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SECTION 1, CONTEXTUALITY, AND THE ANTI-DISADVANTAGE PRINCIPLE†

Introduction

In this article, I will suggest that the courts should use a contextual framework that also reflects certain universal principles, such as the anti-disadvantage principle, to interpret section 1 of the Canadian Charter of Rights and Freedoms.[1] I will reject the dichotomy between contextual and universal considerations; instead, I will argue that the courts' decisions can (and should) reflect both contextual *and* universal considerations, with the appropriate universal consideration being the anti-disadvantage principle.

In analysing Charter cases, the courts at present use a two-step process that has some (but not enough) contextual elements and some (but not enough) consideration of the anti-disadvantage principle. First, the courts determine whether a plaintiff has established an infringement of a substantive Charter right; and, second, if the plaintiff meets that burden of proof, they determine whether the defendant (usually a branch of government) can justify the infringement. The second step proceeds under section 1 of the Charter and is the focus of this article. The existing framework, I will argue, as represented by *R.* v. *Oakes*,[2] has some (but not enough) contextual elements; it also does not reflect the anti-disadvantage principle. The modified *Oakes* framework that was articulated by former Chief Justice Dickson in *Attorney-General of Quebec* v. *Irwin Toy*[3] is also insufficiently contextual but has begun to reflect the anti-disadvantage

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1 Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK) 1982 c. 11

2 [1986] 1 SCR 103

3 (1989) 58 DLR (4th) 577

principle. If the courts were to recognize that they do not have to choose between contextual and universal principles, I believe that they could begin to incorporate and expand the useful contextual and universal aspects of *Oakes* and *Irwin Toy*. Such recognition has occurred in the recently decided case *R.* v. *Keegstra*.[4]

In the first few years of Charter interpretation, some commentators criticized the Supreme Court's section 1 approach for not reflecting the language of the section,[5] for being too activist,[6] or for not reflecting a sufficiently unified conception of the Charter.[7] More recently Justices Dickson and Wilson have argued that the courts' decisions should be more contextual,[8] whereas various commentators have argued that the courts' decisions should be more abstract (or striving towards universal truths).[9]

4 (1991) 117 NR 1

5 See generally Lorraine Weinrib 'The Supreme Court of Canada and Section One of the Charter' (1988) 10 *Supreme Ct LR* 469 (commenting that the courts' 'early analysis of the opening section of the Charter seemed to come from nowhere').

6 Ibid. 470–1 (referring to other commentators). Despite Weinrib's claim that some commentators describe the Court as too activist, I have not found any commentators who make that explicit claim. See, for example, Andrew Petter 'The Politics of the Charter' (1986) 8 *Supreme Ct LR* 473 at 474, 498 ('Far from advancing the interests of disadvantaged Canadians, the Charter is much more likely to work to the detriment of those interests ... [The Court has given] its most expansive interpretations in relation to procedural rights and [has avoided], where possible, any overt balancing of substantive policy.'); D. Martin Low 'The Canadian Charter of Rights and Freedoms and the Role of the Courts: An Initial Survey' (1984) 18 *UBC LR* 69 at 94 ('The conclusion of this initial survey suggests that the courts have exhibited an appropriate judiciousness in dealing with challenges to legislation.'). But see Andrew Petter and Patrick Monahan 'Developments in Constitutional Law: The 1985–86 Term' (1987) 9 *Supreme Ct LR* 69 (describing the Supreme Court's activism in its early jurisprudence); F.L. Morton, G. Solomon, I. McNish, and D.W. Poulton 'Judicial Nullification of Statutes under the Charter of Rights and Freedoms 1982–1988' (1990) 28 *Alta LR* 396 at 425 (concluding that the Charter has been a catalyst for 'an unprecedented style of judicial activism'). See also Robin Elliot 'The Supreme Court of Canada and Section 1 – The Erosion of the Common Front' (1987) 12 *Queen's LJ* 277 (arguing against an activist role for the Court).

7 See, for example, Patrick Monahan *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Toronto: Carswell 1987) 115–6.

8 See, for example, *Edmonton Journal* v. *Attorney-General for Alberta* (1989) 64 DLR 577 at 581–4 (Wilson J concurring) (arguing that the Court should use a contextual rather than an abstract approach to Charter interpretation); *Keegstra* supra note 4, 38 (Chief Justice Dickson's majority opinion approving Justice Wilson's contextual approach).

9 See, for example, Jamie Cameron 'The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy* v. *Attorney-General of Quebec*' (1989) 35 *McGill LJ* 253 (arguing that the Court's analysis of whether a substantive infringement has occurred should be entirely abstract; contextual considerations should only become part of the analysis under section 1's justificatory inquiry). See also B. Jamie Cameron 'The First Amendment and Section 1 on the Charter' (1990) 1 *Media & Communications LR* 59 (developing a contextual approach to section 1 interpretations, based on United States precedent). Both Wilson and Cameron make the assumption that an abstract approach cannot be contextual, and vice versa. I do not make that assumption in this article. As I will argue, that assumption is flawed.

I will not argue for or against judicial activism as a theoretical matter. Instead, I will search for both a unified and contextual understanding of the Charter that can help judges determine whether to be activist on a case-by-case basis.

This article will focus largely on the contributions made to Canadian jurisprudence by Justices Dickson and Wilson, because some aspects of their frameworks are compatible with my proposed framework. The article does not purport to survey all of Canadian constitutional jurisprudence; that would be an impossible task. Due to the retirements of both Dickson and Wilson, as well as their important contributions to the Court, it seems appropriate to focus on their contributions at this time.

DEFINITIONS

Contextualizing

Before discussing various Charter frameworks, I will define what I mean by contextualizing and the 'anti-disadvantage principle.' The importance of contextual analyses is a central feature of both critical and feminist theory.[10] The need for contextual analyses flows from two related observations within feminist and critical theory.

First, these theorists recognize that we each come to an inquiry from our own subjective perspective.[11] It is wrong to claim that a perspective is universally shared or objective. Thus, in order to understand an issue, one must try to grasp its specific meanings for a wide variety of people, by listening closely to how they describe the issue's impact on their lives.[12] When we try to speak at too great a level of generality, we often fail to account for the multiple perspectives that exist on a particular issue by falsely assuming that our particular perspective is reflective of everyone's experience. For example, instead of asking how abortion restrictions affect all women, a contextual perspective would advise us to recognize the

10 See, for example, Martha Minow 'The Supreme Court 1986 Term: Foreword: Justice Engendered' (1987) 101 *Harv. LR* 10 (feminist theory); Zillah Eisenstein *The Female Body and the Law* (Berkeley: University of California Press 1988) (critical-feminist theory); Katharine Bartlett 'Feminist Legal Methods' (1990) 103 *Harv. LR* 829 at 848 (feminist theory); Mari Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Mich. LR* 2320 at 2363 (critical-feminist theory).

11 See Martha Minow *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca and London: Cornell University Press 1990) 60–5 (arguing that we mistakenly believe that the observer can see without a perspective).

12 See Nitya Duclos 'Lessons of Difference: Feminist Theory on Cultural Diversity' (1990) 38 *Buff. LR* 325 at 360–1. Duclos explains that we must try to understand others through their own words. Thus, it is not enough to imagine what others might say through some abstract exercise such as Rawls's original position.

varieties of ways that abortion regulations affect various subcategories of women.[13] The unit of analysis would be smaller than 'all women,' and the perspectives for which we would account would be diverse.

Before her retirement Justice Wilson appeared to incorporate this contextual observation into her opinions. In *Edmonton Journal* v. *Attorney-General for Alberta*, she observed that the challenged statute (which forbade publication of judicial proceedings regarding matrimonial relations) 'does not impact uniformly on all litigants in matrimonial disputes but more particularly on some.'[14] She took an important step in recognizing the non-universal impact of the statute on the group that it was designed to protect. The step, however, that Wilson did not take was to determine what is the legal *significance* of that non-uniformity. As I will argue in the next section, she needed to make reference to a universal principle, such as the anti-disadvantage principle, to answer that question.[15]

Second, we must be cautious in trying to define broad injuries, rights, or freedoms. For example, we need to be careful not to try to speak abstractly about whether 'freedom of expression' or 'life' should be protected by the Charter. We need to understand the specific context in which the claim has arisen in order to determine how seriously to take that claim. We would therefore find it difficult to answer the question whether the Charter should protect 'freedom of expression' or 'life.' We would have to say, 'It depends,' because we would need to know the context in which the question arose in order to answer the question.

Justice Wilson also applied this second principle in *Edmonton Journal*, although in a section 2 rather than a section 1 analysis.[16] She defined the constitutional importance of freedom of expression, for section 2 purposes, within the context of how the constitutional issue arose. She therefore spoke about freedom of expression in terms of an open court process;

13 For an example of this approach, see Ruth Colker 'An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class' (1991) *Duke LJ* 324.

14 (1989) 64 DLR (4th) 577 at 591

15 One reason for suggesting that Wilson did not develop an adequate framework to apply her contextual observation was that she lacked a universal standard by which to judge the contextual result. Under my proposed analysis, if the Court adopted the universal standard embodied in the anti-disadvantage principle along with a contextual analysis, then it could note that the group most likely to receive protection under the Edmonton statute – public figures – was not likely to be a disadvantaged group. Thus, the observation that one subgroup – public figures – is most likely to be protected by the statute and that the subgroup is not one that has been historically disadvantaged would have made it easier for the Court to justify overturning the statute. It would be clearer that the statute infringed a section 2 right without sufficient justification.

