting scrutiny.

The *Frank* decision provided an opportunity to consider the Court's political process jurisprudence as a whole. The Court has identified multiple democratic rights under section 3 and section 2(b), and it has also been attuned to the institutional context within which these rights are exercised. With respect to the relationship between the right to vote and the freedom of expression, I claim that section 3 and section 2(b) are best understood as distinct yet complementary rights that are animated by and reinforce the fundamental democratic values protected by the Charter.

As for the upcoming *Toronto (City)* case, a central question is whether courts ought to take a formal approach or a contextual approach to electoral expression, and its infringement, under section 2(b). The consequences of this choice are significant, not only for the immediate case but also for the Court's general approach to its review of the electoral process.

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[231] *Frank*, at para. 1.