16 Supra note 14, 582

whereas Justice Cory, who did not use a contextual analysis, speaks about freedom of expression more abstractly.[17]

This appreciation of multiple perspectives would result in the courts treating the plaintiff's claim of an alleged infringement of Charter rights with the fullest possible respect.[18] Two modifications to the Court's present framework would occur, corresponding to the two observations made above. First, rather than ask what governmental interests are sufficiently *important* to the government in order to justify an infringement of a substantive right, a contextual approach would try to understand what kinds of justifications are *legitimate* in the light of the distinctive nature of the right being infringed; and, second, it would assess the legitimacy of the justification for the infringement from the perspective of the plaintiff, the group purported to be protected by the legislature, society at large, and the government. Under a contextual approach, the same argument could justify the infringement of one substantive right but not another one. This interactive and multiple-perspectives approach, I believe, would be more protective of the core nature of a substantive right and its relationship to a wide variety of actors in society than would a non-interactive and single-perspective approach that tries to assess the importance of a justificatory argument apart from consideration of the nature of the substantive rights and the significance of the justification for the limitation to the plaintiff.

In this article, I will elaborate further on this proposed section 1 analysis, showing how it would clarify many of the Court's recent decisions and, in some cases, possibly change the result. Although the framework that I am suggesting has not been a formal part of any of the Court's decisions, I believe it does represent the views often expressed by many members of the Court, particularly Dickson and Wilson.

The need for universal principles

The framework that I have sketched above would reflect a contextual perspective. Although it is not the exact framework that has been suggested by judges or commentators, such as Wilson, I believe that it might meet with their general approval. However, as I stated at the outset, I am not satisfied with an entirely contextual approach, because it does not sufficiently try to embody some minimal, universal values.

An entirely contextual (that is, non-objective) approach is popular within

17 Whether a contextual approach is appropriate under section 2, as well as section 1, is beyond the scope of this article. For a criticism of a contextual, section 2 approach, see Cameron 'The Original Conception' supra note 9.

18 I discuss the importance of respect elsewhere. See Ruth Colker 'Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom,' (1989) 77 *Cal. LR* 1011 at 1027–8.

feminist theory. Some feminists argue that a general critique of objectivity flows from the feminist critique of one form of objectivity – that of sexual objectification. Catharine MacKinnon best represents this perspective and describes it succinctly:

> The male epistemological stance, which corresponds to the world it creates, is objectivity: the ostensibly noninvolved stance, the view from a distance and from no particular perspective, apparently transparent to its reality. ... Woman through male eyes is sex object, that by which mans knows himself at once and as subject.[19]

Although I generally agree with the feminist critique of the problem of sexual objectification, I do not agree that this critique forces us to abandon our aspirations for objective or universal norms. It is true that when judges have purported to speak from an objective perspective, they have often relied on the norms of a white, male, heterosexual, Christian, able-bodied society. That fact, however, should not cause us to abandon entirely our search for universal, ethical principles, especially because it is not possible to avoid embedding our work in some ethical principles. If we have no ethical principles then we have no basis for judging what types of changes might move us, as a society, in a better direction. Irrespective of whether we propose procedural or substantive modifications to the Court's existing framework, we need to have a basis upon which to judge the appropriateness of those modifications and ultimately to measure whether those changes, if incorporated, achieve our desired results. Thus, rather than pretend that we can proceed without reliance on *any* universal or objective principles, I try to develop those principles as minimally and carefully as possible.

In devising such principles, we have the obligation to choose principles that we believe will best help the society in which we live while also moving cautiously in devising such principles. Even those commentators, like Catharine MacKinnon and Martha Minow, who disavow the possibility of developing universal and objective principles embed their own work in such principles.[20] But that is not surprising. If we have no system of ethics, then we have no aspirations by which to evaluate present society.

Although there are some ethical norms to which we can aspire, we

19 Catharine MacKinnon 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7 *Signs: J. of Women, Culture & Society* 515, reprinted in N. Keohane, M. Rosaldo, and B. Gelpi (eds) *Feminist Theory: A Critique of Ideology* (Chicago: University of Chicago Press 1982) 1, 23–4

20 Catharine MacKinnon's work, I would argue, is embedded in the anti-subordination principle. Martha Minow's work is embedded in the equal respect principle. Their development of those principles, although often unarticulated as such, has greatly influenced my own work.

should not assume that they are numerous, wide-ranging, or even constant over time. The feminist critique of objectification should make us acutely aware of how difficult it is to generalize. In addition, the limited nature of good faith dialogue should caution us against expecting ourselves to be able to attain universal principles easily. Thus, in this essay, I am seeking to develop only one universal principle for Charter interpretation – the anti-disadvantage principle.

The anti-disadvantage principle

Commentators have attempted to identify universal principles that underlie section 1 of the Charter. The most frequently articulated principle is the protection of democracy, since section 1 explicitly refers to 'free and democratic societ[ies].'[21] Nevertheless, I contend that the reference to democracy, although instructive, does not sufficiently inform the courts about which values to embody in section 1 adjudication.

Section 1 comes into the analysis when the courts have already concluded that a substantive infringement of a Charter right has occurred. The question under section 1 is whether the court should also conclude that the legislation or policy should be struck down as unconstitutional. The burden of proof is on the government to show that the statute is *not* unconstitutional.[22] In other words, the premise underlying the section 1 analysis is that the statute should be found to be unconstitutional *unless* the government can demonstrate otherwise. That is, at root, an undemocratic assumption. The interpretative question for the courts is what principles should guide the evaluation of whether that presumption should be overturned. Thus, the reference to democracy in section 1 may be seen as a reminder to the courts to respect the wisdom of the legislature and not to be too activist;[23] however, the reference to democracy does not easily resolve the issue of which values the courts should use when they choose *not* to defer to the legislative judgment.

Along with the primacy of democracy, I believe that the Charter recognizes the importance of the anti-disadvantage principle. The anti-

21 See, for example, Cameron 'The Original Conception' supra note 9, 262 (noting the special character of parliamentary democracy that underlies the Charter).

22 The text of section 1 actually does not compel this allocation of the burden of proof, because it speaks in the passive voice. Either the plaintiff or the defendant could have been given the burden of proof to demonstrate the reasonableness of an infringement. The reference to democracy, in fact, could have been used as a justification for imposing the burden of proof on the plaintiff rather than on the government-defendant. All the justices on the Court, however, seem to have concluded that the appropriate burden of proof under section 1 is on the government.

23 Robin Elliot makes this argument; see supra note 6.

disadvantage principle is democratic, rather than anti-democratic, because it helps to ensure that democracy works effectively. It helps groups attain political and economic power so that they can be taken seriously in the political marketplace.

The anti-disadvantage principle, which was articulated by former Chief Justice Dickson in *Irwin Toy*[24] for section 1 analysis and by Justice McIntyre in *Law Society of British Columbia* v. *Andrews*[25] for substantive section 15 analysis, lies at the heart of a wide range of people's understandings of the Charter.[26] The language of the Charter, with its special reference to disadvantaged groups in section 15, as well as its attention to minority language rights and minority language educational rights, supports this principle.

The anti-disadvantage principle is also distinctively Canadian, because it fits well with parliamentary democracy by trying to reconcile individual and community rights. As Jamie Cameron has explained, the United States Constitution is premised on the idea that 'individual rights are entitlements which are imperative against the state as a matter of supreme law.'[27] The Charter, by contrast, as an extension of Canadian parliamentary democracy, 'recognizes that individual autonomy and social values will conflict, but contemplates their reconciliation on a pragmatic, *ad hoc* basis.'[28]

Justice McLachlin seems to agree with Cameron's description of the distinctive nature of Canadian society. She has described this distinctive aspect in a recent article:

> Canada, as a western democracy, has a strong tradition of liberalism. But it has other traditions too, traditions which distinguish its society markedly from that of the United States ... [T]he individual is seen as a member of the community and the state is viewed as an agency which mediates between the interests of various groups within society, and by which the goals of the collectivity are advanced. Another Canadian tradition which finds no counterpart in the United States is our concept of multiculturalism. We have long embraced, and our *Charter* expressly guarantees, the equal status of the French and English languages, with all its

24 Supra note 3, 625

25 (1989) 56 DLR (4th) 1 at 18, 24

26 McIntyre and Dickson, for example, have had quite contrasting judicial styles. It is therefore interesting that they both would endorse the anti-disadvantage principle, although one does need to keep in mind that McIntyre endorses that principle for section 15 purposes, not for section 1 purposes. Some commentators have also adopted the anti-disadvantage principle. See, for example, Petter 'The Politics of the Charter' supra note 6.

27 See Cameron 'The Original Conception' supra note 9, 262.

28 Ibid.

attendant cultural implications. Additionally, the *Charter* recognizes the multicultural heritage of Canada – a far cry from the 'melting pot' metaphor that is used so often in referring to the United States.[29]

The anti-disadvantage principle seems well suited to this task of reconciliation (Cameron's phrase) or mediation (McLachlin's phrase) because it can, on the one hand, recognize that individuals who are disadvantaged are entitled to certain rights while it can, on the other hand, define who are entitled to benefits in a group-based or communitarian way. Thus, it would be the way that an individual fits into the community that would make him or her entitled to certain rights; the entitlement would not flow to him or her purely on an individualistic basis. Although it has been difficult to maintain an anti-disadvantage principle within United States jurisprudence,[30] this principle should be compatible with the Canadian Charter, as well as Canadian culture.[31]

The anti-disadvantage principle is often mentioned with respect to Charter interpretation, but it is rarely defined in more than a minimal way.[32] I would therefore like to elaborate on what I understand the principle to mean. The concept of disadvantage recognizes that various groups in society are disadvantaged for reasons that do not relate to their actual merit or ability. These disadvantages come in many different forms, depending upon the specific group that is being disadvantaged. For example, as I have argued elsewhere, heterosexual women often face discrimination due to a lack of respect for their childbearing abilities rather than due to a hatred or dislike of them as people in society.[33]

29 The Honourable Madam Justice Beverley McLachlin 'The Charter of Rights and Freedoms: A Judicial Perspective' (1989) 23 *UBC LR* 3

30 See Ruth Colker 'Anti-Subordination Above All: Sex, Race, and Equal Protection' (1986) 61 *NYU LR* (surveying the difficulty of maintaining an anti-subordination principle in the United States).

31 Nevertheless, I do not wish to overstate the acceptance of multiculturalism or the anti-disadvantage principle in Canadian society. The public outcry over Sikhs in the RCMP wishing to wear their traditional headgear, the rising popularity of the English-only movement outside Quebec, and the obstacles to Native people's recognition as a distinct society within the Charter reflect opposition by some people to multiculturalism. The 'Charter's reflection of these values may therefore not be consistent with the public's respect for these values.

32 Andrew Petter, for example, uses the term 'disadvantage' but seems to apply it only to groups that he considers to be economically disadvantaged (Petter, supra note 6, 483). He once refers to 'social disadvantage' but then applies that phrase only in class-based terms (ibid. 487). I find this definition of disadvantage to be too limited because it does not consider the numerous ways, for example, that women or gay people may be disadvantaged through social attitudes concerning their abilities or morality irrespective of whether they have access to economic resources.

33 See supra note 18.

Lesbians, by contrast, are more likely to be treated adversely due to a genuine dislike or moral disapproval of their lifestyles; their childbearing capacity is generally unacknowledged by heterosexual society.[34] In both cases, the perspective of the dominant majority operates to limit the opportunities of the groups acted upon, and thereby creates disadvantages, although the values accounting for the stereotypes may differ.

The concept of disadvantage, however, includes more than momentary expressions of stereotypes. It also includes a historical perspective that acknowledges that certain groups have faced disadvantageous stereotypes over a period of years, which have operated to exclude them from real power in society. Thus, some people might argue that heterosexual, white, middle-class men face certain stereotypes about their inability to express their feelings, or perform certain 'feminine' tasks; however, those stereotypes do not result in their being systematically excluded from power in society. In fact, those stereotypes may reinforce their power in society by making them seem like more capable leaders of industry or government.

Finally, the concept of disadvantage is a group-based concept that recognizes that people are acted upon in a stereotypical way based on the actor's perception of them as falling within a particular group. The categorization may not be accurate, as when, for example, an individual perceives a gay man to be physically handicapped because the individual assumes that the gay man has AIDS. Nevertheless, the characterization operates to limit the opportunities of the person who is perceived to be disadvantaged.

The anti-disadvantage principle is predicated on the assumption that the courts have the responsibility to ensure that the legislative process fully protects the needs and interests of disadvantaged groups. Disadvantaged groups need judicial protection because they cannot always expect to get that protection from the majority-controlled legislatures. In addition, privileged groups can more readily afford to survive without that judicial protection, because they have the economic resources to minimize the adverse consequences of substantive infringements. For example, a statute that creates geographical inequities in the availability of abortions will be

34 Thus, lesbians have difficulty in finding a clinic that will assist them with artificial insemination, whereas heterosexual, married women are encouraged to seek medical assistance when they are experiencing difficulties getting pregnant. Clinics in Ontario, for example, routinely reject lesbians as applicants for use of alternative reproductive technology despite the fact that such medical services are covered by OHIP. Conversations with Saara Chetner, LLM candidate, University of Toronto, spring 1990. See also Barbara Kritchevsky 'The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family' (1981) 4 *Harv. Women's LJ* (discussing United States experience).

more problematic to disadvantaged women who do not have the economic resources to overcome those geographical obstacles than to middle-class women with more economic resources. In considering the constitutionality of such a statute, it is thus extremely important to keep in mind its impact on the most disadvantaged groups in society.[35]

Nevertheless, I must acknowledge that I have some misgivings about the term 'disadvantage.' I wonder if the Canadian tendency to refer to 'disadvantage' rather than 'subordination' is a method of understating the scope of discrimination in society.[36] In addition, the term 'disadvantage' may suggest that the individuals who are being treated unfairly are, in some way, responsible for this unfair treatment through handicapping traits that they possess. The term 'subordination' may indicate more clearly that discrimination is caused by other people's negative perceptions of certain groups in society rather than by any inherent characteristics of the subordinated groups. Despite my misgivings about the term 'disadvantage,' I have retained it in this article since it appears to be a well-accepted term in Canadian society. I have tried to define the term clearly so that it will not suffer from these inappropriate characterizations.

COMPARISON WITH OTHER FRAMEWORKS

Using these definitions, I will examine three justificatory frameworks that could be applied to section 1: (1) a relatively non-contextual approach, which is reflected in the *Oakes* test and which does not reflect the anti-disadvantage principle; (2) a relatively contextual approach, which has been developed in the United States but which does not reflect the anti-disadvantage principle, and (3) a relatively non-contextual test, which was suggested by Dickson in *Irwin Toy* but which does reflect the anti-disadvantage principle. Although many feminist and critical scholars may argue that

35 For further discussion of this concept, see Mari Matsuda 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *Harv. CR–CL LR* 323.

36 In the United States context, I have used the term the 'anti-subordination' principle; see supra note 30, 1007. In the Canadian context, the term 'disadvantage' seems to be more popular than 'subordination' because it is embedded in the Charter (see supra note 1, section 15(2)). Because many of the less powerful, racial minority groups in Canada are recent immigrant groups that have not faced a long history of subordination within Canadian society, it may seem more appropriate to characterize such people as disadvantaged in Canadian society rather than subordinated by it. The term 'subordination' probably better fits the American racial experience where Afro-Americans, who are often the descendants of slaves, are the paradigm of a disadvantaged group. I do not mean to suggest that slavery is irrelevant to the Canadian experience, although it does appear to play a lesser role in Canadian history than in the United States. See Raj Anand 'Ethnic Equality' in Anne Bayefsky and Mary Eberts (eds) *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985) 81–130.

the extent to which a legal framework is contextual is the most (or only) appropriate consideration in assessing the appropriateness of a legal framework, I will suggest that contextuality, alone, will not provide sufficient protection for individual rights and freedoms. Effective protection of these rights requires both a contextual framework and a framework that reflects the anti-disadvantage principle.

In some modest ways, my framework will reflect consideration of some of the concerns that prompted Professor Patrick Monahan to criticize the *Oakes* test. Like Monahan, I believe that the courts should try to identify a central principle in interpreting section 1, and should not assume that there is an inherent tension between state intervention and individual freedom.[37] Unlike Monahan and many other commentators, I do not believe that it is appropriate for the Court to develop a generally less activist framework.[38] In some areas of the law, my approach would lead the Court to be more activist; in other areas, it would lead the Court to be less activist. The history of United States courts' interpretations of the Bill of Rights over the last thirty years amply demonstrates that one cannot hold an absolute, theoretical position in favour of judicial activism or judicial restraint. During the 1950s and 1960s, local governments were often violating the rights of Afro-Americans; judicial activism was needed to correct those violations. By contrast, in the 1980s, local governments were often acting to enhance the opportunities of Afro-Americans; judicial activism has undercut those efforts.[39] Without examining the context in which the Court is acting, it is therefore not appropriate to have a theoretical position in favour of or in opposition to judicial activism. My theoretical perspective reflects a concern that substantive rights should most fully protect disadvantaged individuals or groups at all stages of Charter interpretation, including section 1 analysis.

In other ways, my proposed framework will share similarities with the approach suggested by Professor Lorraine Weinrib.[40] Like Professor

37 Supra note 7

38 By 'activism' I am referring to the tendency of the Court to overturn legislative judgments by concluding that they are unconstitutional. Although many people (my students, for example) often assume that a more activist court is also more progressive, that is not necessarily the case. In order to know whether a court's activism is progressive one would have to know what is the political content of the legislative decision that the court is overturning. For a good definition of 'activist' and 'passivist,' see Michael Perry *The Constitution, the Courts, and Human Rights* (1982) 7 n.

39 Compare *Brown* v. *Board of Education* 349 US 294 (1955) (finding that racial segregation in the school system was unconstitutional) with *City of Richmond* v. *J.A. Croson Co.* 109 S.Ct 706 (1989) (holding that the minority set-aside program that had been passed by city council was unconstitutional).

40 Supra note 5

Weinrib, I will praise the Court for trying to develop a section 1 test that is based on a unified understanding of the role of the Charter (and judicial review) in Canadian society. Unlike her, however, I believe that a more contextual framework can exist alongside this unified approach, one that tries to be sensitive to the needs of disadvantaged groups in society.[41]

In part I of this article, I will discuss the relatively non-contextual formulation embedded in the *Oakes* test but show how its application has always reflected some contextual considerations. In part II, I will discuss the contextual approach that has been developed in the United States and suggest how it might be modified better to fit the Canadian experience. In part III, I will discuss the *Irwin Toy* framework, which, I will argue, represents an appropriate articulation of the anti-disadvantage principle but is not sufficiently contextual. I will finally look at *Keegstra*, which combines both universal and contextual elements.

I *The* Oakes *test*

INTRODUCTION

The Canadian Charter of Rights and Freedoms contains an explicit standard that an institution must meet if it desires to justify its infringement of someone's rights and freedoms. That explicit standard is: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[42]

R. v. *Oakes*[43] represents the Supreme Court of Canada's first major formulation of the section 1 test. Writing for himself and four other members of the Court (Chouinard, Lamer, Wilson, and Le Dain), Dickson developed the following section 1, justificatory test.

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which

41 Supra note 5, 509–10 (criticizing Chief Justice Dickson for deviating from the *Oakes* formula to 'forward the interests of the economically disadvantaged').

42 Supra note 1, section 1. In addition, numerous substantive provisions contain their own built-in limitations. Sections 6–9 have limitations relating to 'reasonable residency requirements,' 'principles of fundamental justice,' 'unreasonableness,' and 'arbitrariness.' In addition, section 15 contains an explicit exception for laws, programs, or activities that have as their object the 'amelioration of conditions of disadvantaged individuals or groups.' Although I will refer to these limitations or exceptions later in this article, for now I will focus on the umbrella limitation of section 1. I will eventually argue that a proper, contextual interpretation of section 1 will reflect the existence of these built-in limitations on substantive rights.

43 [1986] 1 SCR 103

the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom.' ... It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. ... There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. ... In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. ... Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance.'[44]

Before assessing this framework, it is interesting to note how little it directly relates to the language of section 1. Section 1 refers to 'reasonable limits,' without specifying to whom a limit should be reasonable – the plaintiff, the government, society at large? Dickson interpreted the reasonability requirement to mean that the objective of the challenged legislation must be *important* and implies that that importance must be measured from the *government's* perspective.[45] Dickson's inattention to the Charter's language was not, in itself, a fatal flaw; however, it makes it easier to argue that alternative interpretations might be preferable. Clearly, Dickson's framework was not the only plausible interpretation that flowed from the language of section 1.

I call Dickson's framework non-contextual because it purported to use exactly the same standard for considering all substantive infringements and tried to use objective standards like 'importance,' 'rationality,' and 'minimal impairment,' which rarely considered the subjective perspective of the plaintiff. The only place that contextuality explicitly came into the framework was through the third step of the proportionality test, where the effects of the infringements on the plaintiff were weighed against the desirability or importance of the objective underlying the challenged action or policy to the government. The third step of the proportionality test, however, has played an insignificant, explicit role in the cases. Despite this attempt to develop a single, relatively non-contextual standard, I will argue

44 Ibid. 138–9 (citations omitted)
45 Ibid.

that contextual considerations have kept creeping into the Court's analysis, outside the proportionality analysis.

PRE-*OAKES*

R. v. *Big M Drug Mart, Ltd*

One of the first major cases to discuss section 1 was *R.* v. *Big M Drug Mart, Ltd.*[46] The corporation had been charged with unlawfully carrying on the sale of goods in violation of the federal Lord's Day Act. The statute was found to violate section 2(a) of the Charter because it was animated by a religious purpose. The Court found that the statute infringed the corporation's section 2 rights and had to turn to section 1 to see if that infringement could be justified. Dickson sketched the outlines of the section 1 test that he would further develop in *Oakes* when he wrote that the Court would have to consider whether the government's stated objective was of 'sufficient importance to warrant overriding a constitutionally protected right or freedom.' If the 'sufficient importance' test could be met, Dickson said, then the Court should consider whether the means chosen to achieve this interest are reasonable, proportional, and involve as little impairment as possible.[47] The 'sufficient importance' test, as noted above, did not contain any contextual elements. The next step that Dickson sketched out – which included the proportionality test – would have been more contextual and plaintiff-centred; however, Dickson's analysis did not lead him to apply that part of the test.

Dickson's application of the 'sufficient importance' test to the facts in *Big M* added some clarity to it. The first stated justification offered by the government was convenience and expediency – that it would be most practical to provide the day of rest as the one adhered to by the Christian majority.[48] Dickson rejected this justification because: (1) is it based only on 'convenience and expediency' and (2) it was repugnant to the values underlying section 2 (that is, protection from majoritarian, religious coercion). The rejection of these arguments is interesting because Dickson superficially seemed to be saying that a government's objective to choose convenient and practical rules was not an objective of sufficient importance

46 [1985] 1 SCR 295. Other earlier cases that interpreted section 1 include *A.G. Quebec* v. *Quebec Association of Protestant School Boards* [1984] 10 DLR (4th) 321, in which the Court drew a distinction between an 'exception' to a constitutional guarantee or a complete 'denial' of a constitutional right that can only be permitted under section 33, and a 'limit' on a guarantee that can be justified under section 1. In this essay, I will not be discussing the development of that distinction because I find it illusory and unhelpful. For a more favourable discussion of the distinction, see supra note 5, 481–2.

47 Supra note 46, 352

48 Ibid.

to meet the section 1 test. He made this observation in an off-hand way by saying that the government's argument was 'only' an argument about convenience and expediency. As a non-contextual statement, it is a somewhat remarkable statement because one can imagine that convenience and expediency are very important values to the government. (An example will be forthcoming in the next paragraph.)

I do not think that Dickson really meant to say that *no* arguments based on administrative convenience could pass the section 1 analysis.[49] The administrative convenience argument was problematic because it relied on consideration of the needs and interests of the religious majority – a group that section 2(a) is supposed to forbid from imposing its views on others, in furtherance of the anti-disadvantage principle. I doubt that an argument about practicality would have been so clearly unconstitutional if the group that was being protected were not a religious majority. For example, what if the argument had been made that a uniform day of rest, which corresponded to the Christian day of rest, had been necessary in order to ease the child-care burdens of working parents who, I will assume, constitute a majority of the population? Would that argument have also been rejected because it 'only' corresponded to arguments of convenience and expediency of a majority group? I don't think so, because the protected group is no longer a religiously based majority and might even constitute a group that can be considered 'disadvantaged' despite its majority status.[50] It is only through a contextual analysis of the importance of religious freedom coupled with an understanding of the importance of the anti-disadvantage principle that Dickson was readily able to conclude that expediency based on the needs of a religious majority was not an appropriate justification under section 1 when section 2(a) has been infringed. Thus, even in his first major section 1 discussion, Dickson implicitly saw the difficulties with a non-contextual section 1 argument. Although he spoke generally about administrative convenience arguments as not meeting the sufficient objectives test, he really had a more contextual picture coupled with an anti-disadvantage principle of which types of those arguments might be unacceptable when section 2(a) was being violated.[51]

49 Professor Weinrib seems to believe that Dickson did mean to dismiss all convenience and expediency arguments, except for emergencies. See supra note 5, 500–2.

50 The group might be disadvantaged because of the unavailability and high cost of child care in Canada, which puts an enormous strain on families where the parent or parents are working outside the home.

51 Dickson's rejection of the second offered justification also adds more insight into the meaning of the section 1 test. The government argued that the statute could be justified by the need to provide everyone with a universal day of rest. He rejected that justification not because it was not sufficiently important, but because it was not the actual motivation for the legislation.

Although Dickson formulated the section 1 test as appropriately considering what kinds of purposes can be considered sufficiently 'important,' I see the test as being an explanation of what kinds of legislative purposes are inimical to Charter analysis. The purpose behind legislation could be very important, but if the legislation protected advantaged groups in society, then it could not achieve that purpose by infringing the Charter rights of disadvantaged groups. In other words, one has to consider the Charter provision being interpreted to know what kinds of purposes are legitimate rather than consider only the weight of the policy choices made by government.[52] In addition, one needs a more plaintiff-centred perspective in making a judgment that acknowledges that disadvantaged groups will face more adverse consequences from a Charter infringement than privileged groups, which can minimize those consequences. Thus, the protection of privileged groups through the infringement of the rights of disadvantaged groups could have been considered equally problematic when Dickson utilized his 'sufficiently important' analysis. He needed to consider the significance of the legislation to the *plaintiff* as well as its importance to the government and to society.[53]

B.C. Motor Vehicle Reference

The next major case involving a section 1 interpretation was decided about six months later. It was a reference, *Re B.C. Motor Vehicle Act*.[54] The British

52 Wilson appeared to agree with my formulation of the section 1 test in her concurrence in *Big M.* Rather than refer to whether the purpose of the legislation is sufficiently important, she asked whether it is 'legitimate' and acknowledged that a purpose cannot be legitimate if it 'is precisely the purpose at which the *Charter* right is aimed' (supra note 46, 362). My problem with her analysis is that she relies entirely on a contextual analysis of the substantive right that has been infringed and does not inquire as to whether there are overarching principles that underlie all Charter provisions, such as anti-disadvantage, that should guide section 1 analysis.

53 An example may clarify this point. Let us assume that the Toronto police loosen their regulations about when they may fire their pistols. All Torontonians, to some degree, would believe that their security of the person was being threatened. Black Canadians, however, who have recently been criticizing the police for being too willing to shoot at black youths, without cause, would be especially concerned about such a change in the regulations. See, for example, *The Washington Post* 22 January 1989 (reporting increasing tension between Toronto blacks and the police). If a group of black people brought a challenge to the regulations, and the court determined that their security of the person were infringed by the regulations so that a section 1 analysis became necessary, it would be important for that section 1 analysis to be sensitive to the plaintiff's situation. Although the regulations would not be directly aimed at infringing the section 7 rights of black people, in particular, the regulations would cause much more concern in the black community than in the white community. The government's assessment of the importance of the regulations is unlikely to consider the importance to the black community of there *not* being such regulations.

54 [1985] 2 SCR 486

Columbia statute had provided for absolute liability with possible imprisonment if a person was driving without a valid licence, even if the person was unaware of the invalidity of the licence. Justice Lamer, writing for five members of the Court, concluded that section 7 does not permit the combination of absolute liability and imprisonment; thus, it was violated in this case. The section 1 justification offered by the province of British Columbia seemed somewhat half-hearted, so Lamer readily concluded that the province had not met its burden of persuasion. Before reaching that conclusion, however, Lamer did make some passing observations about justifications involving administrative convenience. He provides a more contextual dismissal of those arguments than had Dickson in *Big M.* He says:

> Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. ... *But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency.* Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.[55]

Notice that Lamer is not throwing out expediency arguments generally for all substantive provisions. Instead, he is throwing out the possibility of incarcerating someone for those reasons. From a contextual perspective, I interpret Lamer as saying that the core of section 7 is to prevent breaches of a person's liberty or security of the person, of which incarceration is the most obvious example. Thus, we cannot allow an argument for expedient imprisonment to justify that kind of core infringement. An argument for expediency, for example, might justify the creation of rebuttable presumptions, which might make the criminal justice system more efficient without creating the risk of unjust imprisonment. It is only by understanding how the argument for convenience directly undermines a substantive right protected by the Charter that one can understand the illegitimacy of the purported justification. The justification is problematic not because it is based on an unimportant public objective – clearly, getting drunk drivers off the road is very important to public safety – but because the framework that it uses to achieve that result is illegitimate under the values established by that particular Charter provision.

55 Ibid. 518 (my emphasis)

My reinterpretation of the *B.C. Motor Vehicle Reference* makes it more contextual but does not bring universal values into the analysis. I do believe, however, that the anti-disadvantage principle would work well here. An example may clarify this point. Let us assume that there has been a dramatic increase in the number of women who have been raped while walking along a particular stretch of a major downtown street between 10 p.m. on Friday night and 5 a.m. on Saturday mornings. The rapes have been exclusively committed by men who were walking alone on that stretch of the street. Let us assume that the federal government decides to create a statute whereby it is unlawful for a man to walk unaccompanied on those blocks unless he has been given a special permit.[56] The statute would also require that signs be posted in all major languages in that area describing these requirements. A man who violates the statute would be absolutely liable and subject to possible imprisonment. I think it is clear that all members of the Court would say that the statute violates a man's section 7 rights. But could this statute be justified under section 1? Because the purpose of the statute is to protect women's security of the person, but the means chosen infringe some men's security of the person, I believe that it would be appropriate to say that the statute was justified under section 1. Why? Because the purpose of the statute was to protect rather than infringe one group's security of the person. Since protecting security of the person is a constitutionally enshrined right, such a purpose is legitimate under section 1 even when it results in a violation of another, more privileged, group's section 7 rights. I should emphasize that I am not making an absolute statement that one group's rights can be infringed for the sake of another group's rights. However, the rights of a more privileged group can be sacrificed, under some circumstances, for the rights of a less privileged group. Section 1 is the place to embed this universal principle in Charter analysis while being sensitive to the seriousness of and type of right being infringed.

Justice Wilson used a more contextualized approach in her concurrence in the *B.C. Motor Vehicle Reference*[57] case; nevertheless, I believe that her suggested contextual approach suffers from serious problems. Wilson argued that section 1 analysis is not necessary when a deprivation of the

56 This example is not far-fetched. See Doris Anderson 'A Modest Proposal: Ban Men After Dark' *The Toronto Star* 4 May 1990 (observing that men are responsible for 85 per cent of all homicides, constitute 98 per cent of all federal prisoners, and are almost 100 per cent responsible 'for the most despicable crimes against women and children which often result in death'; arguing that the idea of a curfew against men is not so outrageous when you consider that 'all women constantly live under a self-imposed curfew').

57 Supra note 54. See also Bertha Wilson 'Decision-Making in the Supreme Court (1986) 36 *UTLJ* 227; Wilson 'The Making of a Constitution' (April–May 1988) 71 *Judicature* 334.

rights protected by section 7 has been established, because of the special nature of the consideration of 'principles of fundamental justice' in section 7 analysis.[58] Although I agree with Wilson that the justificatory scheme for section 7 should reflect section 7's fundamental purpose and scope of protection, I believe she has gone too far in suggesting that *no* section 1 analysis should occur when section 7 has been infringed; the application of the anti-disadvantage principle through section 1 analysis in a section 7 case could be very important. The need for an anti-disadvantage principle in section 7 cases was not apparent in the *B.C. Motor Vehicle Reference* since the government was not trying to protect a disadvantaged group by making incarceration of those driving without a valid licence easier. If anything, the government's actions probably made it easier to incarcerate disadvantaged groups, who may be more likely to be improperly arrested. The need for an anti-disadvantage principle, however, should be more evident in my previous hypothetical. I assume that Wilson's sensitivity towards women's rights and well-being would help her see the need to uphold the statute in the previous hypothetical, even if she concluded that principles of fundamental justice were infringed. By completely avoiding a section 1 analysis in such a case, she seems to assume that the appropriate course for the Court is also to be judicially activist. As in my hypothetical, one could imagine that section 1 might be an appropriate source of judicial restraint when the legislature is legitimately trying to protect the interests of a disadvantaged group. Wilson's framework does not allow for that possibility.[59]

58 Supra note 54, 529. This view applies only to the anti-deprivation clause in section 7. Wilson also holds the view that the first part of section 7, which grants everyone 'the right to life, liberty and security of the person' creates affirmative governmental obligations rather than simply a freedom from deprivation, which is protected by the rest of the clause. She would permit section 1 analysis in the case of a showing of a positive entitlement under section 7, because the showing of a positive entitlement is not restricted by principles of fundamental justice. It is important to note, however, that Wilson has largely abandoned her distinctive view of section 7, as she has not continued to refer to it in recent cases.

59 My criticism of Wilson's approach to Charter analysis is not limited to her section 1 test. I also believe that her proposed analysis of whether there has been a substantive infringement is deeply flawed. Wilson, in her concurrence in *Big M Drug Mart, Ltd* supra note 46, argued that the Court should have first analysed whether the statute had the effect of infringing a Charter right rather than whether it was based upon an unconstitutional purpose. Her support for that proposition was a United States case, *Griggs* v. *Duke Power Co.* 401 US 424 (1970), which interpreted a statute rather than the Constitution. I find her analogy unhelpful because the case she cited did not reflect any special consideration of the Court's appropriate role in limiting state action under the Constitution; it was a case involving private action that violated a rather detailed civil rights statute. If Wilson wanted to find United States precedent for a more expansive framework for interpreting individual rights, I believe it would have been more appropriate for her

In sum, the courts need to move towards a more contextual approach in thinking about section 1, but the more contextual framework suggested by Justice Wilson is not the appropriate framework, because her framework failed to recognize that judicial activism may harm disadvantaged groups.

OAKES

The major formulation of the section 1 test occurred in the *Oakes* case. The respondent, David Oakes, had been charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to the Narcotic Control Act. He challenged the statute for placing upon him the burden of proving that he was not in possession of the narcotic for the purpose of trafficking. This statutory presumption was found to violate section 11(d) of the Charter, which was interpreted to require the government to prove each element beyond a reasonable doubt; a reverse onus provision violated that requirement.

Having concluded that the Narcotic Control Act infringed section 11(d), the Court had to consider whether the infringement could be justified under section 1. Dickson stated the general test, which has been quoted above.[60] Dickson then applied the test to the facts in *Oakes*. Turning first to the question of whether the objective was sufficiently substantial, Dickson readily concluded that the objective of curbing drug trafficking by facilitating the conviction of drug traffickers is substantial.[61] Dickson then turned to the rational connection test. He found that the presumption was not rational – 'possession of a small or negligible quantity of narcotics does not support the inference of trafficking.'[62] Having concluded that the statute could not pass the first component of proportionality, Dickson did not consider the next two components. He did note, however, that the irrationality problem was especially problematic because the statute contained the possibility of imprisonment for life. The seriousness of the

to cite the United States case law, which has said that the foreseeability of an unconstitutional effect or impact should be probative of an unconstitutional purpose. See, for example, *Personnel Administrator of Massachusetts* v. *Feeney* 442 US 256 at 179 n25 (1979); *City of Mobile* v. *Bolden* 446 US 55 at 95 (1980) ('an invidious discriminatory purpose can be inferred from objective factors') (White J dissenting). But see *Feeney* supra, at 28 (requiring proof that an action occurred 'because of' and not merely 'in spite of' its adverse consequences upon an identifiable group). There is no inherent difficulty with using a purposeful analysis to determine whether an unconstitutional infringement has occurred; the important point is to define the test in a way that is sufficiently protective of individual rights.

60 See text accompanying note 44, supra.

61 Supra note 43, 140–1

62 Ibid. 142

infringement of the substantive right therefore affected his conclusion about rationality.

Although Dickson tried to rely on two relatively objective standards – the importance of the objective underlying the statute and the statute's internal rationality – I believe that his conclusion could be more readily explained under a more contextual approach. The core purpose of section 11(d) is to prevent people from being imprisoned, especially for substantial periods, without being given the presumption of innocence. Unless the government can provide evidence of exceptional circumstances that demand modification of this basic structure, then it must abide by these basic principles. I would expect the government to have to demonstrate that a national emergency existed which required easier incarceration than the Charter would permit. In the *Oakes* case, the government did not simply have the objective of curtailing drug trafficking; it had the more specific objective, which Dickson acknowledged, of curtailing drug trafficking by incarcerating nearly all people who were in possession of any quantity of drugs for substantial periods of time, without any direct evidence that the people incarcerated were, themselves, sellers of drugs. I do not see the government as providing any evidence concerning a national emergency that requires a response of easy incarceration of people in possession of small quantities of drugs.

In the United States, for example, there has been much publicity about the 'war on drugs,' with its emphasis on drug busts and incarceration.[63] Yet, many people, including the former 'drug czar' William Bennett, have acknowledged that these warlike efforts have had little effect on drug trafficking.[64] Many people have suggested that the expenditure of those same funds on drug treatment centres would have more impact on the demand for drugs than the warlike approach.[65] Thus, in *Oakes*, I would want the Court to ask the question why easy incarceration is thought to be *essential* to attaining the government's objective. The incarceration aspect of the statute is what makes it so troubling in terms of Charter infringe-

63 See *The Washington Times* 24 January 1990 ('President Bush ... wants to boost spending (on the war on drugs) to more than $10 billion and institute the death penalty for drug kingpins whose operations lead to fatal overdoses, administration officials say.'); *The Los Angeles Times* 25 January 1990 ('Acknowledging limited success to date, President Bush proposed a $1.1-billion escalation of America's war against drugs today through military might, more federal agents and the death penalty for drug lords.').

64 *The New York Times* 5 April 1990 (Bush administration officials say they have concluded that a year-old effort to make the nation's capital a 'test case' in the war on drugs has largely failed.); *The New York Times* 14 April 1990 (Bennett says that the results of the administration's one-year 'test case' of federal efforts in the 'war on drugs' in the District of Columbia have been 'mixed, spotty, incomplete.')

65 *The Los Angeles Times* 25 and 26 January 1990

ment; the incarceration aspect is what must be justified. Rather than having the nature of the infringement be 'icing on the cake' that facilitated the Court's conclusion, it should have been the contextual core of the analysis.[66]

In sum, the *Oakes* decision tried to focus on objective issues such as the importance of the government's objective and the internal rationality of the statute. It only made passing reference to the appropriate contextual questions, although they do appear to have influenced the Court's judgment.

POST-*OAKES*

An important post-*Oakes* case was *R.* v. *Edwards Books*, which involved the constitutionality of the Ontario Sunday closing legislation, the Retail Business Holidays Act.[67] The Court's opinion, written by former Chief Justice Dickson, contained the first hints of the anti-disadvantage principle that would be further elaborated in *Irwin Toy*.

Dickson recognized that the Sunday closing law was created, in part, to help people resist the compulsion to work on Sundays. These pressures, he concluded, were particularly felt in the retail trade, which has a low level of unionization, a high proportion of women, and a heterogenous population. That labour force, he concluded, 'was especially vulnerable to subtle and overt pressure from its employers' and therefore needed to be singled out for 'special and immediate attention.'[68] In a rather uncharacteristic move for Dickson, who was often known for his judicial activism, he said that it would be appropriate for the Court in such a case to defer to the legislature. He supported that proposition with a United States case that is applicable when important substantive rights have *not* been infringed.[69] Dickson's explanation for when this restrained level of scrutiny should be applied was when the legislature has tried to respond to 'particularly urgent concerns or to constituencies that seem especially needy.'[70] In such cases, Dickson said, 'simplicity and administrative convenience are legitimate concerns.'[71] This statement was in sharp contrast to Dickson's analysis in *Big M* where he refused to defer to considerations of simplicity and administrative convenience. Application of the anti-disadvantage principle led to that result.

66 In addition, I would want the Court to apply the overarching anti-disadvantage principle to its analysis. Because the narcotics control statute had no arguable, anti-disadvantage purpose, that part of the analysis would not be very important in this case.

67 [1986] 2 SCR 713

68 Ibid. 771

69 Ibid. 772 (citing *Williamson* v. *Lee Optical of Oklahoma* 348 US 483 at 489 (1955))

70 Ibid.

71 Ibid.

Justice Wilson, by contrast, refused to apply the anti-disadvantage principle to invoke a more restrained level of scrutiny in *Edwards Books*. She insisted that the legislature must have a 'principled' approach that does not differentiate between the needs or interests of various groups in society.[72] She was especially troubled by the fact that the legislature had distinguished between large and small retailers in imposing the Sunday closing requirement; Dickson had deferred to the legislature's right to make that decision. Wilson concluded that the legislature 'cannot decide to subordinate the freedom of religion of some members of the group to the objective of a common pause day and subordinate the common pause day to the freedom of religion of other members of the same group.'[73] Wilson literally applied the *Oakes* test, which could always support judicial activism, whereas Dickson modified it with the application of the anti-disadvantage principle, so that he could more contextually determine whether judicial activism was appropriate.

In sum, in the year preceding his retirement from the Court, Dickson was moving towards the overarching anti-disadvantage principle in order to make himself a more pragmatic activist. That move, I argue, made his framework more satisfactory than Wilson's, which presumed that judicial activism is *always* beneficial. Nevertheless, I believe that a more contextual consideration of the substantive right that was being considered would have made Dickson's framework even more sensitive to the importance of the substantive right that was being infringed. Possibly, such modification of Dickson's framework will occur under the leadership of Chief Justice Lamer. As we will see by consideration of the United States case law, such a move is possible without watering down substantive rights.

II *The US approach*

The US Constitution contains no umbrella, limitation clause.[74] Nevertheless, the Supreme Court of the United States has created limitations for every constitutional, individual rights provision. I call the American approach more contextual than the Canadian framework, because it is more sensitive to the substantive right that has been infringed. In the free speech area, for example, two different justificatory schemes exist, depend-

72 Ibid.

73 Ibid.

74 The US Constitution does, like the Canadian Constitution, have some limitations built into substantive provisions. The fourth amendment refers to 'unreasonable' searches and seizures, as well as a 'probable cause' standard for warrants to search and seize property. The fifth and fourteenth amendments refer to exceptions relating to 'due process of law.'

ing upon whether the challenged regulation is content-specific or content-neutral, despite the fact that the first amendment explicitly states that 'Congress shall make no law' infringing the freedoms of religion, speech, assembly, or petition.[75] A content-specific infringement is considered to be a core infringement; the justificatory standard is therefore quite high. The regulation is unconstitutional unless the government can show that the message being suppressed poses a 'clear and present danger,'[76] constitutes a defamatory falsehood,[77] or is obscene.[78] No explicit balancing occurs in this area; the regulation is presumptively invalid unless one of these clearly specified exceptions can be met. The second kind of infringement is subject to a balancing test, under which the court considers on a case-by-case basis whether the regulation unduly constricts the flow of information.[79]

The principles that underlie these first amendment cases are that less protection should be provided to communications 'which by their very utterance inflict injury,'[80] or which do not contribute to the development of the truth.[81] Free speech is considered to be such an important value that other arguments, except in the commercial speech area,[82] can rarely justify an infringement. Thus, the US courts ask what kinds of justifications can be legitimate in the light of the importance that we place on freedom of speech. Since speech is central to the operation of the democratic process, speech that does not promote discovery of the truth or could cause injury to individuals who might want to participate in the democratic process can be regulated.

Absent from the US framework, however, is an overarching anti-disadvantage principle. The anti-injury and anti-falsehood principles, which emerged from a contextual interpretation of freedom of speech, could be combined with an anti-disadvantage principle. Such an overarching

75 US Constitution, Amendment 1

76 *Schenck* v. *United States* 249 US 47 at 52 (1919)

77 *Beauharnais* v. *Illinois* 343 US 250 at 261 (1952)

78 *Roth* v. *United States* 354 US 476 at 485 (1957)

79 *Chaplinsky* v. *New Hampshire* 315 US 568 (1942)

80 Ibid. (citing Chafee *Free Speech in the United States* (1941) 149)

81 Ibid. 571–2 (permitting regulation of utterances that have 'slight social value as a step to truth')

82 In the commercial speech area, the US courts have explicitly developed a lower level of scrutiny. (*Virginia Board of Pharmacy* 425 US 748 at 771–2 n24). Justice Powell has developed a four-part test for determining whether particular commercial speech is protected by the first amendment: (1) the speech concerns lawful activity and is not misleading, (2) the state interest advanced by the restriction is not substantial, (3) the regulation does not directly advance that state interest, or (4) the regulation is not more extensive than is required to serve the governmental interest. *Central Hudson Gas & Electric Corp.* v. *New York Public Service Commission* 447 US 557 at 566 (1980).

principle would make it easier for the courts to uphold statutes that try to regulate speech motivated by racial hatred or sexual subordination. At present, the United States courts rarely recognize an anti-disadvantage principle in considering whether regulation of pornography or racial speech should be permitted.[83]

The Supreme Court of Canada, by contrast, has been able to recognize an anti-disadvantage principle to uphold legislation that regulates racially derogatory speech. The Court has defined freedom of expression broadly so as not to carve certain kinds of expression out of it, such as libel, speech that incites dangerous activity, racial vilification, or pornography.[84] However, by recognizing a form of the anti-disadvantage principle, they have been able to justify infringements of this kind of speech.[85] This framework preserves a broad definition of the substantive rights while also giving the courts the case-by-case opportunity to justify an infringement when certain principles, which will themselves be constantly re-examined, have been established.[86]

As a second example from the United States, the justificatory framework developed in the equal protection area is also quite contextual. In this area of the law, the court has three different justificatory frameworks depending upon the basis on which discrimination has been alleged.[87] The most stringent standard is applied to racial discrimination, where the government must demonstrate that the statute serves a compelling purpose and the means used are necessarily related to the achievement of the state

83 See *Hudnut* v. *American Booksellers Assn*, 106 S.Ct 1172 (1986). But see *New York* v. *Ferber* 458 US 747 at 756–7 (1982) ('a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."' (quoting *Globe Newspaper Co.* v. *Superior Court* 457 US 586 at 607 (1982)).

84 See, for example, supra note 4 and *R.* v. *Andrews* (1990) 77 DLR (4th) 128.

85 Ibid.

86 I should acknowledge, however, that the anti-injury and anti-falsehood principles that have emerged in the United States may not be appropriate in the Canadian context. Since the history of racial discrimination in the United States and Canada are different, the history of governmental suppression of speech may also be different. Thus, I want to underscore that it is important for contextual principles to develop that underlie the core of freedom of expression in Canada, that are sensitive to the Canadian Charter and history, rather than for US principles to be imported into the Canadian context. Nevertheless, it does seem, at this time, that the anti-injury and anti-falsehood principles are relevant to the Canadian experience and therefore might be applicable as core principles. My argument concerning the structure of Charter analysis goes to how these principles should be made a part of the Canadian Charter; the courts have apparently already indicated that these principles are relevant to Charter analysis, as I have shown above.

87 Another significant aspect of the US framework is the intent standard, which I will not discuss because it relates more to how the petitioner establishes a prima facie case of discrimination than to the structure of justification.

purpose.[88] A somewhat weaker standard applies to gender and alienage discrimination, where the government must demonstrate that the statute serves an important purpose and the means used are substantially related to the achievement of the state purpose.[89] Finally, in all other areas, the government must demonstrate that the statute serves a legitimate purpose and the means used are rationally related to the achievement of the state purpose.[90] The most stringent standard results in the invalidation of the legislation unless it is carefully tailored to serve a remedial purpose. The weakest standard permits most legislatively created distinctions. The intermediate standard is somewhat harder to predict but often permits justifications relating to biological differences between women and men or, in the case of alienage, to governmental security.

This contextual approach flows from the premise that racial discrimination is the most significant form of discrimination, given the history of slavery in the United States. It also increasingly relies on the premise that we should strive to be a 'colour-blind' society so that discrimination against African-Americans is as significant as discrimination against Caucasian-Americans. Like the freedom of expression framework, then, it does try to reflect what in the equal protection area are considered to be the core values that deserve protection.

Given the different histories of discrimination in the United States and Canada, and the different conceptions of the nature of inequality embedded in the constitutions of the two countries, it would not be appropriate to import this particular contextual approach into the Canadian cases.[91]

88 *Korematsu* v. *United States* 323 US 214 (1944)

89 *Craig* v. *Boren* 429 US 190 (1976) (gender discrimination); *Plyler* v. *Doe* 457 US 202 (1982) (alienage discrimination). See also *Levy* v. *Louisiana* 391 US 68 (1968) (applying intermediate scrutiny to discrimination on the basis of 'illegitimacy').

90 See, for example, *Dandridge* v. *Williams* 397 US 471 (1970) (applying minimal scrutiny to economic-based discrimination).

91 By the 'different nature of inequality,' I refer to the fact that race discrimination is the paradigm example of discrimination in the United States; in Canada, race and gender claims of discrimination are generally considered to be equally serious. Thus, the significance of gender discrimination was written directly into the Canadian Charter in both sections 15 and 28, whereas the recognition of the significance of gender discrimination is a relatively recent phenomenon in the United States. More fundamentally, however, the understanding of the nature of inequality is quite different in the two countries. The Canadian Charter embodies an explicit anti-disadvantage principle, whereas the US Constitution refers to all individuals deserving the equal protection of the law (irrespective of their social disadvantage). See generally C. Lynn Smith 'Judicial Interpretation of Equality Rights Under the Canadian Charter of Rights and Freedoms: Some Clear and Present Dangers' (1988) 23 *UBC LR* 65; David Baker 'The Changing Norms of Equality in the Supreme Court of Canada' (1987) 9 *Sup. Ct. LR* 487.

I should also note that I do not agree with the United States' sliding scale approach to equal protection for the United States; see supra note 30. That argument, however, is beyond the scope of this article.

There is no reason to place race discrimination above gender discrimination in a hierarchical justificatory scheme in Canada. The Canadian case law, however, has begun to reflect how a contextual justificatory scheme for the categories of discrimination is needed. For example, in *McKinney* v. *University of Guelph*,[92] the Ontario Court of Appeals explicitly rejected the view that it should develop a different justificatory framework for age cases than other discrimination cases. Nevertheless, the court concluded that age discrimination through mandatory retirement was permissible because it made it possible to plan for faculty renewal and the necessary funding that is entailed. Such needs, which were established through questionable empirical data, supported an explicit age-based discrimination. The level of justification, in practice, seemed quite low, although the court purported to use the same standard as it would use for race or gender discrimination cases. The Supreme Court of Canada dismissed the appeal, because it found that the university's actions were not government action that was subject to the Charter under section 32. Nevertheless, the Court did comment on the section 15 issue and generally agreed with the analysis put forth by the Court of Appeals.

Many people have suggested to me that by having the Canadian courts use more than one justificatory scheme, as do the US courts, that the Canadian courts would water down substantive rights. However, the *McKinney* case shows exactly the opposite problem. By having only one justificatory framework for all equality claims, the *McKinney* case has already watered down the justificatory framework for *all* equality claims. Under the *McKinney* analysis, for example, pregnant women who seek maternity leave could be automatically terminated to allow room for people who are more inclined to make a more permanent commitment to the workplace. The *McKinney* holding would be more acceptable if it had been limited to age discrimination cases rather than potentially applied across the board to other kinds of discrimination.[93] In sum, I would suggest that a failure to allow contextual justifications for some kinds of equality infringements and not others runs the risk of the courts watering

92 [1986] 46 DLR (4th) 1983 (appeal dismissed), (1990) 76 DLR (4th) 545

93 Other considerations should also make us not concerned about contextual, justificatory frameworks for discrimination cases. It is important to remember that justifications come in only under section 1. The purported justifications do not alter the conclusion that discrimination has occurred. If the contextual justifications turn out to have been inappropriate, then the courts could revise what justifications are considered legitimate in the future without ever altering the fundamental definition of discrimination. Finally, because the contextual justification emerges under section 1, the government would have the burden of proof. Thus, it would be difficult for the government to satisfy whatever justifications are considered to be appropriate.

down *all* equality claims to reach the correct result in a particular case, as it seemingly did in *McKinney*.

Thus, I would suggest that the US courts are correct not to treat all kinds of discrimination the same. In applying this structure to Canada, however, one needs to be conscious of what is the appropriate way to draw the line between different kinds of discrimination. A more contextualized approach does not necessarily result in the watering down of rights as some people in Canada seem to believe. The important point is to have the contextualization flow from consideration of the appropriate core values.[94]

III Irwin Toy *and beyond*

IRWIN TOY

Further evolution of the section 1 case law in Canada under Dickson's leadership lies in the *Irwin Toy* case, which represents a more mature development of the anti-disadvantage principle in Dickson's framework. The issue in the case was the constitutionality of the Quebec Consumer Protection Act, which prohibited television advertising directed at persons under the age of 13. After concluding that the statute violated section 2, since commercial speech is protected by section 2, the Court turned to its section 1 analysis.

Dickson, writing for a majority of a five-member Court,[95] first concluded that the objective of regulating commercial advertising directed at children was a pressing and substantial objective. McIntyre, dissenting in the judgment, disagreed that sufficient empirical evidence had been put forth to demonstrate that children were in need of being protected from highly fictionalized TV advertising. The dispute between them seemed to be, in part, an empirical dispute about whether sufficient evidence had been put forth to establish that claim.

I would suggest that a more contextual analysis would have made the first part of Dickson's analysis earlier. Dickson seemed satisfied with the empirical evidence because he considered the anti-injury principle that underlay the legislation to be a legitimate principle to justify a freedom of

94 In addition, the courts should consider the overarching anti-disadvantage principle in these cases under section 1. Although the anti-disadvantage principle will already be a part of the section 15(2) analysis, there will be pure section 15(1) cases that do not receive consideration of the anti-disadvantage principle.

95 It is very difficult to determine the precedential value of *Irwin Toy* because of dramatic changes in the Court since that decision was rendered. Dickson wrote the opinion for Wilson, Lamer, and himself. McIntyre and Beetz dissented. Dickson, McIntyre, Wilson, and Beetz have since retired, leaving only one of the authors of the *Irwin Toy* case on the bench.

expression infringement. He deferred to the legislature not because he was overwhelmed with its post hoc and incomplete empirical evidence but because he sympathized with its perspective as an appropriate perspective, notwithstanding section 2. Application of the contextual, anti-injury principle, which has developed in the US case law for free speech purposes, would, I believe, have made Dickson's conclusion more justifiable. It would have clarified that it was a philosophical perspective, rather then empirical data, that compelled his conclusion, thereby making it more understandable. Thus, as I have said above, Dickson should have asked whether the legislative purpose was *legitimate* in the light of the substantive right that has been infringed, rather than whether the empirical evidence can demonstrate that the purpose is pressing and substantial.

The next step of Dickson's framework – the proportionality test – did explicitly utilize the anti-disadvantage principle, although his analysis was somewhat difficult to follow. Dickson divided the cases into two general categories. In category one, the legislature was mediating between the claims of competing groups.[96] In addition, the government was often acting to protect vulnerable groups when it mediated such claims. In category two, the government was acting as the 'singular antagonist of the individual whose rights had been infringed.'[97] It was not trying to protect vulnerable groups. Dickson suggested that it was more appropriate for the Court to be deferential in evaluating category one cases, especially when the government was acting on behalf of vulnerable groups, than in evaluating category two cases.

Although I agree with Dickson's underlying sensibility, I believe he provided an unnecessarily complicated distinction. It is very difficult to say when the government is mediating between two groups (category one) and when it is acting as the singular antagonist (category two). For example, when the government facilitates the incarceration of drug users, one could say that the government is mediating between two groups – drug users and people adversely affected by the drug trade – or one could say that the government is acting as the singular antagonist against drug users. It is somewhat easier, however, to assess when the government is acting to protect vulnerable groups. People adversely affected by the drug trade cannot probably be characterized as a vulnerable group (unless the government is acting to get drugs out of a particularly poor neighbourhood) so that it would be hard to characterize the government as having a protective purpose. It is therefore not necessary to create the two general categories, and then ask, within category one, whether the government's

96 Supra note 3, 626
97 Ibid.

purpose is to protect a vulnerable group. One could simply ask that question directly. Or, more appropriately, given the language of the Charter, one could ask whether the government's purpose is to assist a disadvantaged group.

In sum, Dickson's sensitivity to the interests of disadvantaged groups forced him to introduce an explicit anti-disadvantage principle into his section 1 analysis. It also seems apparent that this section 1 analysis became increasingly contextual although he resisted characterizing it in that way.

R. v. *KEEGSTRA*

R. v. *Keegstra*,[98] Dickson's final major opinion for the Court, represents the best articulation, to date, of the framework that I suggest in this article. The issue in the case was the constitutionality of section 281.2(2) of the Criminal Code, which prohibited the wilful promotion of hatred towards any section of the public distinguished by race, religion, or ethnic origin. The criminal defendant, James Keegstra, was a high-school teacher in Alberta, who taught his students that Jews had various evil qualities. He expected his students to reproduce his teachings in class and on exams. After more than a decade of teaching those views, he was charged with violating section 281.2(2) of the Criminal Code. He sought to have the charge quashed, because the criminal code provision allegedly violated sections 2 and 11 of the Charter of Rights. He won his case in the Court of Appeals and the Crown appealed the decision to the Supreme Court of Canada. The Supreme Court reversed, reinstating his conviction. The Court found that the provision violated both sections 2 and 11 but could be upheld under section 1. I will not discuss the section 11 analysis; instead, I will focus on the section 1 analysis relating to the section 2 infringement.

The majority decision, written by Dickson, was joined by Wilson, L'Heureux-Dubé, and Gonthier. McLachlin wrote a dissent, which was joined by La Forest and Sopinka. As with many important Supreme Court cases, a narrow majority decided the case, two members of the majority are no longer on the Court.

Dickson first concluded that the provision violated section 2(b) of the Charter. He resisted the argument that certain kinds of speech, such as threats of violence, should be carved out of section 2. He then turned to section 1, where he used a framework much like the one that I propose in this article. First, he described the universal principles underlying section 1. Included in these values were 'the inherent dignity of the human

98 Supra note 4

person' and 'commitment to social justice and equality.'[99] These values are quite similar to what I describe as the anti-disadvantage principle. Dickson then recognized the importance of engaging in a contextual, section 1 analysis, citing Wilson's reference to a contextual approach in Edmonton Journal.[100] Based on this contextual approach, he concluded that 'the proper judicial perspective under s. 1 must be derived from an awareness of the synergetic relation between two elements: the values underlying the Charter and the circumstances of the particular case.'[101] Hence, he blended universal values with a contextual approach.

After setting forth these general principles, Dickson applied them to the case. Throughout the opinion, he observed that the objective of the challenged statute was to protect minority groups in Canada against violence.[102] he also observed that such objectives have been endorsed in the Charter under section 15 and 27, which represent a 'strong commitment to the values of equality and multiculturalism.'[103] He considered it appropriate to import these values into section 1, even though the section does not explicitly make reference to equality concerns. A free and democratic society, Dickson observed, must promote equality.[104] The anti-disadvantage principle therefore permitted Dickson to appreciate the importance of the government's objective in passing section 212 and why that objective must be protected under section 1.

Although I believe that Dickson correctly determined that the government's objective met the standards of section 1, I believe that his analysis would have been stronger under the framework proposed in part I of this article. As I said earlier, it would be more appropriate to characterize Dickson as assessing the *legitimacy* of the objective rather than its importance. The objective became legitimate when viewed in the context of the entire Charter. Elsewhere, the Charter made strong reference to the anti-disadvantage principle; thus, it was legitimate for the legislature to utilize the anti-disadvantage principle even when doing so infringed other Charter rights. Furthermore, Dickson did not sufficiently utilize a multi-perspective approach in assessing the legitimacy of the objective. Many different groups and individuals were affected by the Court's decision – Keegstra, Jewish people, society at large, and the legislature. Dickson did describe the history of the statute and the Cohen report, thereby discussing how

99 Ibid. 37
100 Ibid. 38
101 Ibid.
102 Ibid. 51
103 Ibid. 59
104 Ibid. 60

some of those groups were affected by the legislation. But interestingly, he never discussed the significance of the legislature's objective on Keegstra himself, although he was the person facing a potential prison sentence.

In this particular case, one can understand Dickson's unwillingness to discuss the legislature's objective from the perspective of the plaintiff, because he was an entirely unsympathetic plaintiff. The Keegstras of this world, however, need to be discussed, because, ironically, they, too, are a minority that may need state protection. Dickson could have discussed how the anti-disadvantage principle could also be used to protect individuals like Keegstra if they faced the potential of violence from others. It is not unimaginable that a group in society might decide to target Keegstra's group through incitements to violence. In such a case, the criminal code provision might also benefit Keegstra.

By failing to discuss Keegstra's perspective, I believe that the Court gives the incorrect impression that Keegstra represents a powerful group in society that is not in need of Charter protection. Fortunately, Keegstra is a minority. As such, the Charter was also written for his benefit. Although I agree that the Court's resolution of the case was correct, it does not serve us well for the Court to overstate the correctness of its decision. Yes, the state's objective was legitimate in the light of the entire context of the case. However, we do not need to lose sight of the multiple minorities affected by this decision to see the correctness of the Court's judgment.

Turning to the proportionality test, Dickson then became more contextual. He stated that it was important for the Court, under section 1, to examine the 'extent to which the expression at stake in a particular case promotes freedom of expression principles.'[105] He realized that that view would be controversial because it put the Court in the role of judging good speech from bad speech. He accepted that role with the following observation:

> [I]t is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b).[106]

Although he did not define what those other principles are, I would suggest that they include the anti-disadvantage principle.

Dickson then developed a test that embodied his contextual perspective. 'One must ask whether the expression prohibited by s. 319(2) is tenuously connected to the values underlying s. 2(b) so as to make the restriction

105 Ibid. 65
106 Ibid.

"easier to justify than other infringements."'[107] Thus, Dickson seemingly endorsed a sliding-scale approach to justifications where a lower level of justification would be needed in some cases. Rather than weaken section 2 generally by permitting low levels of justification in all cases, he preserved the strength of section 2 while also upholding the anti-disadvantage principle.

In the United States, as discussed above, the courts have achieved a similar result in some cases by creating different justificatory requirements for different categories of speech. Dickson, however, resisting the categorical approach, preferred a more fluid contextual approach. Thus, he stressed 'that in discussing the relationship between hate propaganda and freedom of expression values I do not wish to be taken as advocating an inflexible 'levels of scrutiny' categorization of expressive activity. ... To become transfixed with categorization schemes risks losing the advantage associated with this sensitive examination of free expression principles, and I would be loath to sanction such a result.'[108]

In sum, the *Keegstra* decision embodied a major step forward in the Court utilizing an anti-disadvantage and contextual approach to section 1 adjudication of a section 2 violation. Dickson, however, spoke only for a bare majority of the Court, a majority that has disappeared with the resignations of himself and Wilson. And unfortunately, other majorities, as exemplified by the *McKinney* decision, have not adopted such an approach.

IV *Conclusion*

The Canadian courts have appropriately resisted importing the entire US framework for resolving constitutional questions involving individual rights and freedoms into Canada. One good reason for not strictly following the US approach is that it does not sufficiently reflect the anti-disadvantage principle. The Supreme Court of Canada, in decisions written by former Chief Justice Dickson and former Justice Wilson in section 2 cases, has come increasingly to appreciate the importance of embodying the anti-disadvantage principle and a contextual approach into its section 1 framework; I applaud that trend. As the Court turns to a new chapter under the leadership of Chief Justice Lamer, I encourage it to extend that analysis to other sections of the Charter, such as section 15, and explore how such an approach could strengthen rather than water down individual rights when coupled with an anti-disadvantage principle.

107 Ibid. 67
108 Ibid. 72–3

v *Postscript*

Before ending this article, I would like to answer a question that has often been put to me when discussing this paper with others. The question is – why does it matter whether the Court makes these various alterations that I suggest? As a critical scholar, believe that I can rarely persuade the courts to attain outcomes that will please me more by making some suggested modifications to existing doctrine.[109] My proposed framework, like nearly all others, can be applied to reach almost any result in a given case.[110]

Nevertheless, I have two reasons for persisting in this exercise despite my critical scepticism. First, I do believe that doctrinal modifications may make it *more likely* that courts achieve desirable results when those results include changes in underlying *principles* as well as structural changes in the reasoning process. If all I were seeking (as does Martha Minow[111]) were a change in the *structure* of judicial reasoning, then I believe I could be less confident about changes in outcome. However, because I am seeking a change in the *underlying principles* as well as a change in the structure of reasoning, I believe that certain desirable results become slightly more possible.

Second, I believe that my proposed framework might change the kinds of questions that the courts, legislatures, and society consider important to discuss.[112] The court would have to grapple with what it means to be 'disadvantaged,' not only in section 15 cases but throughout all Charter cases. This discussion would occur within a framework that assumes that legislatures and courts have a responsibility to remedy the conditions that

109 Although I am not as cynical about doctrinal arguments as Judy Fudge, I do agree with many of her critical comments about the judicial process. See Judy Fudge 'The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles' (1987) 25 *Osgoode Hall LJ* 485.

110 Critical scholars do not always appear to recognize this limitation in their work. Martha Minow, for example, a feminist, critical scholar, seems to think that we will be more pleased with legal results if we could persuade courts to utilize a relational methodology for thinking about differences (see, for example, supra note 11). But I am not convinced that the political right does not engage in relational thinking about difference. In the gay rights context, for example, the political rights seems to be talking about the effect that gay people have on all of society, arguing that there is no such thing as an entirely 'private' sexual act. Similarly, the anti-abortion movement talks about the effects of abortions on all of society, on our general devaluation of life. Thus, it may make sense to change the framework; however, those changes to not guarantee a particular result unless we *also* agree on a set of values to use in that new framework.

111 See supra note 110.

112 But see Judy Fudge 'The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada' (1989) 17 *Int. J. of Sociology of Law* 445 (arguing that reliance on the courts for pro-feminist, social change demobilizes feminist organizations).

create disadvantages for certain groups of people. I believe that it would be good for all of us to engage in discussions from that perspective. In addition, the courts would attempt to listen to more voices and be more particularized when making decisions. Because of the problem of exclusion from the political and legal process that disadvantaged groups face, an attempt to open up the discussion within cases would be beneficial to us as a society.[113]

Notice that I am arguing that *all* of us benefit from these changes, not simply disadvantaged peoples. Like Martha Minow,[114] I believe that we should strive to understand in communitarian terms how we all benefit from protection of what are commonly considered individual rights. Thus, we as a community benefit from being able to understand the deaf child who has been provided with a sign-language interpreter because we can learn from what the child has to tell us about our world. The approach that I suggest should help us, as a community, come to articulate the communitarian benefits that result from an extension of individual rights rather than see those rights in only abstract and individualistic ways.

In sum, I can only be confident that my proposed framework would be beneficial in dialogic terms. We might come to know each other better across our differences and strengthen our community base. I hope that people who are operating in good faith would have their substantive beliefs altered as a result of that new conversation. In addition, I hope that people would take seriously the obligation to consider the anti-disadvantage principle. But, unfortunately, each of these possibilities can occur only if people, especially courts and legislators, engage in dialogue in good faith.[115]

113 See Derek Bell 'Bakke, Minority Admission, and the Usual Price of Racial Remedies' (1979) 67 *Cal. LR* (arguing that the *Bakke* case was not legitimately decided, because racial minorities were not parties to the case despite that the program being considered was purportedly for their benefit).

114 Supra note 11

115 For further discussion of the importance of dialogue, and the difficulty of attaining it, see Ruth Colker 'Abortion and Dialogue' (1989) 23 *Tulane LR* 1363